Litigation Due Diligence Analysis

{{ text\_matter\_name\_dispute }}

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

{{ text\_existing\_lit\_caseno }}

###

By

{{ text\_ladd\_atty }}

March 21, 2023

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# SUMMARY

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

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

# PARTIES/SIGNIFICANT FIGURES

radio\_num\_of\_parties == 2

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

###

radio\_num\_of\_parties == 3

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

###

radio\_num\_of\_parties == 4

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

###

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

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

# STATEMENT OF FACTS / EVIDENTIARY SUPPORT

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

This table may be amended from time to time as new information/evidence comes in. To the extent that such new information necessitates any significant revisions to Client’s litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

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

# yn\_notable\_provisions\_govdocs\_table == "Yes" NOTABLE PROVISIONS OF THE GOVERNING DOCUMENTS###yn\_notable\_provisions\_agreement\_table == "Yes" NOTABLE PROVISIONS OF ONE OR MORE OPERATIVE AGREEMENTS###yn\_notable\_provisions\_govdocs\_table == "No" or yn\_notable\_provisions\_agreement\_table == "No"RESERVED###

yn\_notable\_provisions\_govdocs\_table == "No" or yn\_notable\_provisions\_agreement\_table == "No"

RESERVED.

###

yn\_notable\_provisions\_govdocs\_table == "Yes" or yn\_notable\_provisions\_agreement\_table == "Yes"

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

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

###

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

# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

yn\_need\_more\_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 LADD may be amended from time to time as new information becomes known.

###

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

At this time, the Firm does not need Client to provide any additional information or clarification. This section of the LADD may, however, be amended from time to time as new information/questions arise.

###

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

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 == "No"

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.

###

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

###

# 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 }}

###

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

— {{ text\_more\_docs\_five }}

###

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

— {{ text\_more\_docs\_six }}

###

— \*

— \*

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

###

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

None at the moment. This section of the LADD, however, may be amended from time to time if Client locates additional documents, or if a third party produces additional documents.

###

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

# THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

yn\_third\_party\_docinfo == "Yes"

Client believes that one or more third parties has possession, custody, control, and/or knowledge of the following documents/information.

|  |  |  |
| --- | --- | --- |
| **Document/Information** | **Significance of the Document/Information** | **Identity of Third Party**[[1]](#footnote-1) |
| Minutes from the executive session dated 3/5/20 re Client’s disciplinary hearing. | These minutes, which are not available to non-directors outside the context of litigation, will show that the Board acted arbitrarily and capriciously in disciplining Client. | PMC Management |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |

The table above may be amended from time to time as new information comes to light.

###

yn\_third\_party\_docinfo == "No"

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

###

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

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.

###

# radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner" POTENTIAL CAUSES OF ACTION ANDTHE STRENGTHS/WEAKNESSES OF EACH###radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "Yes" POTENTIAL CROSS-CLAIMS AND THE STRENGTHS/WEAKNESSES OF EACH###radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "No" POTENTIAL AFFIRMATIVE DEFENSES###

"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&R cause of action, 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.**

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

## Breach of Contract

Elements—Breach of Contract

— “The essential elements of a claim of breach of contract, whether express or implied, are the contract, plaintiff’s performance or excuse for non-performance, defendant’s breach, and 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).

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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.”

###

"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).

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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.”

###

"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.)

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

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

(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)

— When enforcement is an issue in a negligence cause of action, 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 with prospective business advantage*. 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 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.)[[2]](#footnote-2)

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.

— 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).

— \*\*\*

— \*\*\*

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).

— \*\*\*

— \*\*\*

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)

— When enforcement is an issue in a declaratory relief cause of action, 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

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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.”

###

"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.”

###

"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

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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.”

###

"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

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###

"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

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###

"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

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###

"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

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###

"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).

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

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###

"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

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###

"Quiet Title" in checkbox\_potential\_claims or "Quiet Title" in checkbox\_potential\_cross\_claims

## Quiet Title

Elements—Quiet Title

— To prevail on a claim for quiet title, a plaintiff must prove that: (i) there is an adverse claim to the at-issue property; and (ii) the plaintiff possesses superior title to the at-issue property. (Code Civ. Proc., § 761.020; *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1010.)

— For all quiet title causes of action, the caption must include not only the named defendants/cross-defendants, but also language along the following lines: ALL PERSONS UNKNOWN, CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFF’S TITLE

— The complaint itself must be verified and include: (i) a description of the at-issue property; (ii) the title as to which a determination is sought; (iv) a description of the adverse claim(s); (v) the date of which the determination is sought; and (vi) a prayer for the determination of the title. (Code Civ. Proc., § 761.020.)

(radio\_nature\_quiet\_title == "Personal Property" or radio\_nature\_quiet\_title == "Both") or (radio\_nature\_cc\_quiet\_title == "Personal Property" or radio\_nature\_cc\_quiet\_title == "Both")

• For tangible *personal property*, the description must include the property’s usual location. (Code Civ. Proc., § 761.020(a).)

###

(radio\_nature\_quiet\_title == "Real Property" or radio\_nature\_quiet\_title == "Both") or (radio\_nature\_cc\_quiet\_title == "Real Property" or radio\_nature\_cc\_quiet\_title == "Both")

• For *real property*, the description must include both the legal description and its street address/common designation, if any. (Code Civ. Proc., § 761.020(a).)

###

— The plaintiff must also record a lis pendens in the county with the county recorder where the at-issue real property is located. (Code Civ. Proc., § 761.010.)

Remedies—

— The primary remedy is a judgment establishing the priority of the plaintiff’s title as against all other interests. (Code Civ. Proc., § 764.010.)

— Compensatory damages are available for withholding property. (Code Civ. Proc., § 740.)

— Equitable relief is available. (Code Civ. Proc., § 760.040(c).)

— Punitive damages may be available if the plaintiff shows that the defendant acted oppressively, fraudulently, or maliciously. (Civ. Code, § 3294.) That being said, punitive damages in quiet title cases are rare.

Applicable Statute of Limitations

— No specific statute of limitations governs quiet title actions. The applicable statute of limitations is based on the theory of relief underlying the basis to quiet title. (*Salazar v. Thomas* (2015) 236 Cal.App.4th 467, 476.) So, for example, the statute of limitations to recover real property by an owner who is not currently in possession (e.g., to eject an unauthorized user or possessor) is five years (Code Civ. Proc., § 318), while the limitations period is three years if the basis for quiet title is fraud or mistake (Code Civ. Proc., § 338(d)). Likewise, if the basis of the claim was an improperly recorded document, the statue would be four years (to cancel the instrument). (Code Civ. Proc., § 343.)

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 *quiet title*.

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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.”

###

"Slander of Title" in checkbox\_potential\_claims or "Slander of Title" in checkbox\_potential\_cross\_claims

## Slander of Title

Elements—Slander of Title

— To prevail on a claim for slander of title, a plaintiff must prove that defendant: (i) made a publication that casts doubt on plaintiff’s title to property; (ii) without privilege or justification; (iii) that is false; and (iv) causes immediate and direct pecuniary loss. (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.)

Remedies—

— Plaintiff is entitled to compensatory damages and may be entitled to punitive damages if the defendant acted oppressively, fraudulently, or maliciously. (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844; Civ. Code, § 3294.)

Applicable Statute of Limitations

— A claim for slander of title must be brought within three years. (Code Civ. Proc., § 338(g).)

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 *slander of title*.

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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.”

###

"Cancellation of Instrument" in checkbox\_potential\_claims or "Cancellation of Instrument" in checkbox\_potential\_cross\_claims

## Cancellation of Instrument

Elements—Cancellation of Instrument

— To prevail on a claim to cancel a recorded instrument, plaintiff must prove that: (i) the at-issue instrument is void or voidable; and (ii) there is reasonable apprehension that if the instrument is left outstanding it will cause serious injury, including financial loss. (*U.S. Bank NA v. Naifeh* (2016) 1 Cal.App.5th 767, 778; Civ. Code, § 3412.)

Remedies—

— The at-issue instrument will be declared void and ordered delivered up or canceled. (Civ. Code, § 3412.)

Applicable Statute of Limitations

— The statute of limitations is five years. (*Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1327; Code Civ. Proc., §§ 319, 328.)

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 *cancellation of instrument*.

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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.”

###

"Reformation of Instrument" in checkbox\_potential\_claims or "Reformation of Instrument" in checkbox\_potential\_cross\_claims

## Reformation of Instrument

Elements—Reformation of Instrument

— The main purpose of reformation (typically of a contract) is to make it conform to the “real agreement” (the agreement the parties actually intended upon entering into)—i.e., to reflect the intent of the parties. (*Jolley v. Chase Home Finance LLC* (2013) 213 Cal.App.4th 872, 908.)

— Basically, as long as no third party’s rights are prejudiced, an instrument may be reformed where, through fraud or mistake of the parties (or a mistake by one party that the other party knew about), a written contract doesn’t actually express the parties’ true intention. (*Jolley v. Chase Home Finance LLC*, supra, 213 Cal.App.4th at 908; Civ. Code, § 3399.)

Remedies—

— The instrument may be rewritten to express the parties’ intent as long as no third party’s rights are prejudiced. (Civ. Code, § 3399.)

Applicable Statute of Limitations

— The statute of limitations is 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 *reformation of instrument*.

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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.”

###

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

## Conversion

Elements—Conversion

— To prevail on a claim for conversion, plaintiff must prove (i) his or her ownership/right to possess of the at-issue *personal property*; (ii) defendant’s wrongful exercise of control over that property; and (iii) damages. (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.)

— Conversion is a strict liability tort. (*Welco Electronics, Inc. v. Mora, supra,* 223 Cal.App.4th at 208.)

— Money can only be converted if the money that was taken is a specific sum capable of identification. (*Welco Electronics, Inc. v. Mora, supra,* 223 Cal.App.4th at p. 216.)

• For example, attorneys’ fees and costs have rightfully supported a conversion claim (*Murphy v. Am. Gen. Life Ins. Co.* (C.D. 2015) 74 F.Supp.3d 1267, 1280), as have: (i) settlement proceeds (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 616); and (ii) funds sitting in bank accounts. (*Fong v. East West Bank* (2018) 19 Cal.App.5th 224, 231-33.)

— Defendant’s good faith, motive, or lack of knowledge in converting the personal property is irrelevant. (*Los Angeles Fed. Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1388.)

— Conversion vs. trespass to chattels. Conversion arises from the complete dispossession of the *personal* *property*, while trespass to chattels deals with a lesser degree of interference. Note that neither tort is appropriate in the context of *real propert*y.

Remedies—

— Plaintiff is entitled to (i) the value of the property at the time of conversion, with interest from the date of conversion; and (ii) a fair compensation for the time and money expended pursuing the property. (*Virtanen v. O’Connell* (2006) 140 Cal.App.4th 688, 708; Civ. Code, § 3336.)

• If the property had special value to plaintiff, that value may be recovered if defendant knew the value in advance or was a willful wrongdoer. (Civ. Code, § 3355.)

— Emotional distress damages are available. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1605-07.)

— Attorneys’ fees incurred in seeking the recovery of the property are not recoverable. (*In re Martinez* (Bankr. N.D.Cal. 2019) 610 B.R. 290, 305.)

— Punitive damages may be available if the plaintiff shows that the defendant acted oppressively, fraudulently, or maliciously. (Civ. Code, § 3294.)

yn\_conversion\_pet == "Yes"

— If a plaintiff’s pet is converted, as appears to be the case in this matter, and during the conversion the pet is injured, then that plaintiff may recover the reasonable and necessary costs of treating the pet’s injuries (Civ. Code, § 3333), as well as punitive damages if that plaintiff can prove that the injury to his or her pet was caused willfully or as a result of gross negligence. (Civ. Code, § 3340.)

###

Applicable Statute of Limitations

— A claim for conversion must be brought within three years of the taking. (Code Civ. Proc., § 338(c).) The statute of limitations period begins running even if the owner was unaware of the conversion. (*Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 429; *Murphy v. Am. Gen. Life Ins. Co., supra,* 74 F.Supp.3d at 1280.) In other words, the “discovery” rule does not apply to conversion claims.

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 *conversion*.

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

## Trespass to Chattels

Elements—Trespass to Chattels

— To prevail on a claim for trespass to chattels, plaintiff must show (i) that plaintiff owned, possessed, or had a right to personal property; (ii) that defendant intentionally interfered with plaintiff’s use or possession of the property, (iii) that plaintiff did not consent to defendant’s interference, (iv) harm, and (v) causation. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1350-51.)

— The personal property at issue must be *tangible*. (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th 1342 at 1357.)

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

— Trespass to chattels v. conversion. While both trespass to chattels and conversion are similar, there is a difference. Conversion arises from the *complete* dispossession of the *personal* *property*, while trespass to chattels deals with a lesser degree of interference. Note that neither tort is appropriate in the context of *real* *property*.

###

Remedies—

— Compensatory damages are available for actual damages and emotional distress resulting from the lost use or impairment of the property. (Civ. Code, § 3333; *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1605-07.) Nominal damages, however, are not available—i.e., the trespass must cause actual harm. (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th at p. 1351.)

— Injunctive relief is available to prevent future harm. (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th at 1352.)

— Punitive damages may be available if the plaintiff shows that the defendant acted oppressively, fraudulently, or maliciously. (Civ. Code, § 3294.)

— If the following types of property are at issue, treble (triple) damages may be awarded:

• Timber. (Code Civ. Proc., § 733.)

• Injury to Cable Television Property. (Corps. Code, § 14400.)

• Stealing utility services. (Civ. Code, § 1882.1.)

Applicable Statute of Limitations

— A claim for trespass to chattels must be brought within three years, and the statute generally begins accruing when the trespass occurs. (Code Civ. Proc., § 338(c); *AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639.)

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 to chattels*.

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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.”

###

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

## Rescission

Elements—Rescission

— A contract may be rescinded by a party to the contract if (i) consent to the contract was mistakenly given or obtained through duress, menace, fraud, or undue influence; (ii) the contract’s consideration fails through the fault of the party as to whom he or she rescinds; (iii) the contract’s consideration becomes void; (iv) the contract’s consideration materially fails before it is rendered; (v) the contract is unlawful and the parties aren’t equally at fault; or (vi) performance of the contract will prejudice public interest. (Civ. Code, § 1689(b).)

Remedies—

— Rescission seeks to restore the parties to their status before the contract was entered into. (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1147.)

Applicable Statute of Limitations

— The statute of limitations for rescission tracks the statute for breach of contract. Consequently, if the claim is based on a written instrument, the deadline is four years (Code Civ. Proc, § 337), and if the claim is based on an oral instrument, the deadline is two years (Code Civ. Proc., § 339).

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 *rescission.*

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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.”

###

"Financial Elder Abuse" in checkbox\_potential\_claims or "Financial Elder Abuse" in checkbox\_potential\_cross\_claims

## Financial Elder Abuse (Welf. & Inst. Code, § 15610.30)

Elements—Financial Elder Abuse

— To prevail on a claim for financial elder abuse, plaintiff must prove that defendant: (i) took, secreted, appropriated, obtained, or retained an elder or dependent adult’s real or personal property for a wrongful use, with the intent to defraud, or both; (ii) assisted in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use, with the intent to defraud, or both; or (iii) took, took, secreted, appropriated, obtained, or retained an elder or dependent adult’s real or personal property by undue influence. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 174; Welf. & Inst. Code, § 15610.30(a).)

• “Elder” means a CA resident who is 65 or older. (Welf. & Inst. Code, § 15610.27.)

• “Dependent adult” means a CA resident between the ages of 17 and 64 who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. (Welf. & Inst. Code, § 15610.23.)

Remedies—

— In addition to compensatory (money) damages, as well as any damages provided by law, plaintiff is entitled to his or he reasonable attorneys’ fees and costs. (Welf. & Inst. Code, § 15657.5(a).)

— If defendant acted recklessly, oppressively, fraudulently, or maliciously, the “effect of death” limitations under Code of Civil Procedure section 377.34 don’t apply. (Welf. & Inst. Code, § 15657.5(b).)

— Plaintiff may also be entitled to punitive damages. (Welf. & Inst. Code, § 15657.5(c).)

Applicable Statute of Limitations

— An action for financial elder abuse must be brought within four years of when plaintiff knew or should have known of the facts constituting the financial abuse. (Welf. & Inst. Code, § 15657.7.)

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 *financial elder abuse*.

— \*\*\*

— \*\*\*

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

## Negligent Hiring

Elements—Negligent Hiring

— An employer may be held liable to a third party for its own negligence in hiring an employee who is either/both incompetent or otherwise unfit. (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 citing *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.)

— To prevail on a claim for negligent hiring, plaintiff must prove that (i) defendant-employer hired the employee; (ii) the employee was unfit or incompetent to perform the work; (iii) defendant-employer knew or should have known that the employee was unfit or incompetent and that the hiring created a particular risk of harm; (iv) harm; and (v) defendant-employer’s hiring was a substantial factor in causing the harm. (*Phillips v. TLC Plumbing, Inc., supra,* 172 Cal.App.4th at 1139.)

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 also available in certain situations. 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.)

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

— Emotional distress damages are almost certainly not available. As was stated above regarding the claim for “Negligence,” because damages for emotional distress are only available in certain circumstances—i.e., bodily injury, whether direct or in a bystander situation, or fear of bodily injury where a defendant acted with malice, fraud or oppression—such facts must be present to justify damages for emotional distress. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000; *Burgess v. Superior Court, supra,* 2 Cal.4th 1064.)

###

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

— Emotional distress damages are almost certainly not available. 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) is 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 999-1000.)

###

Applicable Statute of Limitations

— The statute of limitations for negligent hiring is two years for personal injuries (Code Civ. Proc., § 335.1), and 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 *negligent hiring*.

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

## Negligent Supervision

Elements—Negligent Supervision

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

— The elements for a claim of negligent supervision—sometimes referred to as “negligent retention”—are identical to those of negligent hiring.

###

"Negligent Hiring" not in checkbox\_potential\_claims and "Negligent Hiring" not in checkbox\_potential\_cross\_claims

— To prevail on a claim for negligent supervision/retention, plaintiff must prove that (i) defendant-employer hired the employee; (ii) the employee was unfit or incompetent to perform the work; (iii) defendant-employer knew or should have known that the employee was unfit or incompetent and that the hiring created a particular risk of harm; (iv) that the employer kept the employee employed after making such a discovery; (v) harm; and (vi) defendant-employer’s retention of the employee was a substantial factor in causing the harm. (See *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 citing *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.)

###

Remedies—

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

— The remedies for negligent supervision/retention are identical to those of negligent hiring.

###

"Negligent Hiring" not in checkbox\_potential\_claims and "Negligent Hiring" not in checkbox\_potential\_cross\_claims

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

— Injunctive Relief is also available in certain situations. 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.)

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

— Emotional distress damages are almost certainly not available. As was stated above regarding the claim for “Negligence,” because damages for emotional distress are only available in certain circumstances—i.e., bodily injury, whether direct or in a bystander situation, or fear of bodily injury where a defendant acted with malice, fraud or oppression—such facts must be present to justify damages for emotional distress. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000; *Burgess v. Superior Court, supra,* 2 Cal.4th 1064.)

###

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

— Emotional distress damages are almost certainly not available. 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) is 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 999-1000.)

###

###

Applicable Statute of Limitations

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

— The statute of limitations for negligent supervision/retention is identical to that of negligent hiring.

###

"Negligent Hiring" not in checkbox\_potential\_claims and "Negligent Hiring" not in checkbox\_potential\_cross\_claims

The statute of limitations for negligent supervision/retention is two years for personal injuries (Code Civ. Proc., § 335.1), and 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 *negligent supervision*.

— \*\*\*

— \*\*\*

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.”

###

"Unfair Business Practices (17200)" in checkbox\_potential\_claims or "Unfair Business Practices (17200)" in checkbox\_potential\_cross\_claims

## Unfair Business Practices (Bus. & Prof. Code, § 17200 et seq.)

Elements—Unfair Business Practices aka Unfair Competition

— A claim brought under Bus. & Prof. Code, § 17200 et seq. is really an unfair competition claim, and the statute is sometimes referred to as the “Unfair Competition Law.” (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558.) It is *not* the same thing as a common law unfair competition claim, the essence of which is the “the inequitable pirating of the fruits of another’s labor and then either ‘palming off’ those fruits as one’s own (deception) or simply gaining from them an unearned commercial benefit.” (*KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 850; *Bank of the West v. Sup.Ct.* (1992) 2 Cal.4th 1254, 1263.)

— This statute is specifically intended to remedy anti-competitive activities (e.g., monopolies) and unfair (e.g., dishonest, deceptive, fraudulent, or discriminatory) business practices. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 179.)

— The passage of Prop. 64, however, greatly narrowed the use (i.e., abuse) of this cause of action. Prior to the passage of Prop 64 (i.e., November of 2004), standing to bring a claim under 17200 did *not* depend upon a showing of damages. (*Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 228.) After the passage of that proposition—which imposed a number of limitations on a private party’s standing to bring such a claim—a private party was required to (i) establish a loss or deprivation of money or property sufficient to qualify as injury in fact (i.e., an economic injury), and (ii) show that the economic injury resulted from an unfair business practice or false advertising. (*Kwikset Corp. v. Sup.Ct.* (2011) 51 Cal.4th 310, 322.)

— Today, a plaintiff wishing to make a claim for unfair business practices must prove that the defendant: (i) engaged in an unlawful, unfair, or fraudulent business practice/act; or (ii) used unfair, deceptive, untrue, or misleading advertising; or (iii) violated an act prohibited under Business and Professions Code section 17500 et seq. (See Bus. & Prof. Code, § 17200 et seq.; see also *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1146.) Plaintiff must not only also establish damages, but plaintiff must also prove that those damages were caused by the unfair competition at issue. (*Kwikset Corp. v. Sup. Ct., supra,* 51 Cal.4th at 322.)

• If plaintiff is arguing that defendant engaged in an “unlawful” business act or practice, plaintiff must (i) specify the unlawful conduct (which may be based on federal, state, or local law); (ii) show that defendant committed the unlawful business practice/conduct; and (iii) show that defendant unjustly received ill-gotten gains, including plaintiff’s money or property, as a result of the business practice/act. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 676.)

yn\_unfair\_antitrust == "Yes"

• In the context of antitrust law, “unfair” under Business and Professions Code section 17200 et seq. means conduct that threatens an impending violation of an antitrust law or that violates the policy of an antitrust law. (*Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda County* (2020) 9 Cal.5th 279, 302.)

###

yn\_unfair\_fraud == "Yes"

• “Fraud” under Business and Professions Code section 17200 et seq. means conduct that is likely to deceive the public. (*Prata v. Superior Court, supra,* 91 Cal.App.4th at 1146.)

###

yn\_unfair\_advertising == "Yes"

• Within the context of a 17200 claim, unfair, deceptive, untrue, or misleading advertising means any advertising that is communicated to plaintiff that is likely to deceive the public. (*Prata v. Superior Court, supra,* 91 Cal.App.4th at 1136.)

• Whether to include an additional cause of action for false advertising under Business and Professions Code section 17500 is still up for discussion. Because the False Advertising Act and the Unfair Competition Act (i.e., 17200) are so similar, it may not be worth while to include it as a separate claim. This is especially true given the fact that the statute of limitations is only three years, as opposed to the four year statute under 17200 (discussed below). The big difference between a claim under 17200 and one brought under 17500 is that with respect to the latter, one of the elements is that the defendant needed to have intended to dispose a consumer of the consumer’s real or personal property (or get a consumer to perform a service). (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950; Bus. & Prof. Code, § § 17500.)

###

Remedies—

— Plaintiff may obtain injunctive relief to prevent the unfair competition and/or to order defendant to return any money or property that may have been unlawfully acquired. (Bus. & Prof. Code, §§ 17200, 17203.)

— Plaintiff is not, however, entitled to compensatory, actual, or punitive damages. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.)

Applicable Statute of Limitations

— A claim for unfair business practices/competition must be brought within four years. (Bus. & Prof. Code, § 17208.)

• Any cause of action brought under 17200 is entitled to the benefit of this four-year statute of limitation. *Thus, an unfair competition claim can revive claims that are otherwise time-barred by shorter statute periods* (e.g., failing to pay wages is an unfair business practice so the four-year statute of limitations applies, not the three-year limitations). (*Cortez v. Purolator Air Filtration Production Co.* (2000) 23 Cal.4th 163, 178.)

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 *unfair business practices*.

— \*\*\*

— \*\*\*

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.”

###

"Receipt of Stolen Property (PC 496)" in checkbox\_potential\_claims or "Receipt of Stolen Property (PC 496)" in checkbox\_potential\_cross\_claims

## Receipt of Stolen Property (Penal Code § 496)

Elements—Receipt of Stolen Property

— To prevail on a civil claim for receipt of stolen property, plaintiff must prove that (i) the property was stolen; (ii) defendant knew that the property was stolen; and (iii) defendant bought or received the property. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, disapproved on another ground in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14; Pen. Code, § 496(a).)

Remedies—

— Plaintiff is entitled to treble (triple) damages, plus his or her reasonable attorneys’ fees and costs. (Pen. Code, § 496(c).)

Applicable Statute of Limitations

— A civil claim for receipt of stolen property must be brought within three years. (Code Civ. Proc., § 338.)

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 *receipt of stolen property*.

— \*\*\*

— \*\*\*

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.”

###

"Fraudulent Transfer" in checkbox\_potential\_claims or "Fraudulent Transfer" in checkbox\_potential\_cross\_claims

## Fraudulent Transfer(Uniform Fraudulent Transfer Act—Civil Code, § 3439 et seq.)

Elements— Uniform Fraudulent Transfer Act (UFTA)

— There are two types of fraudulent transfers—those made with the express intent to defraud a creditor and those made while the debtor is insolvent (otherwise known as *constructive fraud(ulent) intent*). With the former, the intent of the debtor is directly relevant, while with the latter intent is irrelevant, and the transfer may be deemed constructively fraudulent regardless of the debtor’s actual intent. (Civ. Code, §§3439.04 and 3439.05, respectively.)

• To prove a claim for fraudulent transfer where the express intent of the debtor is to defraud the creditor (i.e., transfer done with *actual intent*), a plaintiff must prove that a transfer was made (or an obligation was incurred) (i) with an actual intent to hinder, delay, or defraud a creditor, or (ii) without receiving a reasonably equivalent value in exchange *and* the debtor was *either* (a) engaged in (or about to be engaged in) a business/transaction where the debtor’s assets were unreasonably small in relation to the business/transaction, or (b) intended to incur (or reasonably should’ve believed he or she would incur) debts beyond his or her ability to pay as they became due. (Civ. Code, § 3439.04.) Under this statute, it doesn’t matter whether the creditor’s claim existed before or after the transfer. (*Ibid*.)

→ A transfer will be deemed to have been made with the intent to hinder, delay, or defraud creditors when there is a specific intent to avoid a specific liability.

→ The intent at the time of the transfer is the primary consideration in such transfers. This “actual intent test” requires there to be a connection between the debtor and the creditor at the time of a transfer. So, if for example, a debtor transfers an asset at a time he or she has *no* creditors (or isn’t in the midst of a situation, such a lawsuit, where someone might become a creditor), the debtor will not have had the actual intent to hinder, delay, or defraud the creditor at the time of the transfer.

→ Because proving actual intent is often impossible (How often does one have an audio/video of the debtor discussing his or her actual intent?), courts have developed several *“badges of fraud*” which, while not conclusive, are considered by courts as circumstantial evidence of fraud. The more common “badges of fraud” include things like: (i) becoming insolvent as a result of a transfer (see below); (ii) lack of (or inadequate) consideration; (iii) transfers between family members or other “insiders”; (iv) the debtor’s retention or possession of (or continued right to benefit from) transferred property; (v) the existence of the threat of (or actual) litigation; (vi) the existence or cumulative effect of a series of transactions after the debtor’s financial troubles started; (vii) the secrecy of the transaction; or (viii) a deviation from the normal course of business. The presence of one or more of these “badges of fraud” will shift the burden of proof from the plaintiff/creditor to the defendant/debtor. (Legislative Committee comment to Civ. Code, § 3439.04; See Civ. Code, § 3439.04(b); *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834; *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298.)

• To prove a claim for fraudulent transfer where the debtor did not have an actual intent to hinder, delay, or defraud a creditor, a plaintiff must prove that (i) the plaintiff’s (i.e., creditor’s) claim arose *before* the transfer/obligation at issue, (ii) that the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer/obligation, and (iii) that the debtor was either insolvent at the time of the transfer, or that the transfer itself caused the debtor’s insolvency. (Civ. Code, §3439.05.)

— A transfer of property by a debtor will be treated as a “transfer” for fraudulent transfer purposes only if the transfer puts beyond the creditor’s reach property that the creditor would otherwise be able seize to satisfy the debt. (*Mehrtash v. ATA Mehrtash* (2001) 93 Cal.App.4th 75 [the transfer of real property subject to encumbrances (i.e., existing liens or applicable exemptions) large enough to eliminate a property’s equity did *not* constitute a fraudulent transfer because the creditor couldn’t show how she was injured by the transfer]; *Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834.) In other words, a transfer cannot be deemed “fraudulent” under the UFTA if it doesn’t diminish what a creditor may receive.

— The term “transfer” doesn’t just apply to transfers on their face. That term also applies to other events, such as: (i) inaction; (ii) a waiver of a defense; (iii) the termination of a lease; (iv) an extension of a loan; (v) a withdrawal of cash from an account; (vi) making a tax election; (vii) granting a security interest in a property; (viii) conversion of non-exempt assets into exempt assets; and/or (ix) rental of a property for less than its fair market value. Likewise, clerical actions (e.g., retitling a property to correct title), transfers required by law (e.g., transfer of assets ordered family court judge), or transfers by someone other than the debtor do not constitute voidable transfers.

— A debtor choosing to pay one creditor instead of another does not constitute a fraudulent transfer. (See Civ. Code, §3432.)

Remedies—

— Plaintiff is entitled to set aside the fraudulent conveyance and recover the asset(s) in question. (Civ. Code, §§ 3439.04 and 3439.05.)

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

— Keep in mind that there are fraudulent transfers that leave a plaintiff with no recourse even if the plaintiff establishes actual intent to hinder, defraud, or delay. For example, transfers into ERISA qualified retirement plans *cannot* be voided even if fraud is proven. In that example, the federal ERISA statute trumps California’s fraudulent transfer laws, and thus the UFTA would simply not apply.

Applicable Statute of Limitations—

— A claim for fraudulent transfer with intent to hinder, delay, or defraud must be brought within four years after the transfer is made, or if later, then within one year after the transfer/obligation was (or could’ve reasonably) been discovered by the plaintiff/creditor. (Civ. Code, § 3439.09(a).)

— A claim for fraudulent transfer where equivalent value was not received in the transfer must be brought within four years after the transfer is made. (Civ. Code, § 3439.09(b).)

— “Notwithstanding any other provision of law, a cause of action under this chapter with respect to a transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred.” (Civ. Code, § 3439.09(c).) In other words, seven years is the ceiling regardless of what 3439.09(a) says.

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 *fraudulent transfer*. If one or more provisions of a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

— \*\*\*

— \*\*\*

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.”

###

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

— 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.”

###

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

— 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.”

###

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

# POTENTIAL AFFIRMATIVE DEFENSES

###

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

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.[[3]](#footnote-3)

— 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.)

###

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Statute of Limitations

Affirmative Defense—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)—the caveat being that the statute of limitations for breach of **negotiable instruments**, like promissory notes, is six years (Comm. Code, § 3118).

— For claims involving **breach of the implied covenant of good faith and fair dealing**, the statutes of limitations are the same as they are for 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.)

###

"fraudulent transfer" in checkbox\_sol\_specifics or "fraudulent transfer" in checkbox\_sol\_specificstwo

— For **fraudulent transfer**, four years (or possibly up to seven years if the creditor did not know, and couldn’t reasonable have known, about the transfer). (Civ. Code, § 3439.09.)

###

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Equitable Estoppel

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Unclean Hands

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Laches

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Negligence (Comparative Fault)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Apportionment

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Negligence (Sudden Emergency)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Assumption of Risk

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Force Majeure)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Duress)

Affirmative Defense—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).)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Fraud)

Affirmative Defense—Fraud

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

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Frustration of Purpose)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Lack of Consideration)

Affirmative Defense—Lack of Consideration

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

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Failure of Consideration)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Illegality)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Impossibility)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Impracticability)

Affirmative Defense—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*.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Mistake of Law)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Mistake of Fact)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Novation)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Statute of Frauds)

Affirmative Defense—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).)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Unconscionability)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Contract (Undue Influence)

Affirmative Defense—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)

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Waiver

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Failure to Mitigate

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Lack of Damages

Affirmative Defense—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.

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

"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

Affirmative Defense—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).)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## No Causation

Affirmative Defense—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].)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Justification

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Ratification

Affirmative Defense—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.”].)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

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

Affirmative Defense—Litigation Privilege

— 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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Consent

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Necessity

Affirmative Defense—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.

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Private Necessity

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

## Equitable Easement

Affirmative Defense—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.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

###

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

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

###

# STRATEGIC CONSIDERATIONS

radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner" or yn\_cross\_claims == "Yes"

## Statute of Limitations

To the extent that Client wants to allege all of the suggested causes of action discussed above, the claims must be filed on or before **{{ text\_earliest\_sol\_date }}** (the *earliest* of the applicable statutes of limitations given the desired claims).

###

## Applicability of Davis-Stirling Act

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.

###

## Jurisdiction

### Arbitration

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, and may be compelled or confirmed in the superior court of {{ text\_county }} County (where the property at issue is located).

###

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 the superior court of {{ text\_county }} County because that is where Client’s property is located.

###

### Personal Jurisdiction

yn\_ccr\_arbitration == "Yes"

The parties to the CC&Rs agreed to submit all disputes to binding arbitration (as discussed above) in {{ text\_county }} County, and consequently the parties are all subject to the personal jurisdiction of the courts in that county (e.g., to compel arbitration or confirm an award).

###

yn\_ccr\_arbitration == "No"

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

###

### Subject Matter Jurisdiction

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

## Standing

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.

###

###

## Anti-SLAPP Analysis

yn\_slapp\_protected\_activity == "No"

Anti-SLAPP Overview—

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

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

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

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

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

Anti-SLAPP Test—

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

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

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

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

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

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

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

Application/Analysis/Conclusion—

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

###

yn\_slapp\_protected\_activity == "Yes"

Anti-SLAPP Overview—

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

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

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

Analysis—

— The conduct at issue—i.e., the injury-producing harm—must itself be based on the right to petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

— “Conduct in Furtherance of the Right to Petition or Free Speech” (i.e., the constitutionally protected activity) includes things like:

• Voting in connection with HOA meetings can be, but is not per se, protected activity. (*Talega Maintenance Corp. v. Standard Pac. Corp*. (2014) 225 Cal.App.4th 722, 729 [holding that although an act like voting may trigger a cause of action, voting is not automatically a protected activity); but see *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 543 [holding that lawsuit filed to attack how people voted was a SLAPP].)

• Statements or writings made in the course of a litigation, including the act of filing a lawsuit, are protected under the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 90.) This includes statements or writings made before litigation commences if the statement or writing was made in connection with litigation. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1059; *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 940-44.)

• A parent’s formal complaint urging the firing of a high school baseball coach that was addressed “To Whom It May Concern” and delivered to school board were part of an official proceeding and thus protected by the anti-SLAPP statute. (*Lee v. Fick* (2005) 135 Cal.App.4th 89, 97.)

• The developer/environmentalist example from above, where a developer is trying to get rid of picketers who are opposing a construction project.

yn\_slapp\_official\_proceeding == "Yes" or yn\_slapp\_under\_consideration == "Yes"

yn\_slapp\_official\_proceeding == "Yes" and yn\_slapp\_under\_consideration == "No"

— Acts made in furtherance of petitioning or free speech that are made during a legislative, judicial, executive, or other official proceeding are protected under category **(e)(1)** of the anti-SLAPP statute.

###

yn\_slapp\_under\_consideration == "Yes" and yn\_slapp\_official\_proceeding == "No"

— Acts made in furtherance of petitioning or free speech that are made in connection with a matter under consideration by a legislative, judicial, executive, or other official body are protected under category **(e)(2)** of the anti-SLAPP statute.

###

yn\_slapp\_official\_proceeding == "Yes" and yn\_slapp\_under\_consideration == "Yes"

— Acts made in furtherance of petitioning or free speech that are made during—or in connection with a matter under consideration by—a legislative, judicial, executive, or other official body are protected under categories **(e)(1)** and **(e)(2)** of the anti-SLAPP statute, respectively.

###

— “Official proceedings” are not limited to proceedings before governmental entities. They include proceedings required by law even if conducted by private parties—e.g., hospital peer review proceedings. (See *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199.)

— Even though HOAs are statutorily required to hold open membership meetings, HOA meetings are not considered “official proceedings” subject to anti-SLAPP protection unless the HOA meeting has a strong connection to governmental proceedings. (*Talega Maintenance Corp. v. Std. Pacific Corp., supra,* 225 Cal.App.4th at 732.)

— Courts have applied the protections offered by the anti-SLAPP statute to the following cases under the “legislative, judicial, executive, or other official proceeding” categories—i.e., (e)(1) and/or (e)(2):

• Statements and conduct made during a State Bar-sponsored fee arbitration may be protected by the anti-SLAPP statute because fee arbitrations are statutorily established official proceedings designed to address a particular type of dispute. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 358 [law firm’s fraud and negligent misrepresentation claims against client were subject to anti-SLAPP motion because they related to client’s seeking arbitration].)

• Statements and conduct made in connection with an arbitration of a dispute under an automobile insurance policy’s coverage for claims against uninsured motorists are protected by the anti-SLAPP statute because the arbitration of such disputes is mandated by statute (Ins. C., § 11580.2; *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 542 [subpoenaing mental health records for use in arbitration of uninsured motorist coverage claim dispute constituted protected activity].)

• A parent’s formal complaint urging the firing of a high school baseball coach that was addressed “To Whom It May Concern” and delivered to school board were part of an official proceeding and thus protected by the anti-SLAPP statute. (*Lee v. Fick, supra,* 135 Cal.App.4th at 97.)

• Litigation based on the submission of site maps and planning documents to a city in connection with a permitting process satisfies the first prong of the anti-SLAPP statute. (*Midland Pacific Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, 272*; M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 194-95.)

• Wrongful termination and defamation claims that arose from a telephone conversation with the defendant employer about the plaintiff’s eligibility for state unemployment insurance unequivocally constituted a communication in connection with an official proceeding and was protected by the anti-SLAPP statute. (*Dible v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843, 850.)

• In a civil rights action, a state university manager’s administrative review of a state employee’s grievances involved the exercise of quasi-judicial powers and constituted an official proceeding protected by the anti-SLAPP statute. (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1396-99.)

— Alternatively, courts have declined to extend the statute to any of the following cases:

• A nonjudicial foreclosure is a private, contractual alternative to a judicial foreclosure proceeding. Therefore, a wrongful foreclosure action arising from a nonjudicial foreclosure proceeding is not subject to the anti-SLAPP statute. (*Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1520.)

• A private arbitration is not an “official proceeding” under the anti-SLAPP statute. (*Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 7-8.)

• The submission of bids to obtain a public construction contract and written requests for payment did not involve petitioning activities. (*Kajima Engineering and Const., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 932.)

• A fraud claim arising from a sheriff’s ministerial sale or action that merely consisted of offers and accepting the highest bid without any determinations based on someone’s right to free speech or right to petition did not constitute an official proceeding within the protection of the anti-SLAPP statute. (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677.)

###

yn\_slapp\_public == "Yes"

— Acts made in furtherance of petitioning or free speech that are made in a public forum or that concern a public issue are protected under category **(e)(3)** of the anti-SLAPP statute.

— A “public forum” is a place that is open to the general public to assemble, communicate thoughts, and discuss public questions. (*Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP* (2007) 146 Cal.App.4th 841, 846.) Courts have extended the protections of the anti-SLAPP statute under this category to the following cases:

• HOA meetings. (*Lee v. Silveira*, *supra*, 6 Cal.App.5th at 539–40 [relying on *Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at 476-477 [HOA functioned as a quasi-governmental body promulgating and enforcing policies and rules affecting members living in 440 townhouses].)

• Limited group, as opposed to the general public, if the conduct occurs in connection with an ongoing controversy, dispute, or discussion. (*DuCharme v. Internat. Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 115.)

• Streets, parks, and other public places. (*Zhao v. Wong* (1996) 48 Cal.App.4th 1114, 1125-26 (overruled on other grounds in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123).)

• Speech by mail. (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 674 [holding that mailing campaign flyers constituted a public forum].)

• Newsletters published to many residents of an HOA, even if access to the newsletter was selective and limited. (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at 476-77.)

• Websites open to the public. (Barrett v. Rosenthal (2006) 40 Cal.4th 33, 41, fn. 4 (collecting cases); *Kronemyer v. Internet Movie Data Base, Inc.* (2007) 150 Cal.App.4th 941, 950 [Internet website is a public forum where statements on website are accessible to anyone choosing to visit the site]; *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1367.)

— In the context of the phrase “public issue,” courts have extended the protections of the anti-SLAPP statute to:

• Statements concerning management of a private HOA. (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at 480.)

• An individual homeowner’s complaints about siding replacement on some, but not all, units in a development because the cost of replacing siding came out of the HOA’s budget, which affected all members. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1117-18.)

• Private letters sent to a member in connection with his challenge of a board’s application of architectural standards affected all members as it was an aspect of governance. (*Ruiz v. Harbor View Community Assn., supra*, 134 Cal.App.4th at 1468; but see *Turner v. Vista Pointe Ridge Homeowners Assn.* (2009) 180 Cal.App.4th 676, 687-88 [holding that homeowner’s dispute with HOA regarding homeowner’s home addition exceeding previously agreed to heights was *not* a public issue since the height only affected one neighbor (distinguishing *Ruiz* on the grounds that *Ruiz* dealt with ensuring that the governing documents were equally enforced against all members).].)

yn\_slapp\_catchall == "No"

— Despite the differences in cases referenced above, it seems that courts have interpreted the phrase “in connection with a public issue” used in subdivision (b)(1) of the anti-SLAPP statute and the terms “public issue” or “issue of public interest,” as those phrases are used in subdivisions (e)(3) and (4) of the anti-SLAPP statute, interchangeably. (*DuCharme v. Internat. Brotherhood of Electrical Workers, Local 45, supra,* 110 Cal.App.4th at 118; *All One God Faith, Inc. v. Organic and Sustainable Industry Stds., Inc.* (2010) 183 Cal.App.4th 1186.)

###

###

yn\_slapp\_catchall == "Yes"

— Despite the differences in cases referenced above, it seems that courts have interpreted the phrase “in connection with a public issue” used in subdivision (b)(1) of the anti-SLAPP statute and the terms “public issue” or “issue of public interest,” as those phrases are used in subdivisions (e)(3) and (4) of the anti-SLAPP statute, interchangeably. (*DuCharme v. Internat. Brotherhood of Electrical Workers, Local 45, supra,* 110 Cal.App.4th at 118; *All One God Faith, Inc. v. Organic and Sustainable Industry Stds., Inc.* (2010) 183 Cal.App.4th 1186.)

— Acts made in furtherance of petitioning or free speech that concern a public issue are protected under category **(e)(4)** of the anti-SLAPP statute.

yn\_slapp\_public == "No"

— In the context of the phrase “public issue,” courts have extended the protections of the anti-SLAPP statute to:

• Statements concerning management of a private HOA. (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at 480.)

• An individual homeowner’s complaints about siding replacement on some, but not all, units in a development because the cost of replacing siding came out of the HOA’s budget, which affected all members. (*Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1117-18.)

• Private letters sent to a member in connection with his challenge of a board’s application of architectural standards affected all members as it was an aspect of governance. (*Ruiz v. Harbor View Community Assn., supra*, 134 Cal.App.4th at 1468; but see *Turner v. Vista Pointe Ridge Homeowners Assn.* (2009) 180 Cal.App.4th 676, 687-88 [holding that homeowner’s dispute with HOA regarding homeowner’s home addition exceeding previously agreed to heights was *not* a public issue since the height only affected one neighbor (distinguishing *Ruiz* on the grounds that *Ruiz* dealt with ensuring that the governing documents were equally enforced against all members).].)

###

###

Application/Conclusion—

— REPLACE THIS TEXT by restating applicable facts/claims from above that support that the at-issue facts/claims arising from one or more constitutionally protected activities: (i) made during, or connection with, a legislative, judicial, executive, or other official proceeding; and/or (ii) made in a public forum and concerned a public issue; and/or (iii) made in furtherance of the right to petition or free speech *and* also concerned a matter of public interest.

— CONCLUDE WITH A 1 OR 2 SENTENCE RECOMMENDATION/PLAN OF ACTION.

— After Client has had the opportunity to review this LADD, the Firm will schedule a conference call or in-person meeting to discuss the anti-SLAPP issue in more detail.

###

## Pre-Filing Requirements

yn\_adr\_mandatory == "No"

Given the facts of this dispute, the Davis-Stirling Act does not require pre-lawsuit ADR.

###

yn\_adr\_mandatory == "No" and radio\_ds\_apply == "TBD"

The Firm is still considering whether the Davis-Stirling Act applies to the facts of this case. Once that assessment is complete, a determination regarding pre-filing requirements (e.g., mediation) can be made.

###

yn\_adr\_mandatory == "Yes" and yn\_client\_plaintiff\_complied == "Yes"

Civil Code section 5930 requires parties to attempt alternative dispute resolution prior to filing certain types of lawsuits. While that provision of the Davis-Stirling Act *does* apply in this matter, *Client complied with the statute and will be in a position to file the requisite Certificate of Compliance*.

###

yn\_adr\_mandatory == "Yes" and yn\_client\_plaintiff\_complied == "No"

Civil Code section 5930 requires parties to attempt alternative dispute resolution prior to filing certain types of lawsuits. That provision of the Davis-Stirling Act applies in this case. *Client, however, did not comply with the statute prior to retaining the Firm.*

Not only does such a failure subject Client’s complaint to demurrer, but even if the opposition were to waive its rights to demurrer and the case proceeded to trial where Client prevailed on the merits, Client’s failure to abide by the ADR requirements could result in the Court reducing (or virtually eliminating) the attorneys’ fees to which Client would otherwise be entitled under Civil Code section 5930. (Civ. Code, §5960.) The Firm is in the process of considering Client’s available options, if any, to address this omission.

###

yn\_adr\_mandatory == "Yes" and yn\_client\_defendant\_complied == "Yes"

Civil Code section 5930 requires parties to attempt alternative dispute resolution prior to filing certain types of lawsuits. While that provision of the Davis-Stirling Act *does* apply in this matter, the opposition complied with the statute and will be in a position to file the requisite Certificate of Compliance.

###

yn\_adr\_mandatory == "Yes" and yn\_client\_defendant\_complied == "No"

Civil Code section 5930 requires parties to attempt alternative dispute resolution prior to filing certain types of lawsuits. That provision of the Davis-Stirling Act applies in this case. *The opposition, however, did not comply with the statute prior to filing against Client.*

Not only does such a failure subject the operative complaint to demurrer, but even if Client were to waive the right to demurrer, Client could conceivably file a motion for judgment on the pleadings. Client could also allow the case to proceed to trial where, even if the opposition were to prevail against Client, the opposition’s failure to abide by the ADR requirements could result in the Court reducing (or virtually eliminating) the attorneys’ fees to which the opposition would otherwise be entitled under Civil Code section 5930. (Civ. Code, §5960.)

###

## Attorneys’ Fees and Costs

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

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"

The prevailing party will be entitled to attorneys’ fees and costs under the Davis-Stirling Act. In addition, the prevailing part will also be entitled to their attorneys’ fees and costs under {{ text\_ccr\_fees }} of the CC&Rs.

###

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

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.

###

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

# FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS

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

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

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

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

1. Any third party listed here should also be listed in the “Parties/Significant Figures” section above. [↑](#footnote-ref-1)
2. 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-2)
3. 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-3)