Litigation Due Diligence Analysis

Rominova v. Plumpy Dumpers

By

MBK

March 27, 2023

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# SUMMARY

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# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| Natasha Rominova (“Client”)  DELETE THIS NOTE: If we represent more than one individual/entity, then list all our Clients here—one on each line. Then, make sure to alter the defined “Client” to say: **“(collectively, ‘Client’”)**. The point is to keep “Client” *singular* no matter how many people/entities we represent. If there’s a need to refer to different Clients in the “Statement of Facts/Evidentiary Support” section below, you can put a shortcut (“\*\*\*”) after each individual Client, but still collectively define all of them as “Client.” | N/A |
| Plumpy Dumpers | Infringing Party |

The table above may be amended from time to time to reflect revisions to Client’s narrative and/or new information that may become available in the future.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# STATEMENT OF FACTS / EVIDENTIARY SUPPORT

|  |  |  |
| --- | --- | --- |
| **Date / NA** | **Fact** | **Evidence Supporting That Fact** |
| \* | This section should contain a comprehensive and objective statement of the relevant facts of the case, as well as any relevant dates. When possible, cite to evidence already in our possession that support the facts referenced. | \* |
| 4/19/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  Client closed escrow on the property. | Client Timeline |
| 6/10/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  Client notified HOA of sprinkler leak into Client’s unit. | Email from Client to Mgmt. Co. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. | \*\* |
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This table may be amended from time to time as new information/evidence comes in. To the extent that such new information necessitates any significant revisions to Client’s litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# NOTABLE PROVISIONS OF ONE OR MORE OPERATIVE AGREEMENTS

|  |  |
| --- | --- |
| **Document Name**  **Article / Section No.** | **Text of the Selected Article/Sections No.**  **(if none, put “N/A”; delete rows that you didn’t use; maintain formatting)** |
| CC&Rs  Article IX, Section 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. |
| Purchase Agreement  Section 8.4 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE. IF YOU DON’T KNOW HOW TO DO THAT, ASK MBK. |
| \* |  |
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| \* | \*\* |

The table may or may not contain all the significant provisions of the document(s) at issue. It is simply a place to include one or more provisions of one or more operative agreement/document that we believe could play a role in some aspect of Client’s case (e.g., binding arbitration, attorneys’ fees, and choice of law provisions). The provisions contained in the table, therefore, should neither be viewed as an exhaustive list of key provisions/evidence, nor be used as a measure of what provisions of the operative documents might strengthen (or weaken) Client’s case.

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# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

The Firm should follow up with Client regarding the following items/issues:

— Nunc aliquet bibendum enim facilisis gravida. Amet mattis vulputate enim nulla aliquet porttitor lacus. Suspendisse ultrices gravida dictum fusce ut.

This section of the LADD may be amended from time to time as new information becomes known.

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# CIVIL CODE § 5200 DOCUMENT DEMAND

The HOA produced some documents in response to a Civil Code section 5200 demand. The Firm will complete its review of those documents to determine whether any that should’ve been included are in fact missing.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

The Firm needs to ask Client for the following documents:

— Dolor morbi non arcu risus. Aliquam malesuada bibendum arcu vitae elementum.

— Venenatis urna cursus eget nunc scelerisque viverra. Eu tincidunt tortor aliquam nulla facilisi cras fermentum.

This section of the LADD may be amended from time to time if Client locates additional documents, or if a third party produces additional documents.

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# THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

None at the moment. This, however, may change as new information comes to light, in which case the LADD may be amended to reflect such new information.

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# POTENTIAL CAUSES OF ACTION & THE STRENGTHS/WEAKNESSES OF EACH

## Negligence

Elements—Negligence

— To prove a claim for negligence, plaintiff must establish: (i) duty; (ii) breach of duty; (iii) proximate cause; and (iv) damages. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.)

— In simple terms, negligence is the commission of an unintentional a wrongful act where one fails to exercise the degree of care in a given situation that an otherwise reasonable person would exercise to prevent another from harm. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753–54.)

— An HOA that fails or refuses to abide by its contractual maintenance obligations is liable to the homeowner for damages caused by such negligence. (See, e.g., *White v. Cox* (1971) 17 Cal.App.3d 824, 895.)

Remedies—

— Compensatory damages are available for all harm proximately caused by a defendant’s wrongful acts. (Civ. Code, §§ 3281, 3333-3343.7.)

— Injunctive Relief is available. Courts can fashion equitable relief to remedy negligent conditions. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.)

— Damages for emotional distress are only available in connection with bodily injury. (*Potter v. Firestone Tire & Rubber* (1993) 6 Cal.4th 965.) Such relief, when available, arises out of a claim for *negligent infliction of emotional distress*, which often involve “bystander situations”—e.g., witnessing injury to a family member. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064.) Emotional distress damages for negligence *without* injury (e.g., fear of illness such as cancer if exposed to toxic substances threatening cancer) available if defendant acted with malice, fraud, or oppression, and the fear is based on knowledge corroborated by reliable medical or scientific evidence. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— Two years for personal injuries. (Code Civ. Proc., § 335.1.)

— Three years for claims related to injury to property. (Code Civ. Proc., § 335.1.)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *negligence*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

— \*\*\*

— \*\*\*

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Breach of Fiduciary Duty

Elements—Breach of Fiduciary Duty

— The elements of a claim for breach of fiduciary duty are: (i) the existence of a fiduciary relationship; (ii) its breach; and (iii) damage proximately caused by that breach. (*Tribeca Companies, LLC v. First American Title, Ins.* (2015) 239 Cal.App.4th 1088.)

— Associations owe a fiduciary duty to their members. (*Raven’s Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642.)

— Directors of an association are fiduciaries and are thus required to exercise due care and undivided loyalty for the interests of the association. (*Francis T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513; *Mueller v. Macban* (1976) 62 Cal.App.3d 258, 274.)

— HOAs have an affirmative duty to enforce the restrictions in their governing documents. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111.)

— Among its acts, directors may not make decisions for the association that benefit their own interests at the expense of the association and the entire membership. (*Raven’s Cove Townhomes, Inc. v. Kruppe Development Co.* (1981) 114 Cal.App.3d 783, 799.) This is typically referred to as “self-dealing.”

Remedies—

— If the breach of fiduciary duty results in a breach of CC&Rs, then compensatory (money) damages and injunctive relief may be available.

— If the breach results in damage to property, available compensatory damages are the cost to remedy defects and for loss of use during the period of injury. (*Raven’s Cove Townhomes Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 802.)

— Civil Code § 3333: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

— Equitable remedies such as constructive trust, rescission, and restitution are available when the defendant has been unjustly enriched by the breach. (*Miester v. Mensinger* (2014) 230 Cal.App.4th 381.)

— Punitive damages may be available if the breach constitutes constructive fraud. (Civ. Code., § 3294; *Hobbs v. Bateman Eichler, Hill Richards Inc.* (1985) 164 Cal.App.3d 174.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— A claim for breaching a fiduciary duty must be brought within four years of the breach. (Code Civ. Proc., § 343; *William L. Lyon & Assoc, Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.) If the breach of fiduciary duty stems from the defendant’s fraud (even if pleaded as breach of fiduciary duty), which has a statute of limitations of only three years, the claim must be brought within *three* years. (Code Civ. Proc., § 338; *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *breach of fiduciary duty*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

— \*\*\*

— \*\*\*

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Nuisance

Elements—Nuisance

— The elements for a private nuisance claim are: (i) plaintiff’s interest in property; (ii) defendant’s creation of the nuisance; (iii) unreasonable interference with plaintiff’s use or enjoyment of property; (iv) causation; and (v) damages. (Civ. Code, §§ 3479, 3491; *San Diego Gas & Electric Co. v. Sup. Ct.* (1996) 13 Cal.4th 893, 937.)

— Simply put, a cause of action for private nuisance requires the plaintiff to prove that the defendant interfered with his or her use and enjoyment of the property. (*Adams v. MHC Colony Park, L.P.* (2014) 224 Cal.App.4th 601, 610; *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302-303.)

— A person’s unreasonable, unwarrantable, or unlawful use of his or her own property in a way that interferes with the rights of others is a nuisance. (*Hutcherseon v. Alexander* (1968) 264 CA2d 126.)

— A nuisance occurs where the invasion of the property of another is intentional and unreasonable, or is unintentional but caused by negligent or reckless conduct, or is from an abnormally dangerous activity. An *intentional* nuisance requires proof of malice or actual knowledge that harm was substantially certain to follow from the activity. The conduct is not a nuisance if it is intentional but reasonable, or is accidental and not within one of the above definitions of a nuisance. Where negligence and nuisance causes of action rely on the same facts dealing with lack of due care, the nuisance claim is a negligence claim.

— If the interference is substantial *and* unreasonable (so much so that it would be offensive or inconvenient to the “normal” person), then almost any disturbance of the enjoyment of someone’s property could constitute a nuisance. (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302-303 citing *Koll-Irvine Center Property Owners Assn v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [“an interference need not directly damage the land or prevent its use to constitute a nuisance; private plaintiffs have successfully maintained nuisance actions against airports for interferences caused by noise, smoke and vibrations from flights over their homes ... and against a sewage treatment plant for interference caused by noxious odors....”].)

— Nuisances are characterized as either permanent or continuing. The nature of the claim and available damages are different for either type of nuisance. The crucial distinction between a permanent and continuing nuisance is whether the nuisance is abatable—i.e., capable of being remedied at reasonable cost and by reasonable means. (See *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1093; *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 84.)

— Nuisance v. Trespass. Nuisance is based on a property’s owner’s use of his or her own property in a way that adversely affects other property owners. Typical examples of a nuisance include things like excessive noise, vibration, odors, etc. Trespass refers to a physical invasion of property, either by persons entering the property, or a substance that is dumped, has drained onto, or under the property (e.g., drainage, toxic spills, etc.), or the encroachment of a physical object, such as a structure built over a property line.

Remedies—

— Remedies are different, depending upon whether the nuisance is *permanent* or *continuing*.

• For *permanent* nuisances, compensatory (money) damages are available. The usual measure of such damages is the diminution in fair market value of the affected property. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 292 [jury decides fair market value before and after creation of nuisance].) A plaintiff may also recover the present value of losses or expenses he or she may, with reasonable certainty, incur in the future because of the nuisance. (*Id. at* 295.) A plaintiff must recover all past, present, and future damages in one suit. (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271-272.)

• For *continuing* nuisances, the compensatory (money) damages are different. A plaintiff can only recover actual damages *through the date of the suit* (i.e., plaintiff cannot recover damages for diminution in value) because there is no certainty the nuisance will continue. The rational for that is apparently that if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that the nuisance will continue. (*Gehr v. Baker Hughes Oil Field Operations Inc.* (2008) 165 Cal.App.4th 660, 668.) Which leads to the most common remedy for ongoing nuisances—abatement. A continuing nuisance is ongoing and can be abated at any time via injunction. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868-871.)

— Emotional distress damages are also a possibility. (See *Kornoff v. Kingsburg Cotton Oil Co.*, *supra*, 45 Cal.2d at 272; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 986, fn.10; *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 287-288; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464 [damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort].) Mental distress is an element of loss of enjoyment. (*Sturges v. Charles L. Harney Inc.* (1958) 165 Cal.App.2d 306, 323.)

— Punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Hassoldt v. Patrick Media Group Inc.* (2000) 84 Cal.App.4th 153, 169-170.)

— Declaratory relief may be available in nuisance cases. (Code Civ. Proc., § 1060; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— Three years for property damage resulting from a nuisance. (Code Civ. Proc., § 338(b); *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 743-745.)

— Two years for personal injuries resulting from a nuisance. (Code Civ. Proc., § 335.1.)

— Commencement of running of the statute can be an issue.

• For private *continuing* nuisances, each repetition of a continuing nuisance is considered a separate wrong that commences a new period in which to bring an action based on the new injury. (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996), 44 Cal.App.4th 1160.)

• For a *permanent* nuisance (e.g., a building, fence, buried sewer, or structure located on the property of another), the three year statute of limitations begins to run *when the nuisance first occurred*.

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *Nuisance*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Declaratory Relief

Elements—Declaratory Relief

— The essential elements of a declaratory relief cause of action are: (i) an actual controversy between the parties’ contractual or property rights; (ii) involving continuing acts/omissions or future consequences; (iii) that have sufficiently ripened to permit judicial intervention and resolution; and (iv) that have not yet blossomed into an actual cause of action. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 366–69.)

— In an action for declaratory relief, an “actual controversy” is one that “admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts; the judgment must decree, not suggest, what the parties may or may not do.” (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110.)

— Code Civ. Proc., § 1060 explicitly permits declaratory relief claims to determine the rights and duties of an HOA/homeowner.

Remedies—

— The remedy for a declaratory relief cause of action is a judicial declaration specifying the rights and obligations of the parties. (Code Civ. Proc., § 1060.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— The statute of limitations governing a request for declaratory relief is the one applicable to an ordinary legal or equitable action based on the same claim. (*Mangini v. Aerojet–General Corp.* (1991) 230 Cal.App.3d 1125, 1155.)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *declaratory relief*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

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## Unjust Enrichment

Elements—Unjust Enrichment (Quantum Meruit)

— Unjust Enrichment is technically not a cause of action or a remedy; it is a general principle that is synonymous with restitution. (*Rutherford Holdings LLC v. Plaza Del Ray* (2014) 223 Cal.App.4th 221, 231.) Restitution through unjust enrichment requires (i) the receipt of a benefit and (ii) unjust retention of that benefit at the expense of another. (*Prakashpalan v. Engstom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132.)

• Restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388.)

Remedies—

— Plaintiff is entitled to the return of the thing taken or withheld or its monetary equivalent. (*Federal Deposit Insurance Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346.)

Applicable Statute of Limitations

— The statute of limitations depends upon the underlying wrong. For example, in a case of unjust enrichment resulting from mistake or fraud, the three-year statute of limitations applies. (Code Civ. Proc., § 338(d); *Federal Deposit Insurance Corp. v. Dintino, supra*, 167 Cal.App.4th at 347.)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *unjust enrichment*.

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— REPLACE THIS TEXT by drawing a conclusion about the strengths of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the weaknesses, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Medical Malpractice

Elements— Medical Malpractice

— To prevail on a claim for medical malpractice, plaintiff must prove that (i) the defendant had a duty to use the same degree of skill, prudence, and diligence as other similarly situated members of defendant’s profession; (ii) the defendant breached that duty; and (iii) as a result of the breach, plaintiff suffered damages. (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.)

• Negligent conduct occurring in a medical setting is not enough to bring a claim for medical malpractice. The negligent conduct must result from a health care provider’s rendering of professional services within the scope of their license. (*Flores v. Presbyterian Intercommunity Hosp.* (2016) 63 Cal.4th 75, 83.) For example, if someone slips and falls on a wet floor in a medical office and the floor was wet due to the negligence of the healthcare provider, that would not support a medical malpractice cause action. It would support a negligence claim, however.

Remedies—

— Plaintiff is entitled to his or her compensatory and general damages up to the time of trial and for those future damages that are reasonably certain to occur. (Code Civ. Proc., § 667.7(a); Civ. Code, §§ 3281-3288, 3333.)

— Noneconomic losses (e.g., pain, suffering, inconvenience, physical impairment, disfigurement, etc.) are limited to $250,000. (Civ. Code, § 3333.2.)

— Plaintiff may be entitled to punitive damages if defendant acted intentionally and fraudulently, maliciously, or oppressively. (Civ. Code, § 3294.)

• Plaintiff’s prayer for relief may *not* include a prayer for punitive damages *unless* plaintiff seeks and obtains leave of court to include such a prayer or defendant waives the prohibition. (Code Civ. Proc., § 425.13(a).)

Applicable Statute of Limitations—

— If plaintiff is 18 or older at the time of the injury, he or she must bring a claim for medical malpractice within the *earlier* of (i) *three* years from the injury or (ii) *one* year from when plaintiff knew or should have known of the injury. (Code Civ. Proc., § 340.5.)

— If plaintiff is 6 to 17 years old at the time of the wrongful act, he or she must bring a claim for medical malpractice within *three* years from the date of the wrongful act. (Code Civ. Proc., § 340.5.)

— If plaintiff is under 6 years old at the time of the wrongful act, he or she must bring a claim for medical malpractice within *either* (i) three years from the wrongful act or (ii) before plaintiff turns 8, whichever is *later*. (Code Civ. Proc., § 340.5.)

• That time limitation for minors (i.e., anyone under 18) is tolled for any period of time in which a parent, insurer, or health care provider has committed fraud or collusion in failing to bring an action on behalf of the minor. (Code Civ. Proc., § 340.5.)

— If the requisite notice (see the Pre-Trial Requirements section of this LADD below) is served within the 90-day notice period, then the applicable statute of limitations will be extended by 90 calendar days from the date of the notice.

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *medical malpractice*. If one or more provisions of a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

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## Legal Malpractice

Elements— Legal Malpractice

— The elements of a legal malpractice claim are (i) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise, (ii) a breach of that duty, (iii) a proximate causal connection between the breach and the resulting injury, and (iv) actual loss or damage resulting from the attorney’s negligence. (*Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1089; *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60.)

• An attorney has the duty to exercise the same degree of skill as other similarly situated attorneys in good standing do. (*Smith v. Lewis* (1975) 13 Cal.3d 349, 355.)

• To establish causation in a legal malpractice action, the plaintiff must show that the attorney’s negligence was the actual cause of the plaintiff’s harm, which, as a general proposition, requires plaintiff to show (i) that the harm would not have occurred but for the attorney’s negligence, or (ii) that the negligence was a concurrent independent cause of the harm. (See, e.g., *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240–41; *Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 186; see CACI 601 [“but for” standard in legal malpractice cases]; *Knutson v. Foster* (2018) 25 Cal.App.5th 1075.) This ordinarily requires the plaintiff to prove that, “but for” the attorney’s negligence, he or she would have obtained a more favorable judgment or settlement in the underlying action in which the malpractice allegedly occurred. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193; *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489; *Orrick Herrington & Sutcliffe LLP v. Superior Court* (2003) 107 Cal.App.4th 1052.)

— While the facts may support this legal malpractice claim, Client needs to understand that although held to a high duty of care to their clients, attorneys do *not* warrant or guarantee success or a particular result. (*Lucas v. Hamm* (1961) 56 Cal.2d 583 [holding that the attorney is not, in the absence of express agreement, an insurer of the validity of an instrument that he or she is engaged to draft.].)

• Attorneys are *not* liable for every mistake made in their practice. (*Banerian v. O’Malley* (1974) 42 Cal.App.3d 604, 623; *Smith v. Lewis, supra,* 13 Cal.3d at 349; *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336.)

• And an attorney’s obligation to provide sound advice does *not* require the attorney to advise on “all possible alternatives no matter how remote or tenuous.” (*Davis v. Damrell* (1981) 119 Cal.App.3d 883, 889.)

• Plaintiff may be required to incorporate the case-within-a-case (or trial-within-a-trial) standard of causation, which generally requires the plaintiff to “retry” the underlying case to prove that the outcome would have been more favorable had it not been for the attorney’s error. (See *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531.)

• “[I]n order to make a defendant liable his wrongful act must be the *causa causans* [ (immediate cause) ], and not merely the *causa sine qua non* [ (necessary antecedent) ] [citation].” (*Johnson v. Union Furniture Co.* (1939) 31 Cal.App.2d 234, 237.)

— Client also needs to understand that legal malpractice claims are typically an uphill battle from the start—especially when they involve regret over having entered into settlement agreements—as courts are “loathe to allow settling plaintiffs to later second-guess themselves by suing their attorneys.” (See, e.g., *Blecher & Collins, P.C. v. Northwest Airlines, Inc.* (C.D.Cal.1994) 858 F.Supp.1442, 1458.)

— In the malpractice context, the standard for evaluating the reasonableness of an attorney’s settlement recommendation is “whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less… No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one.” (*Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1462-63.)

— In fact, these types of “settle and sue” lawsuits may require a standard of causation that is perhaps even more burdensome than the above-discussed case-within-a-case standard. (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518; *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 663 [claim that “but for” attorney’s negligence case would have settled sooner or on more favorable terms rejected as speculative].)

— *Orrick Herrington, supra,* 107 Cal.App.4th 1052 serves as an instructive case. In *Orrick Herrington*, a client sued his attorneys for malpractice on the basis that they omitted critical terms from a marital settlement agreement, which allegedly caused the client to enter into a “horribly defective ‘settlement’ agreement.” The court reaffirmed the requisite standard in holding that “. . . in a legal malpractice [case] involving negligence in the prosecution or defense of a legal claim, the case-within-a-case methodology must be used,” and that “. . . the plaintiff must prove his opponent in the underlying litigation would have settled for less, or that following a trial, plaintiff would have obtained a judgment more favorable than the settlement.”

— Other relevant cases to review include: (i) *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 (Viner I); (ii) *Viner v. Sweet* (2004) 117 Cal.App.4th 1218 (Viner II, which followed a remand by the Supreme Court in Viner I); (iii) *Jalali v. Root* (2003) 109 Cal.App.4th 1768; (iv) *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518; (v) *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154; and (vi) *Namikas v. Miller* (2014) 225 Cal.App.4th 1574.

— A breach of the Rules of Professional Conduct is merely evidence of a lawyer’s breach; it is not dispositive of a lawyer’s breach. (*BGJ Assocs., LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1227.)

Remedies—

— Plaintiff is entitled to his or her compensatory and general damages for the harm caused by defendant’s wrongful acts. (Civ. Code, §§ 3281-3282, 3333.)

• That being said, even though the lawsuit will include, as an element of damages, money Client paid to prior counsel (and this Firm), it’s *possible* that the Court will reject that element of damages. Indeed, the general rule in legal malpractice cases is that a plaintiff typically *cannot* recover as tort damages legal fees paid to the negligent attorney or counsel hired to correct those mistakes. (See, e.g., *Orrick Herrington & Sutcliffe LLP v. Sup.Ct.*, *supra*, 107 Cal.App.4th at 1058-1060.)

— Plaintiff may be able to recover his or her attorneys’ fees from having to bring or defend an action against a third party under the “tort of another” doctrine. (*Orrick Herrington, supra,* 107 Cal.App.4th at 1059.)

— If defendant acted intentionally, plaintiff may recover for his or her emotional distress. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1096-97.)

— Plaintiff may be entitled to punitive damages if defendant acted intentionally and fraudulently, maliciously, or oppressively. (Civ. Code, § 3294.)

Applicable Statute of Limitations—

— A claim for legal malpractice must be brought within either (i) one year after plaintiff knew or should have known of the wrongful act or omission; or (ii) four years from the wrongful act or omission, whichever occurs first. (Code Civ. Proc., § 340.6(a).)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *legal malpractice*. If one or more provisions of a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

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• Remember the note referenced above regarding the possible limitations on collecting fees paid as an element of damages. (See, e.g., *Orrick Herrington & Sutcliffe LLP v. Sup.Ct.*, *supra*, 107 Cal.App.4th at 1058-1060.)

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# STRATEGIC CONSIDERATIONS

## Statute of Limitations

To the extent that Client wants to allege all of the suggested causes of action discussed above, the claims must be filed on or before **July 19, 2025** (the *earliest* of the applicable statutes of limitations given the desired claims).

## Applicability of Davis-Stirling Act

## Jurisdiction

### Arbitration

Since there is no binding arbitration provision in the CC&Rs, any litigation related to the dispute must take place in the superior court of Orange County because that is where Client’s property is located.

### Personal Jurisdiction

Because the issues related to the current dispute involve Client’s property, which is located in Orange County, California, and because the parties are residents of California, the superior court in Orange County may exercise personal jurisdiction over the parties.

### Subject Matter Jurisdiction

Subject matter jurisdiction is a requirement for suits filed in federal court. There are no federal court issues of subject matter jurisdiction in connection with this dispute.

## Standing

Based upon the information/evidence that Client has provided thus far, Client has standing to pursue every cause of action described above against each of the intended defendants (excluding DOES, of course).

## Anti-SLAPP Analysis

Anti-SLAPP Overview—

— Strategic Lawsuits Against Public Participation (“SLAPP”) are lawsuits designed to hinder or prevent parties (typically the defendant) from engaging in constitutionally protected activities (e.g., petitioning or free speech). For example, development companies have used SLAPP suits to harass environmental groups standing in the way of large development/construction projects. These companies would file lawsuits against the environmentalists for the express purpose of tying up the smaller (and not as well-funded) environmental groups’ financial resources, effectively preventing them from having their “day in court.” In response, the Legislature passed the anti-SLAPP statute, which was codified in Code of Civil Procedure section 425.16. This statute allows the defending party to file a special motion to strike (called an anti-SLAPP motion) to have the court determine whether the lawsuit can proceed or should instead be thrown out as a meritless attack on the defendant’s acts made in furtherance of his or her right “to petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (Code Civ. Proc., § 425.16(b)(1).)

— The granting of an anti-SLAPP motion can have *severe* consequences, not the least of which is the dismissal of the at-issue claim(s)—or even the entire complaint—depending on the circumstances. In addition, a defendant who prevails on an anti-SLAPP motion *must* be awarded his or her attorneys’ fees and costs, which, given the complexity of anti-SLAPP motions, is typically quite significant. (Code Civ. Proc., § 425.16(c)(1).)

Anti-SLAPP Statute’s Application in HOA-Related Cases—

— SLAPP suits can, and have, arisen in lawsuits by and against HOAs and HOA members. For example, a member might file a lawsuit against a director or committee member to pressure that person to change a critical vote regarding some issue or another. To prevent that type of abuse, and to discourage members from naming individual board members as defendants in litigation, courts have determined that the protections offered under the anti-SLAPP statute apply to various issues that arise in the HOA arena. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130-36 [tree trimming dispute between adjacent homeowners that involved covenants to all lots in the community satisfied the definition of “public interest”]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476-77 [newsletter published to 3,000 residents of an HOA was a “public forum” even if access to the newsletter was selective and limited]; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1409-10 [letters from attorney to management company and the HOA’s board regarding nuisance caused by an HOA member].)

— Obviously, however, not all HOA-related disputes are covered by the anti-SLAPP statute. (*Talega Maintenance Corp. v. Standard Pac. Corp.* (2014) 225 Cal.App.4th 722, 732 [holding that HOA proceedings must have a strong connection to governmental proceedings to qualify as “official proceedings”]; but see *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 540-46 [holding that HOAs “functioned similar to a quasi-governmental body” to constitute a “public forum”].)

Anti-SLAPP Test—

— The courts use a two-prong test to determine if a claim is protected under the anti-SLAPP statute. First, the defendant must prove that the at-issue claim arises from a constitutionally protected activity. (*Ruiz v. Harbor View Community Assn., supra,* 134 Cal.App.4th at 1466; Code Civ. Proc., § 425.16(b)(1).) If the defendant satisfies his or her burden, the burden shifts to the plaintiff to show that there is a probability that he or she will prevail on the merits of the at-issue claim. (*Ibid*.; *Equilon Enterprises v. Consumer Cause Inc.* (2002) 29 Cal.4th 53, 67; Code Civ. Proc., § 425.16(b)(1).)

— With regard to the first prong, there are four categories that the anti-SLAPP statute is intended to protect:

• Any statement (written or oral) or document generated in connection with (or as part of):

→ Any official proceedings authorized by law—e.g., legislative, executive, or judicial proceedings. (Code Civ. Proc., § 425.16(e)(1).)

→ Any issue under consideration or review by a legislative, executive, or judicial body. (Code Civ. Proc., § 425.16(e)(2).)

• Any statement (written or oral) or document made in a place open to the public (or in a public forum) and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(3).)

• Any other conduct made in furtherance of the exercise of a constitutional right of petition or free speech and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(4).)

Application/Analysis/Conclusion—

— Based upon the applicable facts and claims, an anti-SLAPP motion is unlikely because none of the conduct complained of arises from constitutionally protected activities.

## Damage to Client’s Credit as an Element of Client’s Damages

— As a form of special damages, damages related to harm to one’s credit standing (or loss of credit reputation) may apply in a variety of claims involving compensatory damages as a remedy (e.g., malicious prosecution, breach of contract, negligence, breach of equitable servitudes, etc.). (Code Civ. Proc., § 3333 [“For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused. . . .”]; *Bertero v. National Gen. Corp.* (1974 13 Cal.3d 43, 59; *Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132.) Where applicable, such damages can significantly increase Client’s damage demand.

• Credit damage and loss of credit reputation can occur when misconduct by a third party results in negative information appearing on a credit report, and subsequently resulting in an individual or business suffering (i) out-of-pocket costs, (ii) loss of access to credit previously available (including loss of credit capacity/expectancy—e.g., inability to obtain any new credit, or credit at the same interest rate, (iii) loss of security clearance, or (iv) job loss/employment denial.

• Examples of damages available under this legal theory include the difference between a lower and higher interest rate over the life of a loan/credit (e.g., would’ve been qualified for a loan at 5% but for a negative item on credit that raised the rate to 10%—damages would be the difference), or even the loss of credit (e.g., person had a company credit card with $20,000 limit, and while in the process of buyout, partner maxed card on personal items and then refused to pay bill, thus causing loss of the card and damage to credit; damage was $20,000).

• Credit reports from the three major credit report agencies (Experian, Equifax, and Transunion) are *not* admissible in court for credit damage evaluation purposes. Only the “tri-merged” subscriber report is admissible.

• *If Client intends to seek damages under this legal theory, expert testimony might be necessary. Previously, the preeminent expert in this field was Georg Finder (with offices in Orange County), who was Credit Damage Evaluator with two decades of expert experience. His website was (and is?): www.creditdamageexpert.com. The problem is that last time we went to hire him for another case, we couldn’t locate him.* ***See MBK for guidance***.

— **Keep in mind that this remedy may be included as part of Client’s compensatory damages in any cause of action that includes compensatory damages as a proper remedy.**

## Pre-Filing Requirements (e.g., Notice or Mediation Requirements)

While Client did *not* comply with that pre-filing requirement, an argument can be made that such a requirement has been waived. ABC and that’s that.

## Attorneys’ Fees and Costs

The prevailing party will be entitled to attorneys’ fees and costs under the Davis-Stirling Act. In addition, the prevailing part will also be entitled to their attorneys’ fees and costs under Section 31.12 of the CC&Rs.

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# FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS

None at this time.

This section of the LADD might be amended from time to time to reflect new information, strategies, or concerns that arise during the course of the litigation.

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Reviewed and Approved by: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_