Litigation Due Diligence Analysis

Fernandez v. Pacific Shores Homeowners Association

By
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1.
SUMMARY

Client has owned the real property located at 645 Pacific Ave., Unit 409, Long Beach, CA 90802 (the "Property"), within the HOA, for 13 years. The Property is located on the top floor of the building where there is no awning. Client believes that the lack of awning has caused water to pour onto the balcony at the Property and not only damage it but also allow for water to enter into the Property. Additionally, Client has observed water intrusion and water damage to her storage unit.

The HOA has previously blamed Client for damage to the balcony, asserting that she has allowed her dogs to urinate on the balcony and that she hosed the balcony down with water, causing damage to the balcony over time. The HOA's position as to Client's storage unit is unclear at this time.

A key issue will be how an ambiguity in the CC&Rs is resolved. One provision appears to put the duty to maintain/repair the balcony on the unit owner, while another provision appears to put that duty on the HOA.

2.
PARTIES/SIGNIFICANT FIGURES

Name of Party / Significant Figure	Significance to Underlying Matter/Dispute
Alma Fernandez as trustee of The Alma Fernandez Living Trust ("Client")	Client
Pacific Shores Homeowners Association ("HOA")	HOA
Classic Property Management Company, Inc. ("CPM")	HOA's Property Management Company
Judy Anderson ("Judy")	CPM Property Manager
Jason Stewart Painting	HOA Contractor
Gerardo Cajero ("Gerardo")	Jason Stewart Employee

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.

3.
STATEMENT OF FACTS / EVIDENTIARY SUPPORT

Date / NA	Fact	Evidence Supporting That Fact
8/22/19	Client wrote to the resident of Unit 310: Thank you for bringing to my attention the "water damage" to your bedroom ceiling. The drainage system connected to my balcony was inspected and there are no leaves nor particles preventing the flow of water entering the drain. It has been my observation that Pacific Shores has had many units with water damage to their ceilings and walls in the past because of the heavy rains we have experienced in the past two years. I am sure that Classic Property Management will send out a company to inspect the "water damage" and will issue suggestions how to remedy your problem. Client forwarded her correspondence to Judy.	WATER DAMAGE LETTER UNIT 310
1/7/20	Client emailed Judy to inform her that, when she returned from being away on 1/4/20, she noticed water damage on the ceiling of the hallway by her unit. Client stated that she knows roof work had been done, but not sure if area above her unit had been worked on. Judy responded and asked Gerardo for an update and to proceed with interior damage.	1/7/20 Client Email
1/9/20	Client met with Gerardo, who told her that ceiling water marks are result of water intruding into unit and that he would let her know when repairs would be done.	Client Timeline

2/19/20	Client sent a follow-up email to Judy, Gerardo. Authorized ceiling repairs not yet done. Client wondered if Gerardo is right person for job, as he seemed very busy. Client also stated, "In addition, I have not had any confirmation as to whether the roof area was ever repaired so that my Unit may be able to avoid future water damage." Judy replied and added Grace Boughner (board president) to the email. Asked Gerardo if he is able to do this job and if he can confirm that roof was repaired. Asked Client if she had further water intrusion due to recent rain. Grace replied, stating she spoke with Gerardo. Gerardo said roofer will be at Property tomorrow to repair. Gerardo asked about scheduling inside work for Saturday. Client replied that she would contact Gerardo.	2/19/20 Client Email
2/27/20	Client emailed Judy, Gerardo, and attorney Keith Bregman (bcc) re issue with ceiling workers. Showed up this day (not Saturday as had been agreed), did some work and said that they would come back in 45 minutes after ceiling dried. Workers did not come back 45 minutes later and Gerardo did not return calls. Client was not home, but person who was home had to cancel their activities for the day to wait for the workers.	2/27/20 Client Email
2/28/20	Judy replied to Client's email and added Grace to email. Apologized and asked Gerardo to help.	2/28/20 Client Email
12/24/22	Client noticed that floor of balcony was weak around drainage area.	Client Timeline
12/27/22	Client emailed Judy to ask for contact information for Gerardo so that he could inspect balcony. Email also stated, "I am aware that the balcony is the homeowners responsibility."	12/27/22 Client Email
12/28/22	After receiving Gerardo's phone number from Judy, Client texted and left voicemail for Gerardo asking when he could inspect balcony Gerardo responded stating he would check which day would work. Client provided her availability.	12/28/22 Client Email / Client Timeline
12/29/22	Client and Gerardo exchanged text messages and agreed that Gerardo would inspect the balcony on January 5, 2023, at 1pm.	Client Timeline
1/5/23	Gerardo inspected the balcony, as well as balcony window and window outside master bedroom. Gerardo said the balcony floor was weak and needed to be replaced. Gerardo said the floor became weak due to water intrusion and pointed out cracks in	Client Timeline

	balcony structure and in frame outside master bedroom window. Gerardo said rainwater, dampness, and excessive moisture over time will produce mold. Gerardo said he would send his report and pictures to Judy and wait for approval to do the work.	
1/21/23	Client and Judy exchanged emails about status of Gerardo's report. Judy said she would reach out to Gerardo.	1/21/23 Client Email
2/8/23	Client texted Gerardo to ask about status. No response from Gerardo.	Client Timeline
2/9/23	Client emailed Judy to ask about Gerardo. Judy said she had not heard anything. Judy emailed Gerardo copying Client and asking for his findings and estimate for Client's balcony and surrounding area.	2/9/23 Client Email
2/19/23	Client and Judy exchanged emails. Judy said she still had not heard from Gerardo. Client asked about working with another vendor, expressing concerns that more moisture will get into the cracks and that two months for an inspection report is too long. Grace followed with Gerardo who said he would be there on 2/20/23 to repair the unit. He also wanted to schedule a date to schedule the inside of the unit.	2/19/23 Client Email
2/21/23	Client emailed Judy and HOA board members, expressing concerns about Gerardo's lack of communication and about need to move forward soon on repair work. Grace Boughner responded, requesting Gerardo to contact Client and instructing tarp covering for Property in the event rain seeped in.	2/21/23 Client Email
2/21/23	Gerardo and Client exchanged texts after above emails. Someone from Gerardo's company will come to Property tomorrow (2/22/23) by 8 or 8:30 am. Client sent confirmation email to Judy and Gerardo.	Client Timeline / 2/22/23 Client Email
2/22/23	Worker (name unknown) came to the Property and replaced window frame in balcony outside the living room window. The worker caulked visible cracks in the balcony.	Client Timeline; 6/17/24 Client Email
2/28/23	Client and Gerardo exchanged text messages about balcony cracks. Gerardo said he will send his balcony report to Judy. Gerardo emailed Judy, Grace and Client saying balcony is weak, needs to be opened to replace damaged wood, waterproof, and paint, water has been coming from wall cracks probably for a few years, and that he is ready to replace (or already replaced?) the sliding door wood frame, which was rotten.	Client Timeline / 2/28/23 Client Email
2/28/23	Client and Grace exchanged emails (with Judy and Gerardo copied on some). Client informed Grace that only window frame was replaced and that the rotten wood still	2/28/23 Client Email

	needs to be replaced. Grace asked Client to schedule remining wood and crack work with Gerardo. Client said someone coming tomorrow to fill in the cracks.	
3/1/23	Client, Grace, and Judy exchanged emails (Gerardo and other board members are copied on some). Client sent email to confirm that Gerardo has clear instructions—i.e., repairs authorized for balcony and surrounding areas where cracks were detected and water intrusion took place (resulting in unstable balcony floor). Judy responds that balcony is exclusive use and to be maintained by owner, and that this common area damage has not been reported timely. Client responds with disagreement, as she did not know of balcony problem until Gerardo's inspection.	3/1/23 Client Email
3/31/23	Client emailed Judy notifying her of water intrusion in Client's storage unit. Pictures attached. Asked when someone could look at the problem. Judy replied and included Roger Rieger (board member), Grace Boughner, and Gerardo on email. Asked Gerardo to take a look and if this is something that needs excavation for waterproofing.	3/31/23 Client Email
4/14/23	Client emailed Judy asking for copy of Gerardo's report re storage area water intrusion. Asked about status of repairs. Judy replied and included Grace and Gerardo on email. Asked Gerardo to provide update. Grace replied asking Client if Gerardo was able to look inside storage unit, which she said might help in determining problem. Grace forwarded email from Gerardo stating that he needs access to garage or storage to check the leak.	4/14/23 Client Email
4/15/23	Client emailed Judy acknowledging 4/14/23 emails. Explained that she needs 4-hour window to take time off from work and move items out of storage so that worker can inspect. Provided dates and times of availability.	4/15/23 Client Email
4/19/23	Grace emailed Client and Judy stating that Gerardo's people came by to inspect storage water leak but they didn't have access. Stated that they will be there again on 4/25/23, or to contact Gerardo and arrange a time.	4/19/23 Client Email
4/21/23	Client replied to Judy stating that she needs 4-hour window of when worker is expected so that Client can take time off from work and move items in storage unit.	4/21/23 Client Email

	Miscellaneous: — Documents produced by the HOA in response to the Firm's demand show miscellaneous work performed by Jason Stewart in light of reported leaks in the building (multiple locations are unspecified), as well as work done to the Property's balcony, as follows: 3. ROTTED WOOD, UNIT 409 BALCONY REPLACED TRIM, SEAL CORNERS (02/14/2023-02/22/2023 invoice) RE: PACIFIC SHORES unit 409 645 PACIFIC AVE. LONG BEACH, CA UNIT BALCONY AREA 1. PRIMER WOOD ANS CALKING CORNERS 2,PAINT FINISH COAT (02/27/2023-03/01/2023 invoices) — A few years ago, the neighbor downstairs complained about water coming down from Client's unit. This was because Client was using water to clean the surface of her balcony. — The HOA has previously blamed Client for damage to the balcony due to her cleaning her balcony. One or more water intrusion events that the HOA has referred to is a leak into Unit 310 (*see* 8/23/19 correspondence above), which Client believes was caused due to rains (there have been a few units with water damage due to the rains). At that time, an inspection of the drainage system (gutters) was conducted and no blockage was detected. — The HOA has previously blamed Client for damage to the balcony by asserting that she has allowed her dogs to urinate on the balcony. Client does not know where they got this information from, as she takes her dogs out to urinate. — To Client's knowledge, the common roof is no longer leaking. — Client never had an awning over her balcony area. There was a previous homeowner from another unit in the 3rd floor that had an awning but it was purchased by her. Client asked the homeowner where she got the awning and she said that she had to pay for it and she had to get approval from the HOA. That homeowner sold her unit and the awning is no longer there. — Client has not gotten any estimates re the balcony and storage unit.	HOA Docs; Retention Notes; Client Emails

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.

4.
NOTABLE PROVISIONS OF THE GOVERNING DOCUMENTS

Document Name Article / Section No.	Text of the Selected Article/Sections No.
CC&Rs Section 1.8	"Common Area" shall mean the entire Condominium Project except the individual Units belonging to each Owner.
CC&Rs Section 1.17	"Exclusive Use Common Area" shall mean that portion of Common Area designed to solely serve a single Unit, but which is located outside the boundaries of that Unit. This shall include but not be limited to any exterior shutters, awnings, window boxes, exterior doors, door frames, and hardware incident thereto, any screens and windows or other fixtures, as well as any internal and external telephone or wiring, etc.
CC&Rs Section 1.28	"Patio" or "Balcony" shall mean a patio or balcony attached to the dwelling area of a Unit and accessible through the Unit of which it is a part.
CC&Rs Section 1.40	"Unit" shall mean the element of a Condominium which is not owned in common with other Owners of other Condominiums. The boundaries of each Unit shall be as described in the Condominium Plan. The maximum number of Units at any time shall be forty-five (45).
CC&Rs Section 8.1	Duty to Maintain Unit and Exclusive Use Common Area. Each Owner shall, at his sole expense, service and repair his Unit and all components of the Unit. This shall include, but not be limited to, all plumbing fixtures and all components of the air-conditioning and heating systems, wherever located (including pipes, ducts, and valves which are visible and reasonably accessible from insider the Unit, and all thermostats, filters and restart buttons located within the Unit or Exclusive Use Common Area), lighting fixtures, refrigerators, dishwashers, disposals, ranges, and ovens within his Unit, together with such paint, tile, carpet, drapes, wallpaper and any other materials used to decorate the interior surfaces of his Unit. **In addition, each Owner shall, at his sole expense, maintain, service, and repair his Exclusive Use Common Area**.

CC&Rs Section 8.2	Duty to Maintain Patio/Balcony. Subject to the provisions of Section 4.3 of this Declaration and **subject further to the responsibilities of the Association to maintain, repair and replace the Common Area**, each Owner shall, at his sole expense, keep clean all components of his Patio or Balcony including the doors, thresholds, awnings, and floor coverings.
CC&Rs Section 8.4	Personal Injury or Property Damage. Each Owner shall fully indemnify, defend and hold harmless, at his sole expense, the Association, its Members. Officers, directors, and employees from all claims or lawsuits which may be brought as a result of any personal injury or property damage sustained in the Owner's Unit.
CC&Rs Section 9.1	Enforcement of Governing Documents. Enforcement of the Governing Documents shall be by any proceeding at law or in equity against any Person violating or attempting to violate said documents either to restrain violation or to recover damages. The following shall have standing to enforce the provisions of said documents: a. The Association. The Board or any Person duly authorized by the Board. b. The Owners. Any Owner or group of Owners.
CC&Rs Section 9.14	Alternative Dispute Resolution. Any party asserting that a dispute exists … between the Association and one or more Owners, and which arises in connection with the management or operation of the Association (other than the collection of Assessments), including but not limited to, claims to enforce or interpret the terms of this Declaration … and which fall within the requirements concerning Requests for Resolution under Section 1354 of the California Civil Code (or any successor statute thereto), shall offer a Request for Resolution to an opposing party under Section 1354, and shall also comply with all additional requirements of this Section 1354.
CC&Rs Section 10.9	Right of Entry to Inspect. Representatives of the Association, contractors, engineers, workers, or any other person designated by the Board ("Authorized Person") shall have the right and authority to enter any Unit to determine the status of Common Area maintenance when a reasonable cause … exists. …

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.

5.
ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

The Firm needs Client to provide any additional information or clarification:

— Is there still water damage to the interior of Client's unit? If so, where?

— Was the damaged hallway ceiling repaired by the HOA? If so, when?

— It appears that the HOA has made partial repairs to the Property's balcony. What specific repairs have been made? Has the HOA addressed the balcony flooring, all windows, and sliding door wood frame?

— Please provide a list of all of the elements that have been damaged (The Firm understands flooring, windows, sliding door wood frame, but anything else? Any structural elements damaged? Sub-flooring damaged? Anything else to Client's knowledge?)

— Where is Client's storage unit located?

— Is the storage unit still leaking?

— What is the source of the leak(s) into the storage unit (if known to Client)?

— Is there any visible water damage/mold in the storage unit?

6.
CIVIL CODE § 5200 DOCUMENT DEMAND

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

7.
ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

At this time, the Firm does not need Client to provide any additional documents. 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.

8.
THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

At this time, Client is unaware of any documents or information that can only be obtained from a third party. This, however, may change as new information comes to light, in which case the LADD may be amended to reflect such new information.

9.
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, or otherwise obtained access to documents supplied by a board member, 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?

9.1.
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.)

9.2.
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.

9.3.
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.

10.
POTENTIAL CAUSES OF ACTION & THE STRENGTHS/WEAKNESSES OF EACH

10.1.
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.)

— 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.)

— 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

— At the outset, it should be noted that there is an ambiguity in the CC&Rs as they apply to this case. On the one hand, Section 8.1 provides that "each Owner shall, at his sole expense, maintain, service and repair his Exclusive Use Common Area." On the other hand, Section 8.2 provides that, "Duty to Maintain Patio/Balcony. . . subject further to the responsibilities of the Association to maintain, repair and replace the Common Area, each Owner shall, at his sole expense, keep clean all components of his Patio or Balcony including the doors, thresholds, awnings, and floor coverings."

— It would seem that the balcony constitutes an "Exclusive Use Common Area" based on the definition of that term in the CC&Rs. The HOA also characterizes it as such in emails with the Client. Under Section 8.1 of the CC&Rs, titled "Duty to Maintain Unit and Exclusive Use Common Area," balcony maintenance, repair, and replacement is the unit owner's responsibility. However, Section 8.2, titled "Duty to Maintain Patio/Balcony," states that unit owners are responsible for keeping the balcony clean, subject to the "responsibilities of the Association to maintain, repair and **replace** the Common Area." [Emphasis added.] The HOA may argue that Balcony is an Exclusive Use Common Area, as opposed to just a regular Common Area, and therefore Section 8.1 prevails. But then what is the point of the provision in Section 8.2 about Balcony cleaning being subject to the HOA's duty to maintain, repair, and replace?

— Civil Code section 4145 defines exclusive use common area as including balconies and patios where an association's governing documents do not specify. Furthermore, Civil Code section 4775(a)(3) makes the HOA responsible for repairing and replacing exclusive use common areas when the governing documents are silent on them, although the statute does not explain what "maintenance" means.

— At least three principles of contract interpretation support an interpretation of the CC&Rs in favor of the Client. **First**, "when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 834.) **Second**, ambiguities should be interpreted against the drafter or party who caused the ambiguity. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 747; Civ. Code, § 1654.) **Third**, to the extent possible, every part of a contract should be given effect.

(*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 503; Civ. Code, § 1641.)

— It may be argued that Section 8.2 above is the more specific and operative provision, and that the HOA is responsible for maintaining, repairing, and replacing the entirety of the balcony (including without limitation, its structural components [e.g., cracked stucco], flooring, windows, door frame, etc.) the HOA has breached the CC&Rs by failing and/or refusing to adequately and/or fully repair Client's balcony (to be confirmed upon obtaining clarification from Client as set forth in section 5 above). In any event, if the HOA failed to adequately and/or timely inspect, maintain, and/or repair other common area elements (e.g., the roof, gutters, or common pipes), resulting in water intrusion and water damage to Client's balcony, the HOA will be further liable for breaching the CC&Rs.

— Assuming Section 8.2 is the operative provision, Client has a strong claim that the HOA has breached the CC&Rs. Even if Client has a duty to maintain and repair the balcony, it may be argued that the HOA has the duty to replace the balcony under the CC&Rs and the Civil Code.

— There is a reference in the file to the fact that the Client used water to clean the surface of the balcony, at one point causing her downstairs neighbor to complain. If there was excessive/improper water usage on the balcony on the part of Client, the HOA could argue that the damage to the balcony was caused by the Client. There is also a reference to the fact that the Client's dog(s) peed on the balcony, although it is unclear how often that would have to happen for it to be a contributing factor to the balcony's deterioration.

— Based on the information currently available to the Firm and the language in the CC&Rs, it is currently unclear whether Client's storage unit is a "common area". It is likely that the storage unit is deemed part of Client's unit or an "exclusive use common area." Even so, in the event the HOA failed to adequately and/or timely inspect, maintain, and/or repair other common area elements (e.g., a common pipe), resulting in water intrusion and water damage to Client's storage unit, the HOA will be further liable for breaching the CC&Rs.

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

— Based on the foregoing, Client likely has a viable claim for breach of CC&Rs.

10.2.
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.)

— 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.

— 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.

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

— The HOA owes Client a general duty of care to Client, including without limitation, a duty not to cause damage to the Property.

— As discussed above, there is some ambiguity as to whether the HOA's duty to maintain and repair regular Common Areas under the CC&Rs applies to the balcony. Assuming it does apply and/or assuming the water intrusion into the balcony stemmed from the balcony itself or other common area elements, it may be argued that the HOA has breached that duty by failing to adequately and/or timely inspect, maintain, and/or repair the balcony and/or other common area elements, as well as by failing to install an awning or take other measures to prevent water from pouring onto balcony, resulting in damage to the Property.

— Assuming Section 8.2 (and not Section 8.1) of the CC&Rs is the operative provision, Client has claim that the HOA was negligent in failing to maintain the balcony in safe/good condition.

— As discussed above, it is currently whether the HOA is responsible for inspecting, maintaining, and repairing Client's storage unit. The source of water intrusion into Client's storage unit is yet unclear. Assuming that the water intrusion into the storage unit stemmed from the storage unit itself or other common area elements, it may be argued that the HOA has breached that duty by failing to adequately and/or timely inspect, maintain, and/or repair the storage unit and/or other common area elements, resulting in damage to the Property.

— The Firm is not currently in possession of any evidence indicating that the HOA was or should be aware of the issues with Client's balcony. The HOA appears to claim it was not aware of the issues with the balcony. In one of the emails, the property manager implies that they have no way to know about the balcony's condition unless the unit owner tells them.

— Similarly, the Firm is not currently in possession of any evidence indicating that the HOA was or should be aware of the issues with Client's storage unit.

— There is reference in the file to the fact that the Client used water to clean the surface of the balcony, at one point causing her downstairs neighbor to complain. If there was excessive/improper water usage on the balcony on the part of the Client, the HOA could argue that the damage to the balcony was caused by the Client. There is also reference to the fact that the Client's dog peed on the balcony, although it is unclear how often that had to have happened for it to be a contributing factor to the balcony's deterioration.

— Yet, Section 10.9 of the CC&Rs gives the HOA a right to enter units for purposes of inspection. This right can be utilized to inspect common areas that the HOA has a duty to maintain and repair. The fact that the HOA may not have done so does not absolve them of their duty to maintain and repair the balcony and/or storage unit.

— Additionally, in early 2020, there were communications between Client and HOA about need for repairs to the roof area by Client's Property. We can't tell based on the information we have

currently, but if those repairs were not done properly and that contributed to the water damage to balcony and/or storage unit area, then this may be another basis for negligence claim.

— One issue is the three-year statute of limitations for injury to property. Because the Property experienced a ceiling water intrusion issue several years ago, with the Client first becoming aware of it in January 2020, it could be argued that the Client was on notice and should have known that other areas of the Property could be suffering from water intrusion issues no later than January 2020. The statute of limitations for negligence generally does not begin to run until the last element of the cause of action occurs, i.e., damage, but there is case law that apply variations of the discovery rule (i.e., the statute of limitations runs from the point in time when plaintiff should have known about the injury or the negligent cause). (*Siegel v. Anderson Homes, Inc*. (2004) 118 Cal.App.4th 994, 1011-1015.)

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

— Based on the foregoing, Client likely has a viable claim for negligence.

10.3.
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."

— The "enforcement" issues discussed in the context of the "Breach of CC&Rs" and "Negligence" causes of action above are also applicable to a breach of fiduciary duty claim.

— 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 breach of fiduciary duty claim.

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

— As a member of the HOA, the HOA owes Client fiduciary duties of loyalty and care, as well as a duty to enforce and comply with the CC&Rs. As discussed below, it may be argued that the HOA breached these duties by failing to adequately and/or timely inspect, maintain, and/or repair Client's balcony, storage unit, and/or other common area elements, resulting in damage to the Property.

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

— Based on the foregoing, Client likely has a viable claim for breach of fiduciary duty.

10.4.
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.)

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

— Section 8.2 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

— In light of Section 8.2 of the CC&Rs, it may be argued that the HOA is liable for creating a private continuance nuisance because it has failed to comply with its own governing documents—specifically, by failing to adequately and/or timely inspect, maintain, and/or repair Client's balcony, storage unit, and/or other common area elements—thereby allowing the balcony, storage unit, and/or

other common area elements to remain in a state of disrepair and interfering with Client's use and enjoyment of the Property.

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

— Based on the foregoing, Client likely has a viable claim for nuisance.

10.5.
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.

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

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

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

— An actual controversy exists between Client and the HOA. Client maintains, among other things, that the HOA has a duty and must act to: (i) adequately and timely inspect and maintain the Property's balcony and storage unit; (ii) investigate and address all sources of water intrusion into the Property's balcony and storage unit; and (iii) repair all water damage to the Property's balcony and storage unit, at its own expense. On the other hand, the HOA appears to dispute the foregoing contentions.

— The actual controversy between Client and the HOA involves the HOA's continuing misconduct that will have future consequences. The actual controversy is ripe for judicial intervention as the HOA's misconduct is causing Client harm. While the other causes of action may address the harm to Client, the other causes of action do not request an affirmative determination from the court as set forth above. As a result, declaratory relief is necessary.

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

— Based on the foregoing, Client likely has a viable claim for declaratory relief.

10.6.
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

— The HOA is liable to Client for breach of the implied covenant for the same reasons it is liable to her for its contractual breaches. Client had an obligation to report common area maintenance issues and damage resulting from those issues, which she promptly did. The HOA, however, has shown a lack of commitment to address the water intrusion events at the Property and the damage resulting from these events, interfering with the benefits conferred upon Client under its governing documents.

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

— Based on the foregoing, Client likely has a viable claim for breach of the implied covenant.

11.
STRATEGIC CONSIDERATIONS

11.1.
Statute of Limitations

This section is *not* intended to address whether or not the statute of limitations has run on a particular cause of action that might have otherwise been relevant under the facts. Those specifics can be found in reference to each of the potential causes of action discussed above. This section of the LADD is intended only to highlight the earliest statute of limitations of a claim that remains available to Client.

If Client wants to file a lawsuit containing the applicable the causes of action discussed above, the action must be filed on or before **December 24, 2025** (the *earliest* of the applicable non-expired statutes of limitations deadlines given the desired causes of action).

11.2.
Applicability of Davis-Stirling Act

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

11.3.
Jurisdiction

11.3.1.
Arbitration

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

11.3.2.
Venue

Because the issues related to the current dispute involve Client's property, which is located in Los Angeles County, that is the appropriate venue for this case.

11.4.
Standing

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

11.5.
Anti-SLAPP Analysis

Anti-SLAPP Overview—

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

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

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

- SLAPP suits can, and have, arisen in lawsuits by and against HOAs and HOA members. For example, a member might file a lawsuit against a director or committee member to pressure that person to change a critical vote regarding some issue or another. To prevent that type of abuse, and

to discourage members from naming individual board members as defendants in litigation, courts have determined that the protections offered under the anti-SLAPP statute apply to various issues that arise in the HOA arena. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130-36 [tree trimming dispute between adjacent homeowners that involved covenants to all lots in the community satisfied the definition of "public interest"]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476-77 [newsletter published to 3,000 residents of an HOA was a "public forum" even if access to the newsletter was selective and limited]; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1409-10 [letters from attorney to management company and the HOA's board regarding nuisance caused by an HOA member].)

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

Anti-SLAPP Test—

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

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

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

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

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

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

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

Application/Analysis/Conclusion—

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

11.6.
Pre-Filing Requirements
(e.g., Notice or Mediation Requirements)

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.

11.7.
Attorneys' Fees and Costs

The prevailing party is entitled to attorneys' fees and costs under the Davis-Stirling Act. The prevailing party is also entitled to their attorneys' fees and costs under Article 21, Section 21.9 of the CC&Rs.

If new information comes to light that affects Client's right to attorneys' fees and costs, Client will be notified.

12.
FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS

The Firm highly recommends that Client obtain estimates for the damage to her balcony and storage unit to be provided by the HOA in discovery and/or in a future settlement demand. Expert testimony on these issues may be necessary regardless of any such estimates if Client's case proceeds to trial.

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.
