**PRELIMINARY ANALYSIS**

radio\_dispute\_or\_not == "Actual Dispute"

**{{ text\_matter\_name\_dispute }}**

###

radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"

**{{ text\_matter\_name\_question }}**

###

Prepared By

{{ text\_pa\_atty }}

September 19, 2022

# SHORT SUMMARY OF CASE

radio\_dispute\_or\_not == "Actual Dispute"

{{ textarea\_short\_summary\_dispute|parse\_new\_lines }}

###

radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"

{{ textarea\_short\_summary\_question|parse\_new\_lines }}

###

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# Parties / Significant Figures

radio\_num\_of\_parties == 1

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |

###

radio\_num\_of\_parties == 2

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |

###

radio\_num\_of\_parties == 3

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |

###

radio\_num\_of\_parties == 4

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |
| {{ text\_party\_four\_name }} | {{ text\_party\_four\_role }} |

###

radio\_num\_of\_parties == 5

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |
| {{ text\_party\_four\_name }} | {{ text\_party\_four\_role }} |
| {{ text\_party\_five\_name }} | {{ text\_party\_five\_role }} |

###

radio\_num\_of\_parties == 6

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |
| {{ text\_party\_four\_name }} | {{ text\_party\_four\_role }} |
| {{ text\_party\_five\_name }} | {{ text\_party\_five\_role }} |
| {{ text\_party\_six\_name }} | {{ text\_party\_six\_role }} |

###

This table may be amended from time to time as new information/evidence comes in regarding new “parties” and/or witnesses.

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

# Statement of Facts / Evidentiary Support

|  |  |  |
| --- | --- | --- |
| **Date / NA** | **Fact** | **Evidence Supporting That Fact** |
| 4/19/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  Client closed escrow on the property. | Client Timeline |
| N/A | 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**. | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |

This table may be amended from time to time as new information/evidence comes in that require significant revisions to Client’s pre-litigation strategy.

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

# Notable Provisions of the Governing Documents

|  |  |
| --- | --- |
| **Document**  **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  Section 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  The HOA shall paint, maintain, repair and make necessary improvements to the common areas, as well as the exteriors of the garage, deck, and balcony elements of the Units, in good condition and repair. |
| Operating Rules  P. 20 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  [I]n the event of any water damage, mold infestation, or related damage arising from an owner’s negligence, or arising from any pipe leak or similar failure for which this owner has the maintenance responsibility, the owner shall be responsible for all repairs and resulting damage. |
| 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**. |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |

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

# Additional Information/Clarification Needed From Client

yn\_need\_more\_info\_from\_client == "Yes" and yn\_include\_info\_from\_client == "No"

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

— \*

— \*

— \*

— \*

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

###

yn\_need\_more\_info\_from\_client == "Yes" and yn\_include\_info\_from\_client == "Yes"

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

— {{ text\_more\_info\_one }}

yn\_more\_info\_want\_second == "Yes"

— {{ text\_more\_info\_two }}

###

yn\_more\_info\_want\_third == "Yes"

— {{ text\_more\_info\_three }}

###

yn\_more\_info\_want\_fourth == "Yes"

— {{ text\_more\_info\_four }}

###

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

###

yn\_need\_more\_info\_from\_client != "Yes"

Not at the moment. This section of the Preliminary Analysis may, however, be amended from time to time as new information becomes known.

###

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yn\_cc\_doc\_demand == "Yes"

Civil Code § 5200 Document Demand

yn\_cc\_docs\_received == "Yes"

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.

###

yn\_cc\_docs\_received != "Yes"

Although a Civil Code section 5200 demand went out, the HOA has not yet produced the documents. Once that occurs, the Firm will complete a thorough review of those documents to determine whether any that should’ve been produced are missing.

###

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###

# Additional Documents Needed From Client

yn\_need\_more\_documents\_from\_client == "Yes"

The Firm needs to ask Client for the following documents:

— {{ text\_more\_docs\_one }}

yn\_more\_docs\_want\_second == "Yes"

— {{ text\_more\_docs\_two }}

###

yn\_more\_docs\_want\_third == "Yes"

— {{ text\_more\_docs\_three }}

###

yn\_more\_docs\_want\_fourth == "Yes"

— {{ text\_more\_docs\_four }}

###

— \*

— \*

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

###

yn\_need\_more\_documents\_from\_client != "Yes"

None at the moment.

###

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

yn\_client\_board\_mem == "Yes" or yn\_client\_board\_mem\_question == "Yes"

# Must NOT Use HOA’s Privileged Documents

If Client provides the Firm with documents that appear to be privileged (HOA’s attorney-client privilege)—e.g., communications/opinions between the HOA’s prior attorneys and the Board, etc.—such documents:

— May not be cited, or even *referenced*, at all during the pre-litigation or litigation phases of the cases.

— Must be stored in a separate folder in “Client Docs” called “HOA Privileged Docs.”

Because Client was a member of the HOA’s board during some (or all) of the time relevant to the pending dispute, it’s very likely that Client possesses documents that are protected from disclosure by the attorney-client privilege (the HOA’s). This raises three important issues: (i) can Client waive the attorney-client privilege on behalf of the HOA; (ii) does the CRPC mandate the Firm to return the privileged docs; and (iii) does Client violate his or her fiduciary duty to the HOA by providing the privileged docs to the Firm?

## Can Client Waive the Privilege?

— Where the client is a corporation, it alone (through its officers and directors) is the holder of the privilege and it alone may waive the privilege. (*Titmas v. Sup.Ct. (Iavarone)* (2001) 87 Cal.App.4th 738, fn. 1.)

— The authority to waive the attorney-client privilege rests with the corporation’s officers and directors. When control of the corporation passes to new people, so too does the authority to assert or waive the privilege. (*Commodity Futures Trading Com’n v. Weintraub* (1985) 471 U.S. 343.) When control passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes, and new management may waive the attorney-client privilege with respect to communications made by former officers and directors. (*Id. at* 349.) A former director has no power to assert or waive the corporation’s privilege, and a former officer cannot assert the protection if the corporation as waived it. (*Ibid*.)

— The HOA may waive the privilege, but in cases where two or more people are joint holders of a privilege, the waiver of that privilege by one does NOT affect the rights of the other(s) to claim the privilege. (*American Mut. Liab. Ins. Co v. Superior Court* (1974) 38 Cal.App.3d 579; Ev. Code, §912b.)

### Does the CRPC Require the Firm to Return the Privileged Documents?

— CRPC 4.4 requires attorneys to return privileged documents that were “inadvertently sent or produced.” CRPC 4.4, however, does *not* seem to apply. Not only did Client intentionally produce the documents to the Firm, but Client had a valid right to receive the documents in the first place. Notwithstanding that fact, for now the Firm doesn’t believe it’s wise to rest on technicalities when dealing with the ethical rules.

— The official Comment to the Rule states that CRPC 4.4 does not address the “legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been inappropriately disclosed by the sending person.” The Comment then cites to *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, in which the Court of Appeal broadly held that a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged must (1) refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and (2) immediately notify the sender that he or she possesses material that appears to be privileged.

— *Keep in mind that in Clark, the court disqualified the attorney in question* (who represented an employee of a company) for excessively reviewing the employer’s (i.e., the opposing side’s) privileged materials, *despite the fact that (a) the employee intentionally transmitted the documents to the attorney, and (b) the employee had a right to receive the privileged materials during the course of his employment*. This is precisely the scenario that we’re facing.

— While there are some distinguishing facts in *Clark*—e.g., the employee was contractually obligated to return all privileged materials upon termination of his employment—the point of the case is clear: attorneys are prohibited from “excessively” reviewing certain documents covered by another party’s attorney-client privilege. This rule makes sense given the privilege’s sacred status under California law.

— The Firm has, therefore, decided to proceed with caution at the current time, at least until and unless further research calls for a different take on the issue.

## Does Providing Privileged Documents to the Firm Constitute a Fiduciary Breach by Client?

— The Firm is in the process of completing research on this issue, but it *appears* that the answer is yes—former board members cannot make unauthorized disclosures of privileged materials.

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radio\_dispute\_or\_not == "Actual Dispute" and radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner"   
Potential Causes of Action and the Strengths/Weaknesses of Each**###**radio\_dispute\_or\_not == "Actual Dispute" and radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "Yes"   
Potential Cross-Claims and the Strengths/Weaknesses of Each**###**radio\_dispute\_or\_not == "Actual Dispute" and radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "No"   
Potential Affirmative Defenses**###**radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"   
Issues/Questions Posed by Client**###**

radio\_dispute\_or\_not == "Actual Dispute"

"Breach of CC&Rs" in checkbox\_potential\_claims or "Breach of CC&Rs" in checkbox\_potential\_cross\_claims

## Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. Code, § 5975

Elements—Breach of CC&Rs.

— Restrictive covenants and recorded declarations are written agreements governed by contract principles. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 240.) Restrictive covenants and recorded declarations are of a contractual nature and are enforceable by statute unless unreasonable. (*Id.* at 237; and see Civ. Code, § 5975.) Because the Declaration of CC&Rs is a recorded declaration of restrictive covenants, it is enforceable provided it is not unreasonable. “[S]ettled principles of condominium law establish that an owners association, like its constituent members, must act in conformity with the terms of a recorded declaration. (See Civ. Code, § 5975, subd. (a); *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 268 [homeowner can sue association to compel enforcement of declaration's provisions];(Citations.)” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*, supra, 55 Cal.4th at p. 239.)

yn\_enforcement == "Yes" or yn\_cc\_enforcement == "Yes"

— Where enforcement is an issue in a breach of CC&Rs cause of action (as it is here), it tends to arise in two ways: (i) HOA not enforcing rules at all; or (ii) HOA applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn., supra,* 21 Cal.4th at 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* *(US) LLC, supra,* 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

###

yn\_maintain == "Yes" or yn\_cc\_maintain == "Yes"

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

###

Applicable Statute of Limitations—

— The statute of limitations to enforce a restriction, which includes CC&Rs, is five years. (Code Civ. Proc., § 336(b).) Consequently, an action for a violation of a restriction must be commenced within five years after the party enforcing the restriction discovers, or through the exercise of reasonable diligence, should have discovered, the violation. [*As used here, a “restriction” means a limitation on, or a provision affecting the use of, real property in a deed, Declaration, or other instrument in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.*] (Civ. Code, § 784.)

Remedies—

— While typically injunctive in nature, courts may fashion remedies to enjoin an ongoing breaches. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.) Additionally, compensatory damages are available if plaintiff incurred monetary damages. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1385; Civ. Code, §§ 3281, 3300.)

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

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 the CC&Rs*. 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). **By the same token, however, you need to determine whether the CC&Rs actually require the HOA to enforce the CC&Rs. Some do, and some don’t.**

— \*\*\*

— \*\*\*

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 Contract" in checkbox\_potential\_claims or "Breach of Contract" in checkbox\_potential\_cross\_claims

## Breach of Contract

Elements—Breach of Contract.

— To prevail on a claim for breach of contract (express or implied), the plaintiff must prove: (i) the existence of a contract; (ii) plaintiff’s performance or excuse for non-performance; (iii) defendant’s breach; and (iv) the resulting damages to plaintiff. (*Darbun Enterprises Inc. v. San Fernando Community Hosp.* (2015) 239 Cal.App.4th 399, 409; *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.)

Remedies—

— Compensatory (money) damages are available for all expected harm caused by the breach. (Civ. Code, § 3300.) In other words, damages must be reasonably foreseeable. (Civ. Code, § 3300; *Erlich v. Menezes* (1999) 21 Cal.4th 543.)

— Emotional distress damages are generally *not* available *unless* the breach caused bodily harm or a serious emotional disturbance was a particularly likely result. (*Erlich v. Menezesm, supra,* 21 Cal.4th at 558; *Plotnik v. Meihous* (2012) 208 Cal.App.4th 1950 [breach of settlement agreement by hitting dog with baseball bat].)

— Specific performance is an available remedy for breach if the non-breaching party desires to affirm the contract. (Civ. Code, § 1680; *Kassir v. Zahabi* (2008) 164 Cal.App.4th 1352.)

— Rescission (accompanied by restitution) is available in certain circumstances. (Civ. Code, § 1692.) Mutual rescission is available if all parties consent. (Civ. Code, § 1689(a).) Unilateral rescission is available by statute for mistake, fraud, duress, undue influence, failure of or void consideration, or if the contract is unlawful or against public policy. (Civ. Code, § 1689(b).)

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

Applicable Statute of Limitations—

— For breach of verbal contracts, the statute of limitations is two years. (Code Civ. Proc., § 339.)

— For breach of *most* written contracts, the statute of limitations is four years. (Code Civ. Proc., § 337.)

— For breach of *negotiable instruments* (e.g., promissory notes), the statute of limitations is six years. (Comm. Code, § 3118.)

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 contract*. 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 Other Governing Documents" in checkbox\_potential\_claims or "Breach of Other Governing Documents" in checkbox\_potential\_cross\_claims

## Breach of Other Governing Documents

Elements—Breach of Articles, Bylaws, Rules, Etc.

— Civil Code section 5975(a) makes the CC&Rs enforceable as an equitable servitude. Articles, bylaws, and rules (defined as governing document in Civ. Code, § 4150) are not in Davis-Stirling’s definition of equitable servitudes. Civil Code section 5975(b), however, authorizes enforcement of the other governing documents such as bylaws, articles, and rules by an association against a homeowner, and by a homeowner against the association (*but not by an owner against other owners*).

Remedies—

— While typically injunctive in nature, courts may fashion remedies to enjoin any ongoing breaches. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.) Additionally, compensatory (money) damages are available if plaintiff incurred monetary damages. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1385; Civ. Code, §§ 3281, 3300.)

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

Applicable Statute of Limitations—

— Unrecorded governing documents (e.g., architectural guidelines, rules, etc.) fall within the same five year statute of limitations that breach of the CC&Rs does. (*Pacific Hills Homeowners Ass’n v. Prun* (2008) 160 Cal. App. 4th 1557, 1563.)

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 other governing documents*. 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.”

###

"Negligence" in checkbox\_potential\_claims or "Negligence" in checkbox\_potential\_cross\_claims

## 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.)

— 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.)

(yn\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims)

— The “enforcement” issue raised in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a negligence claim.

###

(yn\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims)

— Where enforcement is an issue in a negligence cause of action (as it is here), it tends to arise in two ways: (i) an HOA is not enforcing rules at all; or (ii) an HOA is applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn* (1999) 21 Cal.4th 249, 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a negligence claim.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims)

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

###

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).

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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.”

###

"Breach of Fiduciary Duty" in checkbox\_potential\_claims or "Breach of Fiduciary Duty" in checkbox\_potential\_cross\_claims

## 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.”

yn\_architect == "Yes" or yn\_cc\_architect == "Yes"

— “A decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious.” (Civ. Code, § 4765(a)(2).) “It is a settled rule of law that homeowners’ associations must exercise their authority to approve or disapprove an individual homeowner’s construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith. (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 447; *Branwell v. Kuhle* (1960) 183 Cal.App.2d 767, 779.) As the court in Hannula stated: ‘Each of the decisions enforcing like restrictions has held that the refusal to approve plans must be a reasonable determination made in good faith.’ (*Hannula v. Hacienda Homes*, supra, 34 Cal.2d 442, 447.) The converse should likewise be true, ... ‘[T]he power to approve plans ... must not be exercised capriciously or arbitrarily.’ (*Bramwell v. Kuhle*, supra, 183 Cal.App.2d 767, 779); [Citations]” (*Cohen v. Kite Hill Community Assn*. (1983) 142 Cal.App.3d 642.)

###

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).

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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.”

###

"Nuisance" in checkbox\_potential\_claims or "Nuisance" in checkbox\_potential\_cross\_claims

## 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.)

(yn\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Breach of CC&Rs” and “Negligence” causes of action above is also applicable in the context of a nuisance claim.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Negligence” cause of action above is also applicable in the context of a nuisance claim.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" not in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" not in checkbox\_potential\_cross\_claims)

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

###

yn\_nuisance\_ccrs == "Yes"

— Most importantly, {{ text\_cite\_nuisance\_ccrs }} of the CC&Rs specifically states that a violation of the CC&Rs gives rise to a separate nuisance claim.

###

yn\_cc\_nuisance\_ccrs == "Yes"

— Most importantly, {{ text\_cite\_cc\_nuisance\_ccrs }} of the CC&Rs specifically states that a violation of the CC&Rs gives rise to a separate nuisance claim.

###

— 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.”

###

"Trespass" in checkbox\_potential\_claims or "Trespass" in checkbox\_potential\_cross\_claims

## Trespass

Elements—Trespass.

— “A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it.” (*Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233.) “The essence of the cause of action for trespass is an ‘unauthorized entry’ onto the land of another.” (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1778) [trespass where wastewater was injected from defendant’s property to plaintiff’s, interfering with plaintiff’s mineral estate].

— An action for trespass may technically be maintained only by one whose right to possession has been violated (see generally, Prosser, Law of Torts, (4th ed.) § 13, p. 69; *Uttendorffer v. Saegers* (1875) 50 Cal. 496, 497–498); however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest. (*Rogers v. Duhart* (1893) 97 Cal. 500, 504–505)[citations]” (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774.) In other words, a plaintiff asserting a claim for trespass must have a possessory interest in the land at issue; mere ownership is not sufficient. (*Dieterich Int’l Truck Sales, Inc. v. J.S. & J. Servs. Inc.* (1992) 3 Cal.App.4th 1601, 1608–10.)

— Where possession is an issue, courts have held that “whether plaintiff’s relationship to the land amounts to possession within the meaning of the foregoing principles is a question of fact to be determined by the jury (*O’Banion v. Borba* (1948) 32 Cal.2d 145; *Walner v. City of Turlock* (1964) 230 Cal.App.2d 399; *Brumagim v. Bradshaw* (1870) 39 Cal. 24), unless it can be said as a matter of law that the evidence upon that issue is palpably insufficient to support a verdict for plaintiff. (*O’Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729; [Citations]” (*Williams v. Goodwin* (1974) 41 Cal.App.3d 496, 509.)

— Like nuisances, trespasses can be characterized by either permanent or continuing. The principles governing the permanent or continuing nature of a trespass or nuisance are the same, and the cases discuss the two causes of action without distinction (although the distinction has implications for the statute of limitations and remedies available). (See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583.) The key to classifying a trespass as continuing or permanent is whether it is likely to be discontinued or abated at a later date. (*Id. at* 592.)

"Nuisance" not in checkbox\_potential\_claims and "Nuisance" not in checkbox\_potential\_cross\_claims

— Trespass v. Nuisance. 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. 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.

###

Remedies—

— As is the case with nuisances, the remedies for *prior* trespasses and an *ongoing* trespasses are different.

• For a *prior* act of trespass, the measure of compensatory (money) damages includes the: (i) value of the property’s use during the time it was wrongfully occupied (not more than five years before filing suit); (ii) reasonable cost of repair or restoration of the property to its original condition; and (iii) costs of recovering possession. (Civ. Code, § 3334(a).) The value of a property’s use is the greater of its reasonable rental value or the benefits obtained by the person wrongfully occupying the land. (Civ. Code, § 3334(b); *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, *supra*, 153 Cal.App.4th at 604.) The “reasonable” component means that a plaintiff will recover the lesser of the cost of repairing the damage and restoring the property to its original condition, or the diminution in the value of the property. (*Id.* at pp. 599-600.)

→ Damages for “annoyance and discomfort that would naturally ensue” from a trespass on a plaintiff’s land are also recoverable, and are intended to compensate plaintiff for the loss of peaceful enjoyment of the property. (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 273.) These damages are generally related to distress “arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like.” (*Kelly v. CB & I Constructors Inc.* (2009) 179 Cal.App.4th 442, 456.)

→ A plaintiff may recover damages for emotional distress and mental anguish proximately caused by a trespass. (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905; *Hensley v. San Diego Gas & Elec. Co.* (2017) 7 Cal.App.5th 1337, 1348-1352.) Emotional distress without physical injury is also compensable. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 986, fn.10.)

• With *continuing* trespasses, compensatory damages calculations are different because a plaintiff may only recover damages for *present and past injury to the property*. No award may be made for *future or prospective harm* because, as in the case of ongoing nuisances, a continuing trespass can be abated any time, ending the harm. (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592.) Only the “reasonable” cost of repairing or restoring the property to its original condition is recoverable. (Civ. Code, § 3334(a); see *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1103.)

— A trespass can be abated by an injunction in certain situations. In cases of encroachment, plaintiff may obtain a mandatory injunction ordering defendant to remove the encroachment. (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1251[condominium owner extended deck into common area and was ordered to remove it].)

— For all forms of trespass, punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant is guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Hassholdt v. Patrick Media Group Inc.* (2000) 84 Cal.App.4th 153, 169.)

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

Applicable Statute of Limitations—

— The limitations period for a trespass action is generally three years. (Code Civ. Proc., § 338(b).) When the claim accrues depends on whether the trespass is “permanent” or “continuing.”

• For *permanent trespass*, a claim accrues when the trespass occurs. Plaintiff must bring a single action for past, present, and future damages within three years (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592.)

• For *continuing trespass*, a new cause of action accrues each day the trespass continues, and a plaintiff must bring periodic successive actions if the trespass continues without abatement. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 869.)

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 *trespass*. 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.”

###

"Interference with Prospective Business Advantage" in checkbox\_potential\_claims or "Interference with Prospective Business Advantage" in checkbox\_potential\_cross\_claims

## Interference with Prospective Business Advantage

Elements—Interference with Prospective Business Advantage.

— The elements of the tort of *intentional* interference with prospective business advantage are: (i) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (ii) the defendant’s knowledge of the relationship; (iii) intentional acts on the part of the defendant designed to disrupt the relationship; (iv) actual disruption of the relationship; and (v) economic harm to the plaintiff proximately caused by the acts of the defendant. (*Port Medical Wellness, Inc. v. Connecticut General Life Insurance Company* (2018) 24 Cal.App.5th 153, 182-183; *Redfearn v. Trader Joe’s Co.* (2018) 20 Cal.App.5th 989, 1005.)

— The elements of *negligent* interference with prospective economic advantage are: (i) the existence of an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (ii) the defendant’s knowledge of the relationship; (ii) the defendant’s knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care; (iv) the defendant’s failure to act with reasonable care; (v) actual disruption of the relationship; and (vi) economic harm proximately caused by the defendant’s negligence. (*Redfearn v. Trader Joe’s Co.* (2018) 20 Cal.App.5th 989, 1005.)

Remedies—

— Compensatory (money) damages are available for interference that deprives a plaintiff of nons-speculative, future economic benefits that are reasonably likely to occur. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134.) This includes lost profits. (*Sole Energy v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 233.)

— Emotional distress damages are only available for “extreme and outrageous” conduct if it is objectively reasonable that serious emotional distress will result from the interference. (*Di Loreto v. Shumake* (1995) 38 Cal.App.4th 35.)

— Under ordinary tort principles, equitable relief may be available if the interference is ongoing.

— Punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant is guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1141.)

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

Applicable Statute of Limitations—

— For intentional interference (tort) the statute of limitations is two years. (Code Civ. Proc., § 339(1).) The claim begins accruing when the interference starts.

— The statute of limitations for this is the same as it is for interference with contractual relations. (*Knoell v. Petrovich* (1999) 76 Cal.App.4th 164; *Tu–Vu Drive–In Corp. v. Davies* (1967) 66 Cal.2d 435, 437.)

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 *interference*. 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.”

###

"Intentional Misrepresentation" in checkbox\_potential\_claims or "Intentional Misrepresentation" in checkbox\_potential\_cross\_claims

## Intentional Misrepresentation (Fraud)

Elements—Intentional Misrepresentation (and fraud).

— The elements of a cause of action for intentional misrepresentation are: (i) a misrepresentation; (ii) made with knowledge of its falsity; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)

• A false representation is the suggestion, as a fact, of something untrue by one who does not believe it to be true. (Civ. Code, § 1710(1).) In general, the statement must be of a past or present fact, not opinion, estimates or speculation. (*Neu-Visions Sports Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308-310.)

— The elements of an action for fraud and deceit based on a concealment are: (i) the defendant must have concealed or suppressed a material fact; (ii) the defendant must have been under a duty to disclose the fact to the plaintiff; (iii) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (iv) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; (v) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (*Marketing West Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal. App.4th 603, 612-613.)

— A promise made without intending to fulfill it—i.e., “promissory fraud”—is also actionable as fraud. In this situation, the “fact” being misrepresented is the speaker’s present intention to perform. (Civ. Code, § 1710(4); *Engalla v. Permanente Med. Group Inc.* (1997) 15 Cal.4th 951, 973 [a promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud].)

— Defendant must know the statement is false or act with reckless disregard of its truth or falsity. (*Lazar v. Sup.Ct. (Rykoff- Sexton Inc.)* (1996) 12 Cal.4th 631, 638; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 415 [scienter requirement satisfied if defendant has no belief in truth of statement and makes it recklessly, without knowing whether it is true or false].)

— Civil Code section 1709—“One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”

• Defendant must intend to induce the other party to act in reliance on the false information. (Civ. Code, § 1709; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith Inc.* (1998) 68 Cal.App.4th 445, 481.)

• Although Civil Code section 1709 does not list “reliance” as a required element of deceit, plaintiff must plead and prove that he or she actually and justifiably relied on defendant’s misrepresentation. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1091.)

— Civil Code section 1710—Defines deceit (as used in § 1709), and includes three different types of deceit, including a promise made without any intention of performing (see above). Actual reliance is a component of “justifiable reliance.” (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 737.) A plaintiff must have been justified in believing defendant’s statements. (*Gray v. Don Miller & Assocs. Inc.* (1984) 35 Cal.3d 498, 503.) Actual reliance is shown if the misrepresentation substantially influences plaintiff’s decision to act. (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678.) A plaintiff who does not believe the representations made to him or her cannot establish actual reliance. (*Buckland v. Threshold Enterprises Ltd.* (2007) 155 Cal.App.4th 798, 806-808.)

— There are three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable person standard. (*Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 312–313*.) Second, if the matter is material, reasonableness must take into account the plaintiff’s own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)

— Forbearance can constitute reliance if plaintiff decided not to do something based on the misrepresentations. (*Small v. Frist Cos. Inc.* (2003) 30 Cal.4th 167.)

— While the standard to determine the reasonableness of the reliance is subjective (i.e., the “reasonable person” standard doesn’t typically apply, and thus being gullible is often not a bar to establishing reliance)—*Brownlee v. Vang* (1965) 235 Cal.App.2d 465—there is a limit to that subjective standard. A plaintiff cannot rely on representations that are so preposterous and “so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.” (*Blankenheim v. E.F. Hutton & Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)

— Plaintiff must plead and prove that defendant’s fraud was the cause of plaintiff’s injury (*Service by Medallion Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818) and that his or her damages were proximately caused by defendant’s tortious conduct (Civ. Code, §§ 1709, 3333, 3343; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 65-66.)

Remedies—

— Different measures of compensatory (money) damages are available depending upon the nature of the claim. In general, for compensatory damages, defrauded plaintiffs are limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received. (*Alliance Mortgage. Co. v. Rothwell* (1995) 10 Cal.4th 1226 [damages include difference between value given and value received, plus consequential pecuniary loss caused by reliance on misrepresentation].)

— For claims involving the purchase, sale, or exchange of real property, Civil Code section 3343 governs. Essentially, the plaintiff is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he or she received, together with any additional damages arising from the particular transaction, including any of the following: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) an amount that would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud; and (iii) where the defrauded party was induced by reason of the fraud to sell or otherwise part with the property in question, an amount which would compensate him or her for profits or other gains that might reasonably have been earned by use of the property had he or she retained it.

• Additional damages are available for lost profits if the plaintiff was tricked into selling an income property. (Civ. Code, § 3343(a)(4).)

• The statute does not permit a plaintiff to recover the difference between the value of the property as represented and the actual value of the property, nor does it prevent the plaintiff to obtaining equitable remedies he or she might also be entitled to. (Civ. Code, § 3343(b).)

• In real property transactions, emotional distress damages are not recoverable. (Civ. Code, § 3343.)

— For fraud involving fiduciary relationships, a broader spectrum of damages is available, typically benefit of the bargain damages. (Civ. Code, §§ 1709, 3333.)

— Damages for emotional distress are available for some types of fraud that don’t involve real property. (*Sprague v. Frank J. Sanders Lincoln Mercury, Inc.* (1981) 120 Cal. App. 3d 412, 417 [“general damages for mental pain and suffering are recoverable in a tort action of deceit”].) For negligent misrepresentation cases, no emotional distress damages are available *unless* plaintiff suffers physical injury. (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th, 793, 798-799.)

— Punitive damages are awardable where plaintiff shows by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790; *Branch v. Homefed Bank, supra,* 6 Cal.App.4th at 799.)

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

Applicable Statute of Limitations—

— Where the essence of a claim is that defendant’s act constituted actual or constructive fraud, the claim is subject to the three-year limitations period. (Code Civ. Proc., § 338.)

— Otherwise, the statute of limitations is four years. (Code Civ. Proc., § 343; *William L. Lyon & Associates Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.)

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 *intentional misrepresentation*. 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.”

###

"Negligent Misrepresentation" in checkbox\_potential\_claims or "Negligent Misrepresentation" in checkbox\_potential\_cross\_claims

## Negligent Misrepresentation

Elements—Negligent Misrepresentation.

— The elements of a claim for *negligent* misrepresentation are nearly identical to those required to allege intentional misrepresentation (or fraud), except that the second element requires the absence of reasonable grounds for believing the misrepresentation to be true instead of knowledge of its falsity. The elements, therefore, are: (i) a misrepresentation; (ii) made with no reasonable basis to believe the representation is true; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 231.)

Remedies—

— For compensatory (money) damages, defrauded plaintiffs are generally limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received in return, plus consequential pecuniary loss caused by reliance on misrepresentation. (*Alliance Mortg. Co. v. Rothwell* (1995) 10 Cal.4th 1226.)

— For misrepresentations involving the purchase and sale of real property, damages are governed by Civil Code section 3343. The defrauded party is entitled to recover the difference between the actual value given and the actual value of what they received, together with any additional damage arising from the particular transaction, including: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) amounts for loss of use and enjoyment of the property proximately caused by the fraud; and (iii) in the case of a party induced to sell income property, profits or other gains that might reasonably have been earned by use of the property had the person retained it. (Civ. Code, § 3343(a).) Additional damage calculations apply if the defrauded party was induced to purchase income property. (*Ibid.*) Damages are *not* calculated as the difference between what was represented and what the property is actually worth. (Civ. Code, § 3343(b).)

— Punitive damages and emotional distress damages are not available in the absence of physical injury. (*Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220, 1227; *Branch v. Homefed Bank* (1992) 6 Cal.App.793, 799-800.)

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

Applicable Statute of Limitations—

— Three years. (Code Civ. Proc., § 338(d).)

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 *negligent misrepresentation*. 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.”

###

"IIED" in checkbox\_potential\_claims or "IIED" in checkbox\_potential\_cross\_claims

## Intentional Infliction of Emotional Distress (“IIED”)

Elements—IIED.

— The elements of IIED are: (i) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress in another person; (ii) the plaintiff’s suffering severe or extreme emotional distress; and (iii) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct. (*Davidson v. City of Westminister* [sic] (1982) 32 Cal.3d 197, 209; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) The “conduct must be intended to inflict injury or engaged in with the realization that injury will result.” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

— The conduct must be directed specifically at the plaintiff or plaintiffs, not to persons in general., or the conduct occurred in the presence of plaintiff and the defendant was aware of plaintiff. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) The requirement that the defendant’s conduct be directed primarily at the plaintiff is a factor which distinguishes intentional infliction of emotional distress from the negligent infliction of such injury. (*Id. at* 904.)

— This cause of action should only be used in extreme situations due to the high bar required for proof. Successful cases involve actions such as sexual harassment, mishandling of a corpse (*Christensen v. Superior Court* (1991) 54 Cal.3d 868), intentional dumping of toxic waste (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965), and threats of physical harm to a person’s family or pet (i.e., beating a dog with a baseball bat). (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1950.)

— IIED is only appropriate in cases where the actions of another are so extreme as to be beyond all bounds of decency. This cause of action is not available for “…mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051, citing Rest.2d Torts, § 46, com. d.)

— Actions by an HOA will very rarely meet this standard.

— Note: There is no such cause of action as *negligent infliction of emotional* distress. Courts have repeatedly held that the negligent causing of emotional distress is not an independent tort, but instead is part of the tort of negligence. The traditional elements of duty, breach of duty, causation, and damages, therefore, apply. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.)

Remedies—

— Compensatory (money) damages are available (*Fletcher v. Western Nat’l Life Ins. Co.* (1970) 10 Cal.App.3d 376), as are punitive damages. (Civ. Code, § 3294.)

— 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 for IIED is two years. (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 *IIED*. 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.”

###

"Implied Covenant" in checkbox\_potential\_claims or "Implied Covenant" in checkbox\_potential\_cross\_claims

## Implied Covenant of Good Faith and Fair Dealing

Elements—Breach of the Implied Covenant of Good Faith and Fair Dealing.

— The elements of a claim for breach of the implied covenant of good faith and fair dealing are: (i) the existence of a contract; (ii) the plaintiff’s performance of the contract or excuse for nonperformance; (iii) the conditions required for the defendant’s performance occurred or were excused; (iv) the defendant unfairly interfered with the plaintiff’s right to receive the benefits of the contract; and (v) the plaintiff was harmed. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350; *Racine & Laramie, Ltd. v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032.)

— Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. (Rest.2d Contracts, § 205.) “The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. [Citations.]” (*Carma Developers (Cal.), Inc., v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372.) “All that is required for an implied covenant claim is the existence of a contractual or relationship between the parties. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.)

— The “implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose.” (*Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75; accord *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 401.) A “breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself.” (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59.) Indeed, “breach of a specific provision of the contract is not . . . necessary’ to a claim for breach of the implied covenant of good faith and fair dealing.” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) An association’s duty of good faith extends to each member individually. (See *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642.) The essence of the good faith covenant is objectively reasonable conduct. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)

— The duty of a contracting party under the covenant of good faith and fair dealing is to act in a commercially reasonable manner. (*California Pines Property Owners Assn. v. Pedotti* (2012) 206 Cal.App.4th 384, 394-396; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)

— While *tortious* breach of the implied covenant is generally restricted to the insurance context, it is possible to establish such a breach *outside* the insurance context if: (i) the breach is accompanied by a common law tort (e.g., fraud, conversion, etc.); (ii) the means used to breach the contract (or its implied covenant) are tortious (e.g., involving deceit or coercion); or (iii) a party intentionally breaches the contract (or implied covenant) with the intent/knowledge that such a breach will cause severe and unmitigable harm to the other party in the form of mental anguish, personal hardship, or substantial consequential damages. (*Erlich v. Menezes* (1999) 21 Cal.4th 779.)

Remedies—

— General contractual remedies are available, including compensatory (money) damages. (Civ. Code, § 3300.)

— Tort damages are generally unavailable for real estate related matters other than leases and wrongful eviction claims that are classified as torts. (*Ginsburg v. Gamson* (2012) 205 Cal.App.4th 873.)

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

Applicable Statute of Limitations—

— Same as breach of contract. Four years for written contract (Code Civ. Proc., § 337), two years for oral contract (Code Civ. Proc., § 339), and six years for negotiable instrument (e.g., promissory note) (Comm. Code, § 3118).

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 the implied covenant*. 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.”

###

"Violation of Open Meeting Act" in checkbox\_potential\_claims or "Violation of Open Meeting Act" in checkbox\_potential\_cross\_claims

## Violation of Open Meeting Act

Elements—Violation of Open Meeting Act.

— Relevant statutes: (i) Civil Code section 4910; (ii) Civil Code section 4930; and (iii) Civil Code section 4950.

• Civil Code section 4910: The board shall not take action on any item of business outside of a board meeting, and meetings cannot be conducted “electronically” unless in an emergency, and even then only if all the directors sign a consent.

• Civil Code section 4930: Except under certain enumerated circumstances (see the statute for details), the board may not discuss or take action on any item at a non-emergency meeting unless the item was placed on the agenda included in the notice that was distributed to the members of the HOA.

• Civil Code section 4950: The minutes, including drafts/proposed minutes, and summaries of minutes at all meetings other than executive sessions, shall be available to members within 30 days of the meeting. Members are entitled to copies of such documents if they reimburse the HOA for the cost of the copies. The annual policy statement must detail the process to obtain these documents.

Remedies—

— The statute itself provides for declaratory and/or injunctive relief. The injunction would most likely set aside the Board’s action. (Civ. Code, § 4955.) A court can impose a $500 penalty on the HOA. (*Ibid*.)

— 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 limitation for violation of the Open Meeting Act is one year. (Civ. Code, § 4955.) A court can issue a penalty of $500 for a violation. (*Ibid*.)

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 *violation(s) of the Open Meeting Act*. 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" in checkbox\_potential\_claims or "Declaratory Relief" in checkbox\_potential\_cross\_claims

## 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.

(yn\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims)

— The “enforcement” issues discussed in the context of the “Breach of CC&Rs” and “Negligence” causes of action above are also applicable to a declaratory relief claim.

###

(yn\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims and "Negligence" not in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims and "Negligence" not in checkbox\_potential\_cross\_claims)

— The “enforcement” issues discussed in the context of the “Breach of CC&Rs” cause of action above is also applicable to a declaratory relief claim.

###

(yn\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims)

— The “enforcement” issue raised in the context of the “Negligence” cause of action above is also applicable in the context of a declaratory relief claim.

###

(yn\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" not in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" not in checkbox\_potential\_cross\_claims)

— Where enforcement is an issue in a declaratory relief cause of action (as it is here), it tends to arise in two ways: (i) an HOA is not enforcing rules at all; or (ii) an HOA is applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn* (1999) 21 Cal.4th 249, 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims and "Nuisance" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims and "Nuisance" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Breach of CC&Rs,” “Negligence,” and “Nuisance” causes of action above is also applicable in the context of a claim for declaratory relief.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims and "Nuisance" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims and "Nuisance" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Negligence” and “Nuisance” causes of action above is also applicable in the context of a claim for declaratory relief.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" not in checkbox\_potential\_claims and "Nuisance" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" not in checkbox\_potential\_cross\_claims and "Nuisance" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Nuisance” cause of action above is also applicable in the context of a claim for declaratory relief.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" not in checkbox\_potential\_claims and "Nuisance" not in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" not in checkbox\_potential\_cross\_claims and "Nuisance" not in checkbox\_potential\_cross\_claims)

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

###

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.

— 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.”

###

"Violation of Election Laws" in checkbox\_potential\_claims or "Violation of Election Laws" in checkbox\_potential\_cross\_claims

## Violation of Election Laws (Civ. Code, § 5100 et seq.)

Elements—Violation of Election Laws.

— Preponderance of evidence is the applicable burden of proof, and thus if the plaintiff shows by a preponderance of the evidence that the election procedures set forth in the Davis-Stirling Act were not followed, a court must void any results of the election unless the association establishes, by a preponderance of the evidence, that the association’s non-compliance with the law didn’t have any affect on the results of the election. (Civ. Code, §5145(a).)

— All HOAs must have operating rules that:

• Permit all candidates access to the member’s. Specifically, an HOA’s rules must specifically address (and permit) that any candidate or member advocating a point of view is provided access to the HOA’s media, newsletters, or internet websites during a campaign provided that the reasons for such access are reasonably related to that election. Such views also include those *not* endorsed by the board. The rules must also state that the HOA may not edit or redact any content from those communications (but may include a statement specifying that the candidate or member, and not the association, is responsible for that content). (Civ. Code, § 5105(a)(1).)

• Provide members access to the common areas, at no cost, to ensure that candidates have equal access to the members. (Civ. Code, § 5105(a)(2).)

• Specify qualifications for candidates. (Civ. Code, § 5105(a)(3).)

• Specify the timing of elections and requirements regarding holding of elections. HOAs are required to hold an election for a seat on the board of directors at the expiration of a director’s term and at least once every four years. (Civ. Code, § 5100(a)(2).)

• Specify who may be a candidate for director. After January 1, 2020, HOAs have a specific list of grounds for disqualification of a candidate. The HOA cannot disqualify a candidate for any reason other than the ones referenced by law. Disqualifications come in two categories: (i) mandatory disqualifications; and (ii) permissive qualifications.

→ Mandatory: *Only* HOA members can be candidates for director (the sole exception relating to developer seats). (Civ. Code, § 5105(b).)

→ Permissive—Criminals: An HOA *may* disqualify a candidate if the association is aware or becomes aware of, a past criminal conviction that would either prevent the association from purchasing the fidelity bond coverage required by Section 5806 should the person be elected or terminate the association’s existing fidelity bond coverage as to that person should the person be elected. (Civ. Code, § 5105(c)(4).)

→ Permissive—Disqualification for Non-Payment of *Assessments*: An HOA *may* have rules that disqualify candidates if that candidate is not current on monthly assessments and special assessments. If, however, a member paid assessments under protest according to Civil Code section 5658, or if the member is under a repayment plan under Civil Code section 5665, then that member cannot be disqualified. (Civ. Code, § 5105(c)(1).) An additional requirement should an HOA adopt this disqualification is that the rule must apply to current directors as candidates. [*Note: There is no permissive disqualification for non-payment of fines. The above permissive disqualification for payment of assessments does not apply to payment of fines. An association may not disqualify a nominee for nonpayment of fines, fines renamed as assessments, collection charges, late charges, or costs levied by a third party. (Civ. Code, § 5105(d).)*]

→ Permissive—Joint Ownership: An HOA *may* have rules stating that if there are joint owners of any individual unit, only one joint interest holder may serve as a director at any given time. (Civ. Code, § 5105(c)(2).)

→ Permissive—Membership Less Than One Year: An HOA *may* have rules that require candidates to have been members of the HOA for more than one year. (Civ. Code, § 5105(c)(3).)

• Specify nomination procedures. An HOA must provide general notice of the deadline and procedure for submitting nominations for director at least 30 days prior to that deadline. Individual notice is required if a member requests individual notice. (Civ. Code, § 5115.)

• Provide proper election notice. At least 30 days prior to ballots being sent to members, the HOA must provide general notice of: (a) the date and time by which, and the physical address where, ballots are to be returned by mail or handed to the inspector or inspectors of elections; (b) the date, time, and location of the meeting at which ballots will be counted; (c) the list of all candidates’ names that will appear on the ballot; and (d) individual notice of the above paragraphs shall be delivered to all members who request individual notice. (Civ. Code, § 5115(b).)

• Provide proper instructions regarding providing ballots to members. At least 30 days before an election, the inspector of election must deliver to each member the ballot or ballots, and a copy of the election operating rules. Alternatively, the inspector may post the election operating rules online with the web address on the ballot. (Civ. Code. § 5105(g).)

• Specify who is permitted vote. An HOA cannot deny a ballot to any member for any reason other than not being a member at the time that ballots are distributed. This means that HOAs cannot revoke or suspend voting privileges as a measure of discipline or as a penalty for a member who is behind on dues. In addition, HOAs can no longer deny a ballot to a person who acts under general power of attorney for a member (and, of course, must count a ballot timely received from a person acting under a general power of attorney for a member). (Civ. Code, § 5105(g).)

• Specify a voting period. Ballots must be sent out to all members at least 30 days prior to the deadline for voting, i.e., members should have 30 days to vote (less any time that the ballots were in the mail). (Civ. Code, § 5115(c).)

• Set forth the rules regarding inspectors of election. HOAs must have an inspector of elections who is responsible for several portions of the election process, including receiving and counting ballots. *The big change for 2020 is that the inspector of elections cannot be the property manager.* The inspector must be an “independent third party,” which includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. An independent third party may be a member, but may not be a director or a candidate for director or be related to a director or to a candidate for director. (Civ. Code, § 5110.)

— Election rules cannot be changed within 90 days of an election. (Civ. Code, § 5105(h).) To be timely, each HOA will have to plan ahead if they are going to change election rules. An HOA must also comply with the required procedure for amending rules (i.e., 28 days of notice to membership for comment unless the rule change is solely to include language required by law).

— Civil Code section 5125 (dealing with inspectors of election) was amended to ensure that the inspectors of election maintained physical custody of sealed ballots, signed voter envelopes, voter lists, and candidate registration lists. That section also addresses recounts and vote tabulations.

— Civil Code section 5200 now requires HOAs to provide “Association Election Materials” in records requests. Association Election Materials include returned ballots, signed voter envelopes, the voter list of names, parcel numbers, and voters to whom ballots were to be sent, proxies, and the candidate registration list. Signed voter envelopes may be inspected, but not copied.

Remedies—

— Under Civil Code section 5145(a), the voiding of the election is mandatory unless the HOA can prove by a preponderance of the evidence that the violation had *no* effect on the results of the election.

— An HOA member who prevails on a challenge to an election in *small claims court* may recover his or her reasonable attorneys’ fees and costs incurred in consulting an attorney in connection with the small claims case. (Civ. Code, § 5145(a).)

— 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 limitation for challenges to elections is one year from the date that the inspector(s) of election notifies the board and membership of the election results, or when the cause of action accrues, whichever is later. (Civ. Code, § 5145(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 *violation of the election laws*. 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.”

###

"Assault" in checkbox\_potential\_claims or "Assault" in checkbox\_potential\_cross\_claims

## Assault

Elements—Assault.

— The elements of a cause of action for assault are: (i) the defendant acted with *intent* to cause harmful or offensive contact, or *threatened* to touch the plaintiff in a harmful or offensive manner; (ii) the plaintiff reasonably believed that he or she was about to be touched in a harmful or offensive manner (or even that the plaintiff reasonably believed that the defendant was about to carry out a threat); (iii) the plaintiff did not consent to the defendant’s conduct; (iv) the plaintiff was harmed by the conduct (e.g., the threatened contact); and (v) that the defendant’s conduct was a substantial factor in causing the plaintiff’s harm.” (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 890.)

Remedies—

— Compensatory (money) damages are available for harm proximately caused by the assault. (Civ. Code, §§ 3281-3288, 3333.)

— Emotional distress damages are also available in assault cases. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 649.)

— If plaintiff can prove, upon clear and convincing evidence, that defendant acted with oppression, fraud, or malice, then punitive damages are also available. (Civ. Code, § 3294.)

Applicable Statute of Limitations—

— The statute of limitations for assault arising out of anything *other than* domestic violence is two years. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) The statute starts running from the time plaintiff anticipated the harm. (*Id*.)

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 *assault*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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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###

"Battery" in checkbox\_potential\_claims or "Battery" in checkbox\_potential\_cross\_claims

## Battery

(radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner" and "Assault" not in checkbox\_potential\_claims) or (yn\_cross\_claims == "Yes" and "Assault" not in checkbox\_potential\_cross\_claims)

Elements—Battery.

— The elements of a cause of action for battery are: (i) the defendant actually made contact with the plaintiff, or caused the plaintiff to be touched with the intent to harm or offend him or her; (ii) the plaintiff did not consent to the touching/contact; (iii) the plaintiff was harmed by the defendant’s conduct; and (iv) that the defendant’s conduct was a substantial factor in causing the plaintiff’s harm.” (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 890.)

Remedies—

— Compensatory (money) damages are available for harm proximately caused by the battery. (Civ. Code, §§ 3281-3288, 3333.)

— Damages for emotional distress are also available for battery. (Civ. Code, § 3333.)

— If plaintiff can prove, upon clear and convincing evidence, that defendant acted with oppression, fraud, or malice, then punitive damages are also available. (Civ. Code, § 3294.)

— There are further remedies available if the battery occurred as part of any of the following torts: (i) civil harassment (Code Civ. Proc., § 527.6); (ii) workplace violence (Code Civ. Proc., § 527.8); or (iii) elder abuse (Welf. & Inst. Code, § 15657).

Applicable Statute of Limitations—

— The statute of limitations for battery arising out of anything *other than* domestic violence is two years. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) The statute starts running from the time the unwanted contact/touching occurred. (*Id*.)

###

"Assault" in checkbox\_potential\_claims or "Assault" in checkbox\_potential\_cross\_claims

Elements—Battery.

— The elements of a cause of action for battery are identical to those of *assault*, except that instead of there being an *intent* to “touch” or make unwanted contact, the “touching” or unwanted contact actually occurred. (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 890.)

Remedies—

— As in the case with the elements to assault, the *remedies* for battery are also identical to those of assault.

— Unlike assault, however, there are further remedies available if the battery occurred as part of any of the following torts: (i) civil harassment (Code Civ. Proc., § 527.6); (ii) workplace violence (Code Civ. Proc., § 527.8); or (iii) elder abuse (Welf. & Inst. Code, § 15657).

Applicable Statute of Limitations—

— The statute of limitations for battery is identical to that of assault (except that the time starts running from the time the “touching” or unwanted contact 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 *battery*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"Defamation" in checkbox\_potential\_claims or "Defamation" in checkbox\_potential\_cross\_claims

## Defamation

Elements—Defamation.

— To prove a claim for defamation, a plaintiff must prove that there was a “publication” that was false, defamatory, unprivileged, and that the publication had a natural tendency to injure or cause special damage. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.)

— There are two broad categories of defamation—slander (oral) and libel (written), both of which can themselves be divided into two categories—*per quod* and *per se*.

• For slander *per quod*, defamation is “[a] false and unprivileged oral communication attributing to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person. . . .” (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242, as modified.) A statement is slanderous *per se*—i.e., no special damages need to be proven—if the statement falls within one of the first four categories contained in Civil Code section 46 (e.g., statements: (i) that plaintiff was indicted or committed a crime; (ii) that plaintiff was infectious, contagious, or had a “loathsome” disease; (iii) directly tended to injure plaintiff regarding his trade/profession, or that impute that plaintiff is disqualified for that, or any other profession, where such imputation has a tendency to decrease plaintiff’s profits; and (iv) about plaintiff’s impotence or lack of chastity—i.e., calling someone a whore/slut.

• For libel *per quod*, where the defamatory language is *not* libelous on its face, it is not actionable unless the plaintiff alleges and proves that he or she has suffered *special damag*e as a proximate results of the “publication” of the false statement. (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 382.) On the other hand, a libelous statement that is obviously defamatory without the necessity of any explanatory matter (e.g., an inducement, inuendo, or other extrinsic fact), is considered libel on its face, and is known as libel *per se*. (*Ibid.*)

— Under the “single publication rule,” even though an individual false statement may be reprinted or republished multiple times (e.g., such as in multiple copies of magazines or newspapers), for purposes of alleging a cause of action for defamation, there is only *one* claim. (*Shively v. Bozanich*, *supra*, 31 Cal.4th at 1246-1249.) Repetition of the statement by a new party, however, gives rise to a new cause of action against the original defamer if the repetition was reasonably foreseeable. (*Id.* at 1243.) The single publication rule also applies to statements published on a website. (*Traditional Cat Assn. v. Gilbreath* (2004) 118 Cal.App.4th 392, 404.)

Remedies—

— Just as there are different elements to prove depending upon whether the defamation was *per quod* or *per se*, the same holds true regarding the available remedies.

• For defamation (libel and slander) *per quod*, a plaintiff can recover “special damages” resulting from the defamation. (Civ. Code §§45(a), 46(5).) “Special damages” are defined by statute as damages that a plaintiff can prove in connection with property, business, trade, profession, or occupation. (Civ. Code, § 48a(d)(2).)

• For defamation (libel and slander) *per se*, plaintiffs can recover presumed damages (for loss of reputation, shame, mortification, and hurt feelings) *without proof of actual harm*. (Civ. Code, § 48a(d)(1).) Plaintiffs may additionally recover actual proven damages. (*Weller v. American Broadcasting Companies Inc.* (1991) 232 Cal.App.3d 1991.)

— Note that public officials and public figures must prove actual malice to recover any damages. (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 703.)

— Punitive damages are available when oppression, fraud, or malice is proven by clear and convincing evidence. (Civ. Code, § 3294.) Punitive damages may also be awarded in combination with presumed damages or special damages. (*Barnes-Hind Inc. v. Superior Court, supra,* 181 Cal.App.3d at 382; Civ. Code, § 3294.)

— Injunctive relief is available only to prevent repetition of statements already determined to be defamatory. (*Balboa Island Village Inn Inc. v. Lemen* (2007) 40 Cal.4th 1141.) Injunctive relief to prohibit future statements would likely be unavailable as a prior restraint on speech. (*Id.* at 1162.)

Applicable Statute of Limitations—

— The statute of limitations for defamation is one year. (Civ. Code, § 340(c).) The accrual date of the claim is the date the statement was published or distributed to the public. (*Shively v. Bozanich, supra,* 31 Cal.4th at 1247.) [*Note: keep in mind that the “delayed discovery rule,” however, does not typically apply to defamation claims involving books, magazines, or newspapers.*] (*Id.* at 1246-1249.)

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 *defamation*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"Interference with Contract" in checkbox\_potential\_claims or "Interference with Contract" in checkbox\_potential\_cross\_claims

## Interference with Contract

Elements— Interference with Contract.

— The elements for a cause of action for *intentional* interference with contractual relations (aka interference with contract) are: (i) the existence of a valid contract between plaintiff and a third party; (ii) defendant’s knowledge of that contract; (iii) defendant’s *intentional* acts intended to induce the third party to breach (or acts intended to disrupt) the contract; (iv) the breach or disruption of the contract/contractual relationship; and (v) resulting damages. (*Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 55.)

— There are, however, no elements for a cause of action for negligent interference with contractual relations (aka interference with contract) because the California Supreme Court has rejected the existence of that cause of action. (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 9-10; *Fifield Manor v. Finston* (1960) 54 Cal.2d 632.)[[1]](#footnote-1)

Remedies—

— Because intentional interference with contract is a tort, tort damages apply. Compensatory (money) damages are available, including lost profits, expenses, and future profits that are reasonably certain. (Civ. Code, §3333; *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280.)

— Emotional distress damages are available only in cases where: (i) the defendant’s conduct was “extreme and outrageous”; and (ii) it was objectively reasonable that such conduct would cause serious emotional distress. (*Di Loreto v. Schumake* (1995) 38 Cal.4th 35, 38-39.)

— Punitive damages are available upon a showing of oppression, fraud, or malice by clear and convincing evidence. (Civ. Code, §3294; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120.)

Applicable Statute of Limitations—

— The statute of limitations for an intentional interference with contract cause of action is two years. (Code Civ. Proc., § 339(1); *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168.)

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 *interference with contract*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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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###

"Civil Stalking" in checkbox\_potential\_claims or "Civil Stalking" in checkbox\_potential\_cross\_claims

## Civil Stalking

Elements—Civil Stalking.

— To prove a cause of action for civil stalking, a plaintiff must prove that: (i) the defendant either engaged in a pattern of conduct with the intent to follow, alarm, or harass the plaintiff, or the defendant violated a restraining order issued subject to Code of Civ. Proc., § 527.6; and (ii) as a result of defendant’s conduct, the plaintiff either reasonably feared for his or her safety (or the safety of an immediate family member and/or any person who regularly resides in the plaintiff’s household within the preceding six months), or the plaintiff reasonably suffered “substantial emotional distress.” (Civ. Code, §1708.7; *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1510.)

"IIED" in checkbox\_potential\_claims or "IIED" in checkbox\_potential\_cross\_claims

• The law makes it clear that “substantial emotional distress” does not mean the same thing as “severe or extreme” emotional distress necessary for the IIED claim discussed above because under the civil stalking statute, demonstrating “severe emotional distress” does not require a showing of physical manifestations of emotional distress. Instead, “it requires the evaluation of the totality of the circumstances to determine whether the defendant reasonably caused the plaintiff substantial fear, anxiety, or emotional torment.” (Civ. Code, § 1708.7(b)(7).)

###

"IIED" not in checkbox\_potential\_claims or "IIED" not in checkbox\_potential\_cross\_claims

• The law makes it clear that “substantial emotional distress” does not mean the same thing as it does in, for example, an intentional infliction of emotional distress claim, because under the civil stalking statute, demonstrating “severe emotional distress” does not require a showing of physical manifestations of emotional distress. Instead, “it requires the evaluation of the totality of the circumstances to determine whether the defendant reasonably caused the plaintiff substantial fear, anxiety, or emotional torment.” (Civ. Code, § 1708.7(b)(7).)

###

Remedies—

— Economic damages (e.g., general and special damages) are available. (Civ. Code, § 1708.7(c).)

— Punitive damages are also available upon a clear and convincing showing of oppression, fraud, or malice. (Civ. Code, § 3294; Civ. Code, § 1708.7(c).)

— Equitable relief (including injunctive relief) may also be available. (Civ. Code, § 1708.7(d).)

Applicable Statute of Limitations—

— Although there is no case law on the subject, it appears that the three-year statute of limitations for obligations created by statute applies to civil stalking cases. (Code Civ. Proc., § 338(a).)

• The date the statute begins to run may be complicated issue since, by definition, stalking includes a pattern of conduct. (See Civ. Code, § 1708.7(a)(1).) There is no case authority on point, but secondary sources suggest that the “continuing violation” doctrine applies. Under the continuing violation doctrine, a series of acts that continue over time are viewed as a single continuous act. (See *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444.) The trigger date for the statute of limitations under the “continuing violation” doctrine is the date that the continuing acts cease or the date of the last injury to the plaintiff. (*Id.* at 1452.)

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 *civil stalking*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"Violation of Statute (Dog Bite)" in checkbox\_potential\_claims or "Violation of Statute (Dog Bite)" in checkbox\_potential\_cross\_claims

## Violation of Statute (Dog Bite)

Elements—Violation of Statute (Dog Bite).

— A dog owner is strictly liable for damages suffered by a plaintiff bitten by the owner’s dog regardless of whether the bite occurred in a public place or private place (assuming, of course, that if the bite occurred in a private place, the plaintiff had a lawful reason for being there). The owner is liable regardless of the dog’s former viciousness or the owner’s knowledge of such viciousness. (Civ. Code, § 3342(a); *Priebe v. Nelson* (2006) 39 Cal.App.4th 1112, 1120; *Davis v. Gaschler* (1992) 11 Cal.App.4th 1392, 1399.)

Remedies—

— Compensatory (money) damages are available for all harm proximately caused by the bite. (Civ. Code, §§ 3281-3288, 3333, 3342.)

Applicable Statute of Limitations—

— Two years from the date of injury. (Code of 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 *violation of statute (dog bite)*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"False Imprisonment" in checkbox\_potential\_claims or "False Imprisonment" in checkbox\_potential\_cross\_claims

## False Imprisonment

Elements—False Imprisonment.

— The elements of a tortious claim of false imprisonment are: (i) the non-consensual, intentional confinement of a person; (ii) without a lawful privilege (e.g., police); and (iii) that goes on for an “appreciable period of time, however brief.” (*Easton v. Sutter Coast Hosp.* (2000) 80 Cal.App.4th 485, 496.)

Remedies—

— Compensatory (money) damages are available and may include any or all of the following: (i) loss of time; (ii) business interruption; (iii) damage to reputation; (iv) emotional distress, including physical discomfort, illness, or injury; and (v) expenses to secure release from confinement. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 650; *Scofield v. Critical Air Medicine Inc.* (1996) 45 Cal.App.4th 990.)

— Punitive damages are available if oppression, fraud, or malice are proven by clear and convincing evidence. (Civ. Code, § 3294; *Scofield v. Critical Air Medicine Inc.*, supra, 45 Cal.App.4th at 1009.)

Applicable Statute of Limitations—

— The statute of limitations is one year. (Civ. Code, § 340(c).) The statute begins to run upon the party’s release from confinement. (*Scannell v. County of Riverside* (1984) 152 Cal.App.3d 596, 606.)

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 *false imprisonment*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"Invasion of Privacy" in checkbox\_potential\_claims or "Invasion of Privacy" in checkbox\_potential\_cross\_claims

## Invasion of Privacy

Elements—Invasion of Privacy.

— There are four distinct types of activities that violate a plaintiff’s “right to privacy” and give rise to tort liability: (a) intrusion into private matters; (b) public disclosure of private facts; (c) publicity placing a person in a false light; and (d) misappropriation of a person’s name or likeness. (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129.)

• To prevail on a cause of action for invasion of privacy (i.e., *intrusion into private matters*), a plaintiff needs to prove that: (i) he or she had a legally protected privacy interest; (ii) he or she had a reasonable expectation of privacy in the place, conversation, or matter intruded upon; (iii) the defendant’s intrusion was intentional; (iv) the intrusion would be highly offensive to a reasonable person; (v) causation; and (vi) damages. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286; *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 926; also see *Nelson v. Tucker Ellis, LLP* (2020) 2020 WL 2123913, 7-8 citing *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 338.)

• To prove a claim for *public disclosure of private facts*, plaintiff must establish that: (i) defendant widely published; (ii) a private fact; (iii) that would be highly offensive to a reasonable person; (iv) the publication of which did not legitimately concern the public; (v) causation; and (vi) damages. (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 868.)

yn\_invasion == "Yes" or yn\_cc\_invasion == "Yes"

→ In the context of HOA disputes, the facts underlying this cause of action often involve this type of invasion of privacy claim (i.e., public disclosure of private facts). Such claims typically arise from one or more board members disclosing private facts about a homeowner to the members at large (e.g., a homeowner’s delinquency in paying dues, or some other private matter), often to retaliate against that homeowner for making “trouble.”

###

• To prove a claim for *false light publicity*, plaintiff must establish that: (i) defendant publicly communicated; (ii) a false matter about plaintiff; (iii) that would be highly offensive to a reasonable person; (iv) causation; and (v) damages. (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865.)

→ Courts have interpreted the “publicly” requirement to mean that the defendant communicated to a large number of people. (*Catsouras v. Department of California Highway Patrol, supra,* 181 Cal.App.4th at 904.)

→ Although there appears to be a split amongst the courts as to whether *private figures* need to prove actual malice to establish a false light-related invasion of privacy claim (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 239), that is certainly the case when it comes to a public figure, who must prove that he or she was exposed to hatred, contempt, ridicule, or obloquy. (*Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 678.)

→ Where the plaintiff is a public figure, he or she must also prove that the publication was made with *malice* (i.e., knowledge of its falsity or with a reckless disregard for the truth). (*Tilkey v. Allstate Insurance Company* (2020) 47 Cal.App.5th 1072.)

Remedies—

— Plaintiff may recover all damages proximately caused by the intrusion. (Civ. Code, §§ 3281, 3282, 3333.)

— Plaintiff may recover for emotional distress. (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1484-85.)

— Plaintiff may seek punitive damages if the intrusion was oppressive, fraudulent, or malicious. (Civ. Code, § 3294.)

— Injunctive relief is available. (See *Richardson-Tunnell v. School Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1066 (disapproved on other grounds by *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 815, fn. 8)].)

— Plaintiff need not first make a retraction demand. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35.)

Applicable Statute of Limitations—

— Two years (invading someone’s privacy is a personal, rather than property, matter). (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 *invasion of privacy*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"Express Indemnity" in checkbox\_potential\_claims or "Express Indemnity" in checkbox\_potential\_cross\_claims

## Express Indemnity

Elements—Express Indemnity.

— To prevail on a claim for express indemnity, the indemnitee (the person who is entitled to indemnity protection and is thus bringing the claim for express indemnity) must prove: (i) the existence of a contract (oral or written) containing an indemnification provision; (ii) that he or she performed under the contract; (iii) that the indemnitor (the person who promised to indemnify the indemnitee) breached the contract (e.g., by refusing to provide indemnity protection to the indemnitee); and (iv) damages. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 699-700; Civ. Code, § 2772.)

Remedies—

— Compensatory (money) damages are available for all expected harm caused by the breach. (Civ. Code, § 3300.) For an express indemnity claim, this will most often take the form of the fees and costs incurred in defending against the third party’s underlying lawsuit, as well as any judgment levied against the indemnitee.

Applicable Statute of Limitations—

— If the indemnity provision is contained in a document, a claim for express indemnity must be brought within four years. (*Valley Crest Landscape Dev., Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 481; Code Civ. Proc., § 337(a).) If the indemnity provision is not contained in a document (i.e., if it was an oral promise to indemnify), a claim for express indemnity must be brought within two years. (Code Civ. Proc., § 339(1).)

• A claim for express indemnity does not accrue until the indemnitee actually either pays the third party, or incurs expenses for his or her defense that should’ve been covered by the indemnitor. When the underlying third party’s injury occurred is irrelevant. (*Valley Crest Landscape Dev., Inc., supra,* 238 Cal.App.4th at 481.)

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 *express indemnity*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"Equitable Indemnity" in checkbox\_potential\_claims or "Equitable Indemnity" in checkbox\_potential\_cross\_claims

## Equitable Indemnity

Elements—Equitable Indemnity.

— To prevail on a claim for equitable indemnity, the indemnitee (the person who is entitled to indemnity protection and is thus bringing the claim for express indemnity) must prove that the: (i) indemnitee is liable to a third party; (ii) indemnitor’s conduct was negligent or tortious; and (ii) indemnitor was equitably responsible for the third party’s liability (rather than the indemnitee being liable). (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217.)

— Equitable indemnity is similar to comparative fault in that liability to third party is apportioned between the indemnitee and the indemnitor. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 700.)

• Equitable indemnity typically arises when one party (the indemnitee) is ordered to pay a judgment to a third party (a plaintiff from a prior case), and the indemnitee’s liability stems from the indemnitor’s conduct. For example, Tim was driving his car when Brad negligently ran into the street. Tim swerved to avoid Brad but hit Jessica’s car. Jessica sued Tim. Tim now brings a claim for equitable indemnity against Brad. Tim could cross-claim against Brad during the pendency of the lawsuit with Jessica, or Tim could wait to see if Jessica obtained a judgment against him, and then pursue Brad.

Remedies—

— Proving a claim for equitable indemnity entitles the indemnitee to restitution from the indemnitor for the amount of fault attributable to the indemnitor. (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 989.)

Applicable Statute of Limitations—

— A claim for equitable indemnity must be brought within two years. (*Am. States Ins. Co. v. Nat'l Fire Ins. Co. of Hartford* (2011) 202 Cal.App.4th 692, 699; Code Civ. Proc., § 339(1).)

• A claim for equitable indemnity does not accrue until the indemnitee actually either pays the third party, or incurs expenses for his or her defense that should’ve been covered by the indemnitor. When the underlying third party’s injury occurred is irrelevant. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 378, fn. 12.)

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 *equitable indemnity*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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.”

###

"Failure to Permit Inspection of Records" in checkbox\_potential\_claims or "Failure to Permit Inspection of Records" in checkbox\_potential\_cross\_claims

## Failure to Permit Inspection of Records

Elements—Failure to Permit Inspection of Records.

— To prevail on a claim for failing to allow the plaintiff to inspect the HOA’s records, the plaintiff must prove that: (i) he or she is a member of the association; (ii) he or she made a written request to the HOA that it make its records available for inspection; (iii) he or she had a proper purpose for requesting to inspect the records related to his or her interests as an HOA member; and (iv) the HOA either (a) refused to allow the inspection, (b) ignored the plaintiff’s request, or (c) did not make all permitted and requested records available. (Civ. Code, § 5200 et seq.)

Remedies—

— If the plaintiff can prove that the HOA failed to allow him or her to inspect the records, the plaintiff can obtain injunctive relief ordering the HOA to allow the inspection. Additionally, if the HOA’s refusal is deemed to have been unreasonable, the plaintiff may be entitled to a civil penalty of up to $500 for each separate request that was denied, as well as all of his or her attorneys’ fees and costs. (Civ. Code, § 5235(a).)

— Given the potentially low value of this claim, it likely needs to be brought in small claims court if it is the plaintiff’s only cause of action. (Civ. Code, § 5235(b).)

— An HOA may recover its fees and costs if the court determines that the claim was frivolous, unreasonable, or without foundation. (Civ. Code, § 5235(c).)

Applicable Statute of Limitations—

— A claim for failing to allow the records to be inspected must be brought within three years. (Code Civ. Proc., § 338(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 *failure to permit inspection of records*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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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###

yn\_other\_claims == "Yes"

## {{ text\_add\_coa }}

Elements—{{ text\_add\_coa }}.

— Provide the elements AND statutory/case law of this cause of action.

— If you want, add snippets from other cases (see the examples above for ideas). Make sure to maintain the proper formatting and margins established in this document.

— If you have more than one cause of action to add, then cut and paste this one FIRST (before replacing the green highlights) as many times as there are causes of action to add. That way, you’ll be sure to keep everything consistent and standardized.

Remedies—

— What are the available remedies.

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

Applicable Statute of Limitations—

— What is the statute of limitations for this claim?

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 *{{ text\_add\_coa*|lower *}}*. 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.

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— 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.”

###

yn\_other\_cross\_claims == "Yes"

## {{ text\_add\_cc\_coa }}

Elements—{{ text\_add\_cc\_coa }}.

— Provide the elements AND statutory/case law of this cause of action.

— If you want, add snippets from other cases (see the examples above for ideas). Make sure to maintain the proper formatting and margins established in this document.

— If you have more than one cause of action to add, then cut and paste this one FIRST (before replacing the green highlights) as many times as there are causes of action to add. That way, you’ll be sure to keep everything consistent and standardized.

Remedies—

— What are the available remedies.

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

Applicable Statute of Limitations—

— What is the statute of limitations for this claim?

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 *{{ text\_add\_cc\_coa*|lower *}}*. 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.

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radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "Yes"

# Potential Affirmative Defenses

###

Based upon the allegations made against Client thus far, and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the affirmative defenses discussed below appear to be applicable.

"BJR (Lamden)" in checkbox\_aff\_def\_cc or "BJR (Lamden)" in checkbox\_aff\_def

## BJR (Lamden)

Affirmative Defense—Business Judgment Rule.

— The business judgment rule (“BJR”) is a court-made doctrine of judicial deference granted to boards of directors. In general terms, under the BJR, courts presume that directors have based their decisions on sound business judgment, and therefore interference by the court with a board’s decisions is something to be avoided. The BJR applies as long as the director’s decision was made in good faith and in the absence of a conflict of interest. (Corp. Code, §§ 309, 7231; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1045.)

— The BJR was formally applied to boards in HOA cases by a famous case called *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249.[[2]](#footnote-2)

— This presumption granted under the BJR, however, can be overcome—i.e., directors won’t be shielded from personal liability—if the directors’ business decisions were made without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Berg & Berg Enterprises, LLC v. Boyle*, *supra*, 178 Cal.App.4th at 1045.) In other words, to defeat the *Lamden* rule of judicial deference, a plaintiff will need to show that the board either acted in bad faith, failed to investigate, acted with self-interest, or acted outside the scope of its authority. In fact, notwithstanding the expansion of the BJR under *Lamden* referenced in the footnote below, other courts in California have limited *Lamden* in a variety of ways.

• In *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, the court recognized *Lamden’s* narrow scope and noted that while it was certainly a rule of deference in favor of HOA boards, it did NOT create “blanket immunity” for all board decisions. (*Id*., at 940.)

• In *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, the court described Lamden’s BJR as being in the nature of an affirmative defense (and held that a defense of good faith is necessarily factual in nature). Thus, under *Lamden*, that court reasoned that “judicial deference [was] owed only when it ha[d] been shown the Association acted after reasonable investigation, in good faith and with regard for the best interests of the community association and its members.” (*Id*., at 1122-1123.)

• The BJR under *Lamden* does *not* extend to legal questions that may involve the interpretation of an HOA’s CC&Rs—i.e., courts, not HOAs, decide *legal* questions. An association’s Board is afforded deference in determining how to make necessary repairs to common areas, it cannot substitute its discretion for that of a court deciding whether the association has an obligation to make repairs to common areas based upon statutory and contractual language. (*Dover Village Assn. v. Jennison* (2010) 191 Cal.App.4th 123.) *In other words, a board is offered protection under the BJR when it makes a choice, not when it ignores problems.*

yn\_cc\_architect == "Yes"

• When it comes to cases involving disputes related to an HOA’s architectural review powers, deference is given to the restriction itself, but subjective application cannot be arbitrary and must be exercised in good faith. Restrictions on the use of property contained in a recorded set of CCD&Rs are presumed to be reasonable and will be enforced uniformly against all residents of the HOA unless the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction’s benefits to the development’s residents, or violates a fundamental public policy. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In that case, the court held that the reasonableness of a restriction needed to be evaluated in light of the restriction’s effect on the HOA *as a whole* (and not, say, from the perspective of an individual HOA member). (*Id*., at 386.) The court in the above-referenced *Dolan* case said something similar, holding that courts were not supposed to conduct a case-by-case analysis of the restrictions to analyze the effect on any individual HOA member, but instead needed to view reasonableness by reviewing the goals of the entire HOA. (*Dolan-King v. Rancho Santa Fe Association*, *supra*, 81 Cal.App.4th at 975.)

###

###

"SOL" in checkbox\_aff\_def\_cc or "SOL" in checkbox\_aff\_def

## Statute of Limitations

The applicability of a statute of limitations defense depends upon the nature of the claims alleged. Based upon the claims aimed at Client, the following seem relevant:

"enforce a restriction" in checkbox\_sol\_specifics

— The statute of limitations to **enforce a restriction**, which includes CC&Rs, is five years. (Code Civ. Proc., § 336(b).) Consequently, an action for a violation of a restriction must be commenced within five years after the party enforcing the restriction discovers, or through the exercise of reasonable diligence, should have discovered, the violation. [*As used here, a “restriction” means a limitation on, or a provision affecting the use of, real property in a deed, Declaration, or other instrument in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.*] (Civ. Code, § 784.)

###

"breach of contract (written or oral)" in checkbox\_sol\_specifics

— For **breach of verbal contracts**, the statute of limitations is two years (Code Civ. Proc., § 339); for breach of most **written contracts**, the statute of limitations is four years (Code Civ. Proc., § 337); and for breach of **negotiable instruments** (e.g., promissory notes), the statute of limitations is six years (Comm. Code, § 3118).

— Same **breach of the implied covenant of good faith and fair dealing** is the same as breach of contract.

###

"breach of unrecorded governing documents" in checkbox\_sol\_specifics

— **Breach of unrecorded governing documents** (e.g., architectural guidelines, rules, etc.) fall within the same five year statute of limitations that breach of the CC&Rs does. (*Pacific Hills Homeowners Ass’n v. Prun* (2008) 160 Cal. App. 4th 1557, 1563.)

###

"personal injury/injury to property" in checkbox\_sol\_specifics

— Two years for **personal injuries** (Code Civ. Proc., § 335.1); three years for claims related to **injury to property** (Code Civ. Proc., § 335.1).

###

"breach of fiduciary duty" in checkbox\_sol\_specifics

— 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.)

###

"nuisance" in checkbox\_sol\_specifics

— For *property damage* resulting from a **nuisance**, three years. (Code Civ. Proc., § 338(b); *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 743-745.) For *personal injuries* resulting from a nuisance, two years. (Code Civ. Proc., § 335.1.)

• 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.

###

"trespass" in checkbox\_sol\_specifics

— The limitations period for a **trespass** action is generally three years. (Code Civ. Proc., § 338(b).)

• For *permanent trespass*, a claim accrues when the trespass occurs. Plaintiff must bring a single action for past, present, and future damages within three years (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592.)

• For *continuing trespass*, a new cause of action accrues each day the trespass continues, and a plaintiff must bring periodic successive actions if the trespass continues without abatement. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 869.)

###

"intentional interference with prospective business advantage" in checkbox\_sol\_specifics

— For **intentional interference with prospective business advantage** (tort) the statute of limitations is two years. (Code Civ. Proc., § 339(1).)

• The claim begins accruing when the interference starts.

###

"interference with contractual relations" in checkbox\_sol\_specifics

— For **interference with contractual relations,** two years. (*Knoell v. Petrovich* (1999) 76 Cal.App.4th 164; *Tu–Vu Drive–In Corp. v. Davies* (1967) 66 Cal.2d 435, 437.)

###

"fraud/intentional misrepresentation" in checkbox\_sol\_specifics

— For **fraud** and **intentional misrepresentation**, three years. (Code Civ. Proc., § 338(d).)

###

"negligent misrepresentation" in checkbox\_sol\_specifics

— For **negligent misrepresentation**, three years. (Code Civ. Proc., § 338(d).)

###

"IIED" in checkbox\_sol\_specifics

— For **IIED**, two years. (Code Civ. Proc., § 335.1.)

###

"violation of the Open Meeting Act" in checkbox\_sol\_specifics

— For **violation of the Open Meeting Act**, one year. (Civ. Code, § 4955.)

###

"declaratory relief" in checkbox\_sol\_specifics

— 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.)

###

"violation of election laws" in checkbox\_sol\_specifics

— For **violation of election laws** under the Davis-Stirling Act, one year from the date that the inspector(s) of election notifies the board and membership of the election results, or when the cause of action accrues, whichever is later. (Civ. Code, § 5145(a).)

###

"assault/battery" in checkbox\_sol\_specifics

— For **assault** arising out of anything *other than* domestic violence, two years. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.)

• The statute starts running from the time plaintiff anticipated the harm. (*Pugliese v. Superior Court, supra,* 146 Cal.App.4th at 1450.)

— For **battery**, the same as for **assault** (except that the time starts running from the time the “touching” or unwanted contact occurred).

###

"defamation" in checkbox\_sol\_specifics

— For **defamation**, one year. (Civ. Code, § 340(c).)

• The accrual date of the claim is the date the statement was published or distributed to the public. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246-1249.)

###

"civil stalking" in checkbox\_sol\_specifics

— For **civil stalking**, the statute of limitations appears to be three years (i.e., the three-year statute of limitations for obligations created by statute applies to civil stalking cases found in Code Civ. Proc., § 338(a)).

###

"violation of statute related to dog bites" in checkbox\_sol\_specifics

— For **violation of statute related to dog bites**, two years from the date of injury. (Code of Civ. Proc., § 335.1.)

###

"false imprisonment" in checkbox\_sol\_specifics

— For **false imprisonment**, one year. (Civ. Code, § 340(c).)

• The statute begins to run upon the party’s release from confinement. (*Scannell v. County of Riverside* (1984) 152 Cal.App.3d 596, 606.)

###

"invasion of privacy" in checkbox\_sol\_specifics

— For **invasion of privacy**, two years (invading someone’s privacy is a personal, rather than property, matter). (Code Civ. Proc., § 335.1.)

###

###

"Equitable Estoppel" in checkbox\_aff\_def\_cc or "Equitable Estoppel" in checkbox\_aff\_def

## Equitable Estoppel

— If a party acts or makes statements to intentionally or deliberately lead someone else to believe that a particular thing is true, and the second party acts upon that belief, the first party cannot contradict his or her prior statement or conduct. (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 782.)

###

"Unclean Hands" in checkbox\_aff\_def\_cc or "Unclean Hands" in checkbox\_aff\_def

## Unclean Hands

— If the plaintiff’s bad conduct or bad faith causes/is related to his or her own underlying harm, then that plaintiff is barred from obtaining equitable relief—i.e., a plaintiff cannot take advantage of his or her own wrong. (Civ. Code, § 3517; *Lynn v. Duckel* (1956) 46 Cal.2d 845, 850.)

###

"Laches" in checkbox\_aff\_def\_cc or "Laches" in checkbox\_aff\_def

## Laches

— A plaintiff’s claim is barred under the doctrine of laches if: (i) the plaintiff delayed in bringing his or her claim; (ii) the delay was unreasonable or inexcusable; and (iii) the defendant is prejudiced because of the delay. (*In re Marriage of Parker* (2017) 14 Cal.App.5th 681, 688.)

###

"Negligence (Comp. Fault)" in checkbox\_aff\_def\_cc or "Negligence (Comp. Fault)" in checkbox\_aff\_def

## Negligence (Comparative Fault)

— The plaintiff’s own negligence may be used to proportionally reduce the defendant’s fault—i.e., liability is directly proportional to the negligence of each party. (*Burch v. CertainTeed Corp.* (2019) 34 Cal.App.5th 341, 357-58.)

###

"Apportionment" in checkbox\_aff\_def\_cc or "Apportionment" in checkbox\_aff\_def

## Apportionment

— In comparative fault actions for personal injury, property damage, or wrongful death, each defendant’s liability for non-economic damages are several only, not joint. (Civ. Code, § 1431.2.)

###

"Negligence (Sudden Emergency)" in checkbox\_aff\_def\_cc or "Negligence (Sudden Emergency)" in checkbox\_aff\_def

## Negligence (Sudden Emergency)

— The defendant will not be liable for his or her negligence if (i) there was a sudden and unexpected emergency, (ii) that the defendant didn’t cause, (iii) and where the defendant acted reasonably under the circumstances. (*Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 400-401.)

• This doctrine is *not* the same as the Good Samaritan law, which has a much higher bar than reasonableness before liability attaches—i.e., *gross* negligence or wanton misconduct is required rather than mere reasonableness. (Health & Saf. Code, § 1799.102.)

###

"Assumption of Risk" in checkbox\_aff\_def\_cc or "Assumption of Risk" in checkbox\_aff\_def

## Assumption of Risk

— Prior to the harm occurring, the plaintiff expressly agreed to not hold the defendant liable for any harm that might occur, including harm resulting from the defendant’s negligence. (*Sweat v. Big Time Auto Racing, Inc.* (2004) 117 Cal.App.4th 1301, 1304.) This type of “assumption of risk” is *contractual* in nature.

• The doctrine of assumption of risk in the context of a *negligence* claim has been subsumed under the doctrine of comparative fault. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 826.)

###

"Contract (Force Majeure)" in checkbox\_aff\_def\_cc or "Contract (Force Majeure)" in checkbox\_aff\_def

## Contract (Force Majeure)

— A defendant’s breach of a contract may be excused if the contract contains a force majeure clause and the defendant’s breach was caused by unforeseeable circumstances covered by the clause (e.g., acts of God, war, terrorism, pandemic, etc.)

###

"Contract (Duress)" in checkbox\_aff\_def\_cc or "Contract (Duress)" in checkbox\_aff\_def

## Contract (Duress)

— The affirmative defense of duress comes into play when one party secures another party’s consent through unlawful conduct. (Civ. Code § 1569.) There are three types of statutory duress:

• Unlawful confinement of a person or a family member. (Civ. Code, § 1569(a).)

• Unlawful detention of a person’s property. (Civ. Code, § 1569(b).)

• Fraudulent confinement of a person—i.e., confinement that was otherwise lawful in form but either fraudulently obtained or fraudulently made unjustly harassing or oppressive. (Civ. Code § 1569(c).)

— Duress may also be *economic*. This occurs when a wrongful act is committed that is coercive enough to cause an otherwise reasonable person to submit to the bad actor’s pressure. (*Philippine Exp. & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077, reh’g denied and opinion modified (1990).)

###

"Contract (Fraud)" in checkbox\_aff\_def\_cc or "Contract (Fraud)" in checkbox\_aff\_def

## Contract (Fraud)

— Consent obtained through actual or constructive fraud renders the contract voidable by the defendant. (Civ. Code, §§ 1566, 1567.)

###

"Contract (Frustration of Purp.)" in checkbox\_aff\_def\_cc or "Contract (Frustration of Purp.)" in checkbox\_aff\_def

## Contract (Frustration of Purpose)

— If the purpose for entering into a contract is frustrated by an unanticipated cause, such that the value of performing is substantially diminished (e.g., performance would require excessive and unreasonable expense), performance is excused. (*Habitat Trust for Wildlife, Inc. v. Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1336; Civ. Code, § 1932.)

###

"Contract (Lack of Consideration)" in checkbox\_aff\_def\_cc or "Contract (Lack of Consideration)" in checkbox\_aff\_def

## Contract (Lack of Consideration)

— A contract without consideration is not a contract. (*Asmus v. Pac. Bell* (2000) 23 Cal.4th 1, 36; Civ. Code, § 1615.)

###

"Contract (Failure of Consideration)" in checkbox\_aff\_def\_cc or "Contract (Failure of Consideration)" in checkbox\_aff\_def

## Contract (Failure of Consideration)

— The contract fails if a party fails to execute an exchanged-for promise. (Civ. Code, § 1689(b)(2); *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 230.)

###

"Contract (Illegality)" in checkbox\_aff\_def\_cc or "Contract (Illegality)" in checkbox\_aff\_def

## Contract (Illegality)

— Contracts with illegal terms are unenforceable. If the illegality goes to the contract’s purpose, the entire contract is void. (Civ. Code, § 1598.) If the illegal provisions area merely collateral to the contract’s purpose, the illegal provision may be severed rather than voiding the entire contract. (*Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 124.) When given a choice, the law would prefer to *sever* rather than *void* contracts. (Civ. Code, §§ 1636, 1643.)

###

"Contract (Impossibility)" in checkbox\_aff\_def\_cc or "Contract (Impossibility)" in checkbox\_aff\_def

## Contract (Impossibility)

— Performance under the contract is excused, and the contract is void, if performance is objectively impossible (i.e., no one can perform, not just the particular party). (Civ. Code, § 1441.)

###

"Contract (Impracticability)" in checkbox\_aff\_def\_cc or "Contract (Impracticability)" in checkbox\_aff\_def

## Contract (Impracticability)

— Performance under the contact is excused if performance “can only be done at an excessive and unreasonable cost.” (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1336.) “Excessive and unreasonable” goes beyond performance being more costly than anticipated. (*Ibid*.)

###

"Contract (Mistake of Law)" in checkbox\_aff\_def\_cc or "Contract (Mistake of Law)" in checkbox\_aff\_def

## Contract (Mistake of Law)

— If the parties to a contract are mistaken as to the law, that mistake may act as a defense to a claim for breach. The mistake of law defense is available in cases where: (i) all parties to the contract misunderstood the law but thought that they understood it; or (ii) one party to the contract misunderstood the law and the other party to the contract was aware of the first party’s mistake at the time of contracting. (Civ. Code, § 1578.)

###

"Contract (Mistake of Fact)" in checkbox\_aff\_def\_cc or "Contract (Mistake of Fact)" in checkbox\_aff\_def

## Contract (Mistake of Fact)

— If the parties to a contract are mistaken as to a fact, a party may defend a claim for breach of contract if the mistake was not caused by the mistaken party’s neglect, and if the mistake consists of: (i) an unconscious ignorance or forgetfulness of a material past or present fact; or (ii) a belief in the present existence of a thing material to the contract that does not exist (or in the past existence of such a thing, which has not existed). (Civ. Code, § 1577.)

###

"Contract (Novation)" in checkbox\_aff\_def\_cc or "Contract (Novation)" in checkbox\_aff\_def

## Contract (Novation)

— A novation occurs when parties to a contract enter into an entirely new contract, or otherwise substitute old obligations for new ones. (Civ. Code, § 1530.)

###

"Contract (Statute of Frauds)" in checkbox\_aff\_def\_cc or "Contract (Statute of Frauds)" in checkbox\_aff\_def

## Contract (Statute of Frauds)

— The following types of agreements are invalid unless they are in a writing (subject to the exceptions contained in Civil Code section 1624(b)):

• An agreement that, by its terms, can’t be performed within a year of its making. (Civ. Code, § 1624(a)(1).)

• A promise to answer for the debt, default, or miscarriage of another (except those listed in Civ. Code, § 2794). (Civ. Code, § 1624(a)(2).)

• Leases for periods longer than one year. (Civ. Code, § 1624(a)(3).)

• An agreement authorizing or employing someone to purchase or sell real estate. (Civ. Code, § 1624(a)(4).)

• An agreement that, by its terms, can’t be performed during the promisor’s lifetime. (Civ. Code, § 1624(a)(5).)

• An agreement for the purchase of real property secured by a deed of trust (unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property). (Civ. Code, § 1624(a)(6).)

• A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than $100,000, not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. (Civ. Code, § 1624(a)(7).)

###

"Contract (Unconscionability)" in checkbox\_aff\_def\_cc or "Contract (Unconscionability)" in checkbox\_aff\_def

## Contract (Unconscionability)

— Generally speaking, unconscionable contracts are unenforceable. (Civ. Code, §1670.5.) To be deemed unconscionable within the meaning of the law, the contract must be both *procedurally* and *substantively* unconscionable. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125; *Roman v. Sup. Court* (2009) 172 Cal.App.4th 1462, 1469 *Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 114.) While both procedural and substantive unconscionability are required, they need not be present in the same degree, i.e., the more procedurally unconscionable a contract or term is, the less substantive unconscionability is required (and vice versa). (*Ibid*.)

• *Procedural* unconscionability looks at how the contract was agreed upon. A contract or term is procedurally unconscionable if there is such an inequality of bargaining power between the parties that one party (typically the party seeking to invalidate the contract) is unable to negotiate the terms of the contract or make meaningful choices (i.e., the contract is one of adhesion or the way in which the contract was agreed to was oppressive). (*Roman, supra,* 172 Cal.App.4th. at 1469; *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.) Procedural unconscionability may also be evidenced by the way that the terms are presented to the weaker party such that the weaker party is surprised by the terms (e.g., the terms were buried in a pre-printed contract). (*Roman, supra,* 172 Cal.App.4th. at 1469.)

• *Substantive* unconscionability looks at the actual provisions of the contract. A contract or term is substantively unconscionable if the contract terms are so one-sided or so unreasonably favor the stronger party that the terms “shock the conscience.” (*Roman, supra*, 172 Cal.App.4th. at 1470; *Baltazar, supra*, 62 Cal.4th at 1244.) Such terms include unreasonably or unexpectedly harsh terms that alter the main purpose of the contract and terms that contravene public policy. (*Baltazar, supra*, 62 Cal.4th at 1244.)

###

"Contract (Undue Influence)" in checkbox\_aff\_def\_cc or "Contract (Undue Influence)" in checkbox\_aff\_def

## Contract (Undue Influence)

— Consent obtained through undue influence is invalid. “Undue influence” occurs when the party who *receives* the consent: (i) uses the confidence of/authority over another to obtain an unfair advantage over the other; (ii) takes unfair advantage of another’s mental incapacity; or (iii) is grossly oppressive or takes unfair advantage of another’s necessities or distress. (Civ. Code, § 1575.)

###

"Contract (Accord and Satis.)" in checkbox\_aff\_def\_cc or "Contract (Accord and Satis.)" in checkbox\_aff\_def

## Contract (Accord and Satisfaction)

— The defense of accord and satisfaction may be used when: (i) there is a dispute between the parties; (ii) the debtor tenders a certain sum of money to the creditor on the express condition that the creditor’s acceptance of the payment will constitute payment in full; and (iii) the creditor agrees to accept the payment as payment in full. (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058; Civ. Code, §§ 1521, 1523.)

###

"Waiver" in checkbox\_aff\_def\_cc or "Waiver" in checkbox\_aff\_def

## Waiver

— As an affirmative defense, waiver is a type of estoppel. It prevents a plaintiff from relying on a right (typically contractual) that the plaintiff would otherwise have no problem being able to enforce. Often, such a waiver exists because the plaintiff did or said something that made the defendant believe that the provision in question was no longer in effect, and defendant relied upon that action/statement. (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78.)

###

"Failure to Mitigate" in checkbox\_aff\_def\_cc or "Failure to Mitigate" in checkbox\_aff\_def

## Failure to Mitigate

— A plaintiff has a duty to take steps to mitigate damages and is therefore not entitled to damages that could have been avoided had the plaintiff taken those steps. (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111.)

###

"Lack of Damages" in checkbox\_aff\_def\_cc or "Lack of Damages" in checkbox\_aff\_def

## Lack of Damages

— Damages is a necessary element in most causes of action. Consequently, if the plaintiff hasn’t been damaged, it’s almost certain that the plaintiff cannot prevail.

###

"Failure to State a Claim" in checkbox\_aff\_def\_cc or "Failure to State a Claim" in checkbox\_aff\_def

## Failure to State a Claim

— This affirmative defense applies if the plaintiff fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).)

###

"No Causation" in checkbox\_aff\_def\_cc or "No Causation" in checkbox\_aff\_def

## No Causation

— The defendant is not liable for the plaintiff’s damages if another’s conduct was the cause of the harm. (*Martinez v. Vintage Petroleum, Inc.* (1998) 68 Cal.App.4th 695, 700 [“intervening negligence cuts off liability (i.e., it becomes a superseding cause) if the intervening cause, and its results, are not reasonably foreseeable].)

###

"Justification" in checkbox\_aff\_def\_cc or "Justification" in checkbox\_aff\_def

## Justification

— Because of the defendant’s legally protected interest, the defendant’s appropriate conduct was justified in protecting that interest. (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73.) How this affirmative defense is applied, however, depends upon the nature of the claims alleged. For example, in response to an invasion of privacy claim, a defendant may be justified in violating a plaintiff’s privacy interest if the reason for the invasion outweighs the plaintiff’s privacy interest. (*Lewis v. Superior Court* (2017) 3 Cal.5th 561, 573.) In an assault case, however, justification means that the defendant’s force was necessary to protect the defendant or others from wrongful injury. (Civ. Code, § 50.)

###

"Ratification" in checkbox\_aff\_def\_cc or "Ratification" in checkbox\_aff\_def

## Ratification

— The defendant is not liable for the plaintiff’s harm because the plaintiff ratified the defendant’s conduct after the conduct occurred. (Civ. Code, §§ 1588, 2307, 2310, 2311; *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168; *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1111, [“[T]he ratification relates back to the time the tortious act occurred.”].)

###

"Lit. Privilege" in checkbox\_aff\_def\_cc or "Lit. Privilege" in checkbox\_aff\_def

## Litigation Privilege (Civ. Code, § 47)

— The litigation privilege found at Civil Code section 47 is an *absolute* privilege, and it bars all tort causes of action except a claim of malicious prosecution. (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953; Civ. Code, §47.)

— In the context of litigation, the privilege applies to *all* statements/writings made (even those made maliciously): (i) in a judicial or quasi-judicial proceeding; (ii) by litigants or other participants authorized by law; and (iii) to achieve the objects of the litigation (whether taken before, during, or after such proceedings. (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1300.)

— In the context of HOA disputes, the litigation privilege applies to comments by the HOA’s attorney made about one or more homeowners (in a letter to the homeowners), even if such comments are defamatory. (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1.)

— The privilege also applies in various other “official” proceedings, such as those related to: (i) city counsel proceedings (*Cayley v. Nunn* (1987) 190 Cal.App.3d 300); (ii) school boards (*Frisk v. Marrihew* (1974) 42 Cal.App.3d 319); (iii) police investigations (*Cox v. Griffin* (2019) 34 Cal.App.5th 440); (iv) regulatory complaints (*Carver v. Bonds* (2005) 135 Cal.App.4th 328); and (v) executive (governmental) functions (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424.)

###

"Consent" in checkbox\_aff\_def\_cc or "Consent" in checkbox\_aff\_def

## Consent

— The defendant is not liable for the plaintiff’s harm if the plaintiff consented to the conduct prior to the harm-producing conduct’s occurrence. (Civ. Code, §§ 3515, 3516; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 875; *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498.)

###

"Necessity" in checkbox\_aff\_def\_cc or "Necessity" in checkbox\_aff\_def

## Necessity

— “Necessity” is an affirmative defense to nuisance claims that basically states that the defendant acted to prevent a threatened injury from something *not* connected to the plaintiff (e.g., force of nature, dangerous condition not caused by the plaintiff, etc.). (*Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494, 503.) This affirmative defense is different from the “lesser of two evils” defense, which is not applicable here.

###

"Private Necessity (Trespass Only)" in checkbox\_aff\_def\_cc or "Private Necessity (Trespass Only)" in checkbox\_aff\_def

## Private Necessity

— As a defense to a trespass cause of action, the affirmative defense of private necessity requires the defendant to allege (and prove) that the trespass was lawful because it was *necessary* to prevent serious harm to a person or property. (*People v. Ray* (1999) 21 Cal.4th 464.)

###

"Equitable Easement" in checkbox\_aff\_def\_cc or "Equitable Easement" in checkbox\_aff\_def

## Equitable Easement

— A court may deny a landowner’s request to eject a trespasser and instead create an equitable easement in favor of the trespasser, forcing the landowner to accept damages as compensation for the easement. Such an easement may be created only if: (i) the trespass was innocent (i.e., not willful or intentional); (ii) the landowner will not be irreparably injured by the easement; and (iii) the hardship to the trespasser is “greatly disproportionate” to the hardship to the landowner by the continuing encroachment. (*Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19 [balancing of hardships between Plaintiff and neighbor who was using a small portion of land on a hillside that was essentially inaccessible to Plaintiff].)

• As an affirmative defense, an equitable easement is difficult to prevail on. Indeed, as one court held, “[b]ecause equitable easements give a trespasser the practical equivalent of the right of eminent domain, courts must resolve all doubts against their issuance.” (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 269.)

###

This section of the Preliminary Analysis may be amended from time to time if new information/evidence comes to light that supports additional affirmative defenses.

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

###

radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"

\*\*\*\*\*\*Describe the issues/questions that Client wants the Firm to analyze/respond to. This is also the section that you will provide any responses/conclusions/thoughts. To preserve consistency, follow the formatting established above.\*\*\*\*\*\*

\*\*\*\*\*\*The data you input from the Questionnaire appears here:

{{ textarea\_describe\_issues\_questions|parse\_new\_lines }}\*\*\*\*\*\*

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

###

# Strategic Considerations

## Applicability of Davis-Stirling Act

radio\_dispute\_or\_not == "Actual Dispute"

radio\_ds\_apply == "Yes"

The Davis-Stirling Act applies to the facts of this dispute.

###

radio\_ds\_apply == "No"

The Davis-Stirling Act does *not* apply to the facts of this dispute.

###

radio\_ds\_apply == "TBD"

TBD.

###

###

radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"

radio\_ds\_apply\_questions == "Yes"

The Davis-Stirling Act is applicable to the facts, issues, and questions raised by Client.

###

radio\_ds\_apply\_questions == "No"

The Davis-Stirling Act does *not* apply to the facts, issues, and questions raised by Client.

###

radio\_ds\_apply\_questions == "TBD"

TBD.

###

###

radio\_dispute\_or\_not == "Actual Dispute"

## Attorneys’ Fees and Costs

yn\_ds\_fees == "Yes" and yn\_ccr\_fees != "Yes"

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under the Davis-Stirling Act.

###

yn\_ccr\_fees == "Yes" and yn\_ds\_fees == "Yes"

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under the Davis-Stirling Act. In addition, the prevailing part in any such litigation will also be entitled to their attorneys’ fees and costs under {{ text\_ccr\_fees }} of the CC&Rs.

###

yn\_ccr\_fees == "Yes" and yn\_ds\_fees != "Yes"

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under {{ text\_ccr\_fees }} of the CC&Rs.

###

yn\_ccr\_fees == "No" and yn\_ds\_fees != "Yes"

If this dispute is adjudicated, the prevailing party will not be entitled to attorneys’ fees and costs.

###

###

radio\_dispute\_or\_not == "Actual Dispute"

## Jurisdiction and Venue

yn\_ccr\_arbitration == "Yes"

{{ text\_ccr\_arbitration }} of the CC&Rs contains a binding arbitration provision. Consequently, legal action related to the issues in dispute must be litigated in the manner directed by that provision of the CC&Rs.

###

yn\_ccr\_arbitration == "No"

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

###

###

radio\_dispute\_or\_not == "Actual Dispute"

## Standing

radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner"

yn\_client\_pl\_standing == "Yes"

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).

###

yn\_client\_pl\_standing != "Yes"

Client may lack standing to bring a cross-claim for \*\*\*. [*State the reasons for lack of standing. If there is more than one cause of action at issue, adjust the language accordingly.*] The Firm will take a closer look at the standing issue and follow up with Client in the near future.

###

###

radio\_client\_plaintiff\_defendant == "Defendant/Respondent"

yn\_opposition\_standing == "Yes"

Based upon the information/evidence that Client has provided thus far, it appears that the opposing party has standing to pursue each of the claims alleged against Client.

###

yn\_opposition\_standing != "Yes"

Based upon the information/evidence that Client has provided thus far, it appears that the opposing party *lacks* standing to pursue a claim against Client for \*\*\*. [*State the reasons for lack of standing. If there is more than one cause of action at issue, adjust the language accordingly.*] The Firm will take a closer look at the standing issue and follow up with Client in the near future.

###

yn\_client\_cc\_standing == "Yes"

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

###

yn\_client\_cc\_standing != "Yes"

Client may lack standing to bring a cross-claim for \*\*\*. [*State the reasons for lack of standing. If there is more than one cause of action at issue, adjust the language accordingly.*] The Firm will take a closer look at the standing issue and follow up with Client in the near future.

###

###

###

radio\_dispute\_or\_not == "Actual Dispute"

## Secondary Conflicts Check

yn\_confirm\_no\_conflict == "Yes"

No new potential or actual conflict of interest between the parties and/or significant figures came to light during the Firm’s preparation of this Preliminary Analysis.

###

yn\_confirm\_no\_conflict == "No"

During the process of analyzing Client’s case and preparing this Preliminary Analysis, the Firm discovered the existence of a new potential or actual conflict of interest between the parties and/or significant figures. The Firm is currently reviewing its ethical obligations to determine if the conflict is waivable or not.

###

###

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

# Final Thoughts / Issues / Concerns / Comments

{{ textarea\_final\_thoughts|parse\_new\_lines }}

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

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

1. Although many think that doesn’t make sense in light of the fact that a cause of action for *negligent* interference with prospective business advantage does exist, because the California Supreme Court has yet to disprove the *Fifeld Manor* case, it remains “good” law. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 349.) [↑](#footnote-ref-1)
2. Although the *Lamden* court narrowed its holding to *maintenance-*related decisions*,* over the last two decades,others courts in California have applied the *Lamden* rule to non-maintenance decisions made by HOA boards/committees. (See, e.g., *Dolan-King v. Rancho Santa Fe Ass’n* (2000) 81 Cal.App.4th 965 [reviews of architectural applications given deference]; *Healy v. Casa del Rey Homeowners Ass’n* (2007) 153 Cal.App.4th 863 [board decision as to how and when to enforce governing documents given deference]; *Harvey v. Landing Homeowners Assn.* (2008) 162 CalApp.4th 809 [whether owners should be granted exclusive use of common areas given deference].) [↑](#footnote-ref-2)