

# Litigation Due Diligence Analysis

Bolufe v. Crescent Gardens COA and  
Kenneth Dittmer Jr.

By  
RD  
January 15, 2024

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## 1. SUMMARY

Ana Bolufe and Ernesto Buscaron (the “Clients”) own the real property located at 9597 Crescent Garden Dr., #D-101, Naples, FL 34109 (the “Unit”), which is located within the Crescent Gardens Condominium Association, Inc. (the “COA”). Three leaks that originated from Clients’ upstairs neighbor, Kenneth Dittmer Jr.’s (“Dittmer”) unit resulted in water damage to the Property. Dittmer’s unit is located at 9597 Crescent Garden Dr., #D-201 (the “Upstairs Unit”). Kristen Lynn (“Lynn”) and her daughter, Brittney Ryan (“BR”)<sup>1</sup> frequently or permanently reside with Dittmer in the Upstairs Unit. The COA inspected the Upstairs Unit and determined that the leak was from his air conditioner’s condensate pan. Dittmer refused to take any responsibility for the water intrusion, causing toxic mold growth within the walls of the Property. Despite having never conducted an inspection of the Upstairs Unit, Dittmer’s insurance carrier, Alder Adjusting, denied liability for Clients’ water damage. On August 11, 2022, the COA inspected the Upstairs Unit but failed or refused to provide a copy of the inspection to Clients despite repeated requests.

Beginning on July 11, 2022 through July 18, 2022, Clients conducted mold remediation to mitigate the damage to the Unit from Dittmer’s water leak. The Clients and their young children were displaced and forced to live in a hotel during the mold remediation process. Clients and the COA discussed settlement for the first two leaks. But on July 27, 2023, Clients discovered and notified the Property Manager of a third water leak into the Unit from the Upstairs Unit. Clients want to be reimbursed for the out-of-pocket costs they incurred due to the repeated leaks that caused extensive water damage to the Unit, which included mold remediation and hotel expenses while Clients were displaced for same.

Further, Clients want the COA to abide by and enforce its governing documents against all unit owners, including members of the COA Board, regarding the safety and appearance of the community. Specifically, Clients want the COA Board to enforce the parking rules and regulations, levy fines for hanging garments and other prohibited items from the railings and stairways within the community, and maintain, repair, and/or replace all missing or deteriorating railings within the community.

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## 2. PARTIES/SIGNIFICANT FIGURES

Name of Party / Significant Figure	Significance to Underlying Matter/Dispute
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<sup>1</sup> Lynn’s daughter, BR, is a person with disabilities, according the Clients.

Ana Bolufe and Ernesto Buscaron (“Clients”)	Clients / Owners
Crescent Gardens Condominium Association, Inc. (“COA”)	COA
Dayle Cartwright	COA President
Bela Kalapos and Goran Zdravkovski	COA Board Members
Kenneth “Butch” Dittmer (“Dittmer”) and Kristen Lynn (“Lynn”)	Clients’ upstairs neighbors / Owner and Guest
Jayme Martin (“Martin”)	Clients’ aggrieved neighbor / Owner
Gulf Breeze Management Services (“Gulf Breeze”)	COA’s Property Manager
Alder Adjusting	Dittmer’s Claims Adjuster

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

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### 3. STATEMENT OF FACTS / EVIDENTIARY SUPPORT

Date / NA	Fact	Evidence Supporting That Fact
4/20/18	No election was held (only two candidates for two open positions).	2018 CG Annual Meeting

10/25/18	Board meeting was held. No discussions relevant to Clients' case.	2018 CG BOD Meeting Minutes 2018-10-25
11/27/18	Board meeting was held. No discussions relevant to Clients' case.	2018 CG BOD Meeting Minutes 2018-11-27
3/21/19	Annual meeting was held. No election was held.	2019 CG Annual Meeting
6/5/19	Board meeting was held. No discussions relevant to Clients' case.	2019 CG BOD Meeting Minutes 2019-06-05
<b>10/26/20</b>	<b>Clients purchased the Unit.</b>	<b>Retention notes</b>
3/26/20	Annual meeting was held. Dayle Cartwright and Bela Kalapos were elected. Financials approved. Discussions re repair/maintenance projects	2020 CG Annual Meeting; 2020 - CG BOD Meeting Minutes 2020-03-26
3/5/21	The Property Manager corresponded with all Owners regarding the parking issues, including vehicles blocking resident driveways and parking in areas clearly designated as "No Parking." The Property Manager advised that the COA would start towing vehicles that were blocking residents and preventing trash collection within the community.	2021_03_21 Property Manager-Owners re Crescent Gardens Owners – Car Being Towed
3/25/21	Annual meeting was held. Quorum not established. Board will appoint a director.	2021 CG Annual Meeting
<b>4/19/21</b>	<b>Clients noticed a water intrusion from the unit above the Property located at 9597 Crescent Garden Dr., #D-201 (the "Upstairs Unit"). Dittmer owns the Upstairs Unit. Clients emailed the Property Manager seeking instructions regarding the leak from the Upstairs Unit.</b>	<b>2021_04_19 Clients-Property Manager re First Water Leak</b>

5/10/21	While investigating the extent of the water damage, Clients discovered black mold in the master bathroom and the wall between the Unit's den and master closet. Clients emailed the Property Manager seeking additional guidance re same.	2021_05_10 Clients-COA re First Water Leak; 2021_05_06 Water Trace, 2021_05_06 Master Closet Wall, 2021_05_06 Master Bath Wall, 2021_05_06 Master Bath Baseboard 1, and 2021_05_06 Master Bath Baseboard 2
5/12/21	The Property Manager scheduled an inspection of the Unit and the Upstairs Unit for May 13, 2021. A member of the Property Manager's maintenance team, Julio [Last name unknown], inspected both units.	2021_05_12 Property Manager-Clients re First Water Leak
5/13/21	Julio inspected the Unit.	Retention Notes
8/17/21	The Property Manager corresponded with the Owners on behalf of the COA Board notifying them of a community-wide roof replacement project expected at a later date. The notice cautioned Owners: "Please be aware the parking situation Crescent Gardens will be at a bare minimum.... Owners, please get with your renters) and advise them of the situation. All parking should be in the garage and driveway. Two spaces per owner, driveway and garage....the parking around the building is for guest parking and will be at a minimum....."	2021_08_17 Property Manager-Owners re Crescent Gardens Roof Replacement
10/4/21	The COA began a community-wide roof project that required residents to move their cars from the building before work began. The roof project precipitated ongoing parking issues and lack of available parking within the community.	2021_09_21 Property Manager-Owners re Crescent Gardens Roof Update – Schedule Date; 2021_09_20 Roof Replacement Notice

12/14/21	Martin corresponded with the Property Manager about the ongoing parking violations. Martin specified that residents, Lynn and Dittmer, had four cars (double the allotted number) with one of the vehicles parked in front of Martin's unit taking up two parking spots. She expressed her frustration that this the parking issue is against the Governing Documents, yet the COA had taken no action and the residents had not been fined.	2021_12_14 Martin-Property Manager re Parking Again
12/17/21	Clients corresponded with the Property Manager with a proposed parking tag system to cure overnight parking violations. The Property Manager responded to Clients that it would relay the parking tag proposal to the COA Board.	2021_12_17 Clients-Property Manager re Crescent Garden Parking; 2021_12_17 Property Manager-Clients re Crescent Garden Parking
12/19/21	Martin followed up with the Property Manager about the parking issues because her car had just been hit in the parking lot. She also told the Property Manager she would seek legal action if the COA Board continued to take no action. The Property Manager forwarded this correspondence to the COA Board and agreed that Martin would have a case against the COA Board for its failure to act if she sought legal action.	2021_12_19 Martin-Property Manager re Parking Again; 2021_12_19 Property Manager-COA re Parking Again
12/19/21	Board Member, Bela Kalapos, expressed an eagerness to implement Clients' proposed parking tag system and stated, "I think we should implement it and start enforcing with the \$50 fine and towaway option ASAP." The HOA President, Dayle Cartwright, questioned the logistics of implementing such a system, especially regarding towing. Bela Kalapos suggested they implement the parking tag system with a \$50 fine to start. Mr. Kalapos then provided a link for an order of 36 parking tags costing about \$200 and a proposed parking tag numbering system for residents. Mr. Kalapos followed up about two weeks later seeking a response to his proposal. Despite Mr. Kalapos's initial interest, no response or additional action was taken to effectuate Mr. Kalapos's proposed order and numbering system – even after additional follow up from the Clients about the implementation of the tag proposal on January 8, 2022.	2021_12_19 COA-Clients re Crescent Garden Parking; 2021_12_19 COA-Clients re Crescent Garden Parking(1-4); 2022_01_04 COA-Clients re Crescent Garden Parking
12/29/21	The Property Manager corresponded with all Owners notifying them of regular complaints regarding parking violations. The email reiterated the community rules relating to assigned parking, number of vehicles allowed, and restriction on commercial vehicles and trailers.	2021_12_29 Property Manager-Owners re Crescent Garden Parking Violations



1/13/22	Martin emailed the COA notifying it that, after consulting with an attorney, the COA was in breach of the Governing Documents and Florida Statutes due to their failure to enforce the parking rules within the CC&Rs and Bylaws. Additionally, the Board did not meet the minimum requirement of Board members per Florida Statute and the Bylaws. The Property Manager responded that the COA believed her issue with Dittmer to be “resolved when the roof project started and we were told he sold the vehicles.” The Property Manager further advised that the COA could not begin enforcing the parking rules now since prior boards had not because that “could be considered selective enforcement.”	2022_01_13 Martin-Property Manager re HOA Parking – Legal; 2022_01_13 Property Manager-Martin re HOA Parking – Legal
1/13/22	Bela Kalapos notified the Board, the Property Manager, Clients, and Martin that he was resigning from his Board seat effective immediately so that Martin could fill the position working to resolving the parking issues.	2022_01_13 Kalapos-COA re Resignation
1/17/22	Mr. Buscaron followed up on Ms. Kalapos’s resignation email to express his interest in joining the COA Board. He asked the Board to advise of next steps.	2022_01_17 Clients-COA re Kalapos Resignation
1/18/22	The Property Manager responded to Mr. Buscaron’s request for candidacy and stated that the COA Board did not accept Mr. Kalapos’s resignation and that he would stay on the Board. Martin asked the Property Manager when the next Annual Meeting would take place and expressed her frustrations with the current COA Board.	2022_01_18 Property Manager-Clients re Kalapos Resignation; 2022_01_18 Martin-Property Manager re Kalapos Resignation
1/20/22	Clients joined Martin’s interest in attending the next Annual Meeting to address the COA Board’s shortcomings. The Property Manager advised that the next scheduled Annual Meeting was March and suggested Clients and Martin delay any action until they could be elected at the next Annual Meeting.	2022_01_20 Clients-Property Manager re Kalapos Resignation; 2022_01_20 Property Manager-Clients re Kalapos Resignation

1/17/22 and 1/20/22	Clients corresponded with the Property Manager to follow up on the COA's lack of enforcement for parking violations and seeking a date certain for the COA Board to address the parking issue.	2022_01_17 Clients-Property Manager re Crescent Gardens COA Parking; 2022_01_20 Clients-Property Manager re Crescent Gardens COA Parking
1/17/22 and 1/20/22	Clients notified the Property Manager that the owner of Unit 202 in Building 9589 consistently hangs swimming and diving suits from the stairway railing and was late in removing Christmas decorations from the unit's lanai. Clients pointed out that the unit may belong to the HOA President.	2022_01_17 Clients-Property Manager re Crescent Gardens COA Railings Compla int; 2022_01_20 Clients-Property Manager re Crescent Gardens COA Railings Complaint
2/3/22	Mr. Buscaron submitted his notice of intent to run for the COA's Board of Directors. Within his candidate information sheet, Mr. Buscaron included safety concerns relating to railing issues, parking violations, and Board noncompliance as some of the issues facing the associaton. Mr. Buscaron was not elected and the election results were never posted.	Retention Notes; 2022_01_14 Notice of Intent to be a Candidate for the Board of Directors of Crescent Gardens Condominium Association, Inc.; 2022_01_24 Information Sheet Candidate for Election to Board of Directors

2/28/22	Clients requested a parking update from the Property Manager. They further advised that one of the cars violating the parking rules was the HOA President. The email attached photo examples of the parking violations, including Mr. Cartwright's car parked in a guest parking spot.	2022_02_28 Clients-Property Manager re Parking Update Request
3/3/22	Board meeting was held. No discussions relevant to Clients' case.	2022 - CG BOD Meeting Minutes 2022-03-02
3/3/22	<b>Clients discovered additional black mold infecting the walls of the Unit while replacing can lights in the Unit's ceiling. The black mold growth was located around the air conditioner. Clients reported the second water leak to the Property Manager requesting that the COA inspect it. Clients filed a claim with their insurer for water damage to the Unit that same day.</b>	<b>2022_03_03 Clients-Property Manager re Second Water Leak; 2022_08_26 All Service Adjusting Inspection Report</b>
3/10/22	Clients again requested an update from the Property Manager on parking. They advised that it "continues to be terrible." The email attached photo examples of the parking violations, including the HOA President's car parked outside of the designated parking area.	2022_03_10 Clients-Property Manager re Second Parking Update Request
3/14/22	Martin and Clients corresponded with the Property Manager to provide photos of more parking violations and clothes drying from Mr. Cartwright's stair rail.	2022_03_14 Clients-Property Manager re Third Parking and Railing Update Request
3/22/22	Clients corresponded with the Property Manager regarding the second leak into the Unit and advised that their homeowner's policy only covered "from the paint outward" and that "[a]ny mold behind the wall would be the responsibility of the [C]OA." The Property Manager responded that owners are responsible for mold remediation, not the COA, and that the COA would replace the drywall once the mold was removed.	2022_03_22 Clients-Property Manager re Liability for Second Leak Water Damage; 2022_03_22 Property Manager-Clients re Liability for Second Leak Water Damage
3/23/22	Election was held. No quorum established. Board agreed to remain the same.	2021 CG Annual Meeting, Proxies, Sign-in Sheet

4/28/22	Clients followed up with the Property Manager regarding the second leak into the Unit to provide a link to video footage of water dripping from the Unit's ceiling. Clients urged the COA to provide a next step because his family's health was at risk.	2022_04_28 Clients-Property Manager re Liability for Second Leak Water Damage
5/2/22	Clients followed up with the Property Manager again regarding the second leak and provided an additional video of water dripping from the Unit's ceiling. They continued to express health concerns for the recurring black mold growth in the Unit. The Property Manager acknowledged that the leak appeared to come from the Upstairs Unit but stated that the leak was "[n]ot an association issue. Instead, she suggested that Clients "try to knock on their door and advise them of the leak." She further provided Clients with the only email address she had on file for Dittmer but stated that she didn't know if it was correct or not. The email address provided for Dittmer was problemchildbd@gmail.com.	2022_05_02 Clients-Property Manager re Liability for Second Leak Water Damage; 2022_05_02 Property Manager-Clients re Liability for Second Leak Water Damage; 2022_05_02 Property Manager-Clients re Dittmer Email Address
5/4/22	Board meeting was held. No discussions relevant to Clients' case.	2022 - CG BOD Meeting Minutes 2022-05-04
5/10/22	Clients posted a letter on the front door of the Upstairs Unit addressed to Dittmer and notifying him that his defective air conditioning unit was causing a water intrusion and continuing water damage and mold growth into the Unit. Clients urged Dittmer to correct the leak as soon as possible because of the great financial expense and health risk to Clients and their family. The letter also provided Dittmer with a timeline of the water leaks and damage to the Unit from the Upstairs Unit to date. Clients provided a copy of the letter to the COA Board.	2022_05_10 Clients-Dittmer re Warning Letter
5/16/22	Clients asked the Property Manager about broken stair railings and raised concern over the safety issues should someone slip and fall.	2022_05_16 Clients-Property Manager re Broken Stair Rails
5/18/22	Clients notified the Property Manager of loud and obnoxious scratching on the walls that could be heard from Unit 201 in Building 9597 [the Upstairs Unit]. Clients pointed out that the owners of that unit had two dogs, a cat, and birds in violation of the Governing Documents' restriction to one small, domesticated animal and two small caged birds.	2022_05_18 Clients-Property Manager re Noise Caused by Dittmer's Pets

5/26/22	Clients contracted with AdvantaClean to inspect the Unit and prepare an estimate for mold remediation related to the second water leak into the Unit from the Upstairs Unit. The estimated mold remediation costs were in the amount of \$8,059.18.	2022_05_26 AdvantaClean Scheduled Proposal
6/11/22	Clients notified the Property Manager that Dittmer and Lynn removed the stair railings leading to the Upstairs Unit moving a large piece of equipment into his unit. Clients provided a photo of Dittmer unloading the equipment onto the stairway. The Property Manager advised Clients that this was not permitted and that the COA Board would look into the matter. No action was taken against Dittmer and Lynn regarding the missing stair railing. (Clients filed a complaint with Collier County for the stair railing issues after Dittmer removed his stair railing. Collier County closed the complaint finding that the railings are okay).	2022_06_11 Clients-Property Manager re Stair Railings Crescent Garden; 2022_06_11 Dittmer Stair Railing Removed; Retention Notes
6/17/22	Alder Adjusting wrote to Clients re denial of Clients' claim. The denial letter was sent despite the fact that Clients never filed a claim against Dittmer's insurance. The denial letter references a date of loss of May 10, 2022, the same Clients' posted notice of the leaks on Dittmer's front door. The denial letter states that Dittmer is not liable for Clients' damages even though Alder Adjusting never conducted an inspection of the Unit or the resulting water damages.	2022_06_17 Alder Adjusting- Clients re Alder Adjusting Denial Letter; Retention notes
7/6/22	FIGA wrote to Clients re insolvency of Lighthouse Insurance. States FIGA assumed the handling of Clients' claim, assigned Denny Martin as adjuster, advised Clients of right to mediate.	2022_07_06 FIGA Letter
7/10/22 – 7/15/22	Clients were forced to stay in a hotel during the nearly weeklong mold remediation of the Unit.	2022_07_15 Hawthorn Suites by Wyndham Naples Hotel Invoice
7/11/22 – 7/15/22	AdvantaClean performed mold remediation services at the Unit in the amount of \$8,059.18.	2022_05_26 AdvantaClean Scheduled Proposal
7/13/22	Clients corresponded with the Property Manager regarding damage to the Unit's pipes and the need for their immediate removal and replacement, as well as reconstruction of the affected wall. Clients provided a photo of the deteriorated pipes.	Retention Notes; 2022_07_13 Damaged Pipes
7/18/22	Clients contracted with Blue Line Environmental Services to perform an air quality test at the Unit. The cost of the air quality test was in the amount of \$235.00.	2022_07_18 Blue Line Environmental Services Sales Receipt
8/2/22	The Property Manager corresponded with Dittmer on behalf of Board and explained that the COA was notified of several leaks coming from Dittmer's unit and resulting black mold to the unit below. The letter acknowledged the COA's maintenance enforcement obligation contained in the Governing Documents. The Property Manager further advised Dittmer that the COA scheduled a water test at the Upstairs Unit for August 11, 2022.	2022_08_02 Property Manager-Dittmer re Leak

8/2/22	The Property Manager sent a certified letter on behalf of the COA Board to Dittmer notifying him of the scheduled water test for August 11, 2022. Clients responded that they would be available for the water test to the Unit and emphasized that the Unit “is a wreck right now.”	2022_08_02 Property Manager-Clients re Dittmer Unit Maintenance; 2022_08_02 Clients-Property Manager re Dittmer Unit Maintenance
8/11/22	The COA inspected and performed water testing at the Unit and the Upstairs Unit. The COA failed or refused to provide the results of the inspection of the Upstairs Unit to Clients, despite repeated requests for same.	2022_08_02 Property Manager-Clients re Dittmer Unit Maintenance; Retention Notes
8/26/22	All Service Adjusting inspected the Unit for water damage related to Clients claim of loss on March 3, 2022. The estimated cost to repair the water damages was in the amount of \$37,186.21.	2022_08_26 All Service Adjusting Inspection Report
7/27/23	<b>Third water leak into the Unit from the Upstairs Unit.</b>	<b>2023_07_27 CCTV Inside Ceiling</b>
7/27/23	Clients notified the Property Manager of the third water leak into the Unit from the Upstairs Unit.	Client Notes
7/28/23	Clients followed up with the Property Manager regarding the third water leak and requested the COA’s help in mitigating the damages. The COA sent a maintenance personnel to inspect the Unit and take pictures, yet no action has been taken by the COA Board to end the constant water intrusion into the Unit.	Client Notes
8/16/23	Clients contracted with Becker Home Maintenance to inspect the Unit and prepare an estimate of water damages related to the third water intrusion into the Unit from the Upstairs Unit. The estimated water damages were in the amount of \$10,974.00.	2023_08_17 Becker Home Maintenance Estimate #1586
8/17/23	Clients contracted with AdvantaClean to inspect the Unit and prepare an estimate for mold remediation related to the third water intrusion into the Unit from the Upstairs Unit. The estimated water damages were in the amount of \$799.00.	2023_08_17 AdvantaClean Accepted Proposal
8/23/22	Clients contacted the Property Manager about consistent and disruptive noise coming from the Upstairs Unit that sounded like industrial machinery. The noise happened day and night, which caused them to be sleep deprived and increased their stress levels. Clients conveyed that the noise made it impossible for them to enjoy a peaceful living environment.	Client Notes

8/29/23	Clients corresponded with the Property Manager regarding the COA’s ongoing failure to enforce the Governing Documents against parking violations and consequent safety issues re same.	2023_08_29 Clients-Property Manager re Crescent Garden Parking Issue; 2023_08_13 Vehicles Parked Near Fire Hydrant
	Miscellaneous:	
	Dittmer had no outstanding balance with the COA from January 2020-August 2022 during this period of ongoing water intrusion from his unit into Clients’.	Assessment Report 01-01-2020 thru 08-31-2022
	<div>Dittmer’s Unit Maintenance Payments:</div> <div><div>D201</div><div>DITTMER</div><div>\$0.00</div><div>04/01/20</div><div>969.00</div><div>02/28/20</div><div>1,200.00</div><div>01/12/21</div><div>25.00+</div><div>04/01/20</div><div>168.00</div><div>01/12/21</div><div>3,663.00</div><div>07/17/21</div><div>25.00+</div><div>04/01/20</div><div>63.00</div><div>08/31/21</div><div>2,000.00</div><div>01/10/22</div><div>25.00+</div><div>07/01/20</div><div>969.00</div><div>04/04/22</div><div>3,500.00</div><div>01/10/22</div><div>25.00+</div><div>07/01/20</div><div>168.00</div><div>06/29/22</div><div>2,596.43</div><div>04/13/22</div><div>25.00+</div><div>07/01/20</div><div>63.00</div><div>06/29/22</div><div>4,400.00</div><div>05/03/22</div><div>25.00+</div><div>10/01/20</div><div>969.00</div><div>10/01/20</div><div>168.00</div><div>10/01/20</div><div>63.00</div><div>01/01/21</div><div>1012.00</div><div>04/01/21</div><div>168.00</div></div> <div>Clients’ Notes</div>	
1/1/20	Quarterly assessment of \$1,200.00 became due.	
2/28/20	Dittmer paid \$1,200.00 and was assessed a \$25.00 late fee.	
4/1/20	Quarterly assessment of \$1,200.00 became due.	
7/1/20	Quarterly assessment of \$1,200.00 became due.	
10/1/20	Quarterly assessment of \$1,200.00 became due.	
	Dittmer should have made three additional payments of \$1,200.00, or \$3,600.00 and should have been assessed a \$25.00 late fee per assessment for failing to make those additional payments, or \$75.00. Further, interest accrued on the assessments. Dittmer owed <b>\$3,770.00</b> in late assessments and fees, plus accrued interest.	
1/1/21	Quarterly assessment of \$1,263.00 became due.	
1/12/21	Dittmer paid \$3,663.00. Dittmer should have made an additional payment of \$1,200.00 and should have been assessed a \$25.00 late fee for the assessment for failing to make the additional payment. Further, interest accrued on the assesement. Dittmer owed <b>\$1,395.00</b> in late assessments and fees, plus accrued interest.	
4/1/21	Quarterly assessment of \$1,263.00 became due.	
7/1/21	Quarterly assessment of \$1,263.00 became due.	
8/31/21	Dittmer paid \$2,000.00. Dittmer should have made two additional payments of \$1,263.00, or \$2,526.00 and should have been assessed a \$25.00 late fee per assessment for failing to make those additional payments, or \$50.00. Further, interest accrued on the assessments. Dittmer owed <b>\$1,971.00</b> in late assessments and fees, plus accrued interest.	
1/1/22	Quarterly assessment of \$1,263.00 became due.	

4/1/22	Quarterly assessment of \$1,263.00 became due.	
4/4/22	Dittmer paid \$3,500.00. Dittmer should have made an additional payment of \$1,263.00 and should have been assessed a \$25.00 late fee for the assessment for failing to make the additional payment. Further, interest accrued on the assesment. Dittmer owed <b>\$1,022.00</b> in late assessments and fees, plus accrued interest.	
6/29/22	Dittmer paid \$2,596.43.	
6/29/22	Dittmer paid \$4,400.00.	
7/1/22	Quarterly assessment of \$1,263.00 became due.	
10/1/22	Quarterly assessment of \$1,263.00 became due. Dittmer's account should have ended with a surplus of <b>\$3,4448.43</b> .	
	Dittmer's account ended 2022 with a surplus in the amount of <b>\$3,850.00</b> .	Crescent Garden HOA 2022 Activity Report
	Board Member, Bela Kalapos, defaulted on his COA Assessments. Mr. Kalapos owes \$376.12. The COA Board did not enforce the assessment against Mr. Kalapos.	F201 Debt; H022 Kalapos Debt (1-2); Client notes
	Marc Podkowik defaulted on his COA Assessments. The COA Board did not enforce the assessment against Mr. Podkowik. Mr. Podkowik has a credit of \$2,587.00.	J202 Debt; Client notes
	Dittmer operates an exotic pet business that includes boarding, breeding, and selling exotic animals from within the Upstairs Unit. The name of his business is Exoticare, Inc. A complaint was filed against Dittmer in 2014 for "selling 'exotic' animals from location. Recently sold a lizard to a kid down the street." The complaint states that Dittmer admitted to selling exotic pets from the Upstairs Unit from time to time despite being aware that it violated his Business Tax Receipt requirements (formerly known as occupational license). Despite filing Articles of Dissolution, Dittmer continues to hold himself out as a "Reptile Concierge Specialist" providing exotic pet services from the Upstairs Unit.	2012_03_01 Exoticare, Inc. Articles of Incorporation; 2014_07_03 Collier County Complaint re Exoticare, Inc.; 2022_11_29 FaceBook Screenshots(1-5)
	FIGA paid \$10,000.00 to Clients. The adjuster received 20 percent, or \$2,000.00. Clients insurance coverage is comprised if they are forced to file another claim for additional water damage.	

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



## NOTABLE PROVISIONS OF THE GOVERNING DOCUMENTS

Document Article / Section No.	Text of the Selected Article/Sections No.
<p>Declaration</p> <p>Article II Section 3.3</p>	<p><b><u>3.3 BOUNDARIES OF INDIVIDUAL UNITS:</u></b></p> <p>The respective units shall not be deemed to include the undecorated and/or unfinished surfaces of the perimeter walls, floors and ceiling surrounding each unit or any pipes, wires, conduits or other utility lines running through each unit which are utilized for or serve more than one (1) unit, the same being the Common Elements as hereinafter provided. Each unit shall be bounded as to both horizontal and perimetrical boundaries as below defined, whether the same exist now or are created by construction, settlement or movement of the building, or permissible repairs, reconstruction or alterations. The boundaries shall be determined in the following manner: (1) Horizontal boundaries: a) Upper Boundary - The underside of the finished undecorated ceiling of the unit, extended to meet the perimetrical boundaries; b) Lower Boundary - The upper side of the concrete slab upon which the unit is affixed, extended to meet the perimetrical boundaries. (2) Perimetrical boundaries - The perimetrical boundaries shall be the interior surfaces of the perimeter walls of the Unit. Included in the Unit are all glass material in the walls of a Unit, screen in windows and doors, the materials covering other openings in the exterior of the Units and any exterior utility closet which services just one Unit.</p>
<p>Declaration</p> <p>Article V Section 5.2</p>	<p><b><u>5.2 UNITS - ASSOCIATION'S RESPONSIBILITIES:</u></b></p> <p>The Association shall maintain, repair and replace at the Association's expense:</p> <p>A. All exterior portions of a unit including the outside walls of the condominium building and all fixtures on its exterior and boundary walls of units, all load bearing walls, glass windows, partitions, floors, and columns which affect the structural integrity of the building, whether contained in a Unit or not. Changes or alterations to the exterior walls of the building require a vote of 66% of the Voting Interests of the Association.</p> <p>B. All conduits, ducts, plumbing, wiring and other facilities for the furnishing of utility services which are contained in the portions of a unit that service part or parts of the Condominium other than the unit within which contained; and</p> <p>C. All incidental damage caused to a Unit by such work specified in (A) and (B) of this subsection.</p>

<p>Declaration</p> <p>Article V Section 5.3</p>	<p><b><u>5.3 UNITS - UNIT OWNERS' RESPONSIBILITIES:</u></b></p> <p>The responsibility of the Unit Owner shall be as follows:</p> <p>A. To maintain, repair and replace at his expense all portions of his unit, except the portions to be maintained, repaired and replaced by the Association. The portions of a unit to be maintained, repaired and replaced by the Unit Owner at his expense shall include but not be limited to the following items: major appliances such as dishwasher, washer, dryer, disposal, microwave, refrigerator, oven, stove, water heater, air conditioner whether or not such items are within the actual unit; floor coverings, except floor slabs; interior fixtures such as electrical and plumbing fixtures; inside paint and other inside wall finishes. Operation of Mechanical Equipment and its installation shall be done in a manner that will not cause annoyance to the residents of other Units.</p> <p>B. To maintain, repair, and replace at his expense all portions of the interior of the balconies attached to his Unit as a Limited Common Element. This obligation to maintain, repair, and replace shall not, however, be deemed to include alterations to the exterior of those Limited Common Elements or to areas within the Limited Common Elements which are visible from the exterior of the building. Unit Owners shall maintain, repair and replace all hurricane shutters.</p> <p>C. Not to make or cause to be made any structural addition or alteration, decoration, repair, replacement or change to the Common Elements and/or the Limited Common Elements or to any outside or exterior portion of the building or other structures, whether part of a Unit, the Common Elements and/or Limited Common Elements.</p>
<p>Declaration</p> <p>Article V Section 5.4</p>	<p><b><u>5.4 COMMON ELEMENTS - ASSOCIATION'S RESPONSIBILITIES:</u></b></p> <p>A. The maintenance of the Common Elements and the Limited Common Elements (except lanais and enclosed garages as provided for in Section 5.3 B above) shall be the responsibility of the Association; and there shall be no material alterations or substantial additions to the Common Elements and the Limited Common Elements, except in the manner provided in this Declaration and in the Bylaws of the Association.</p>
<p>Declaration</p> <p>Article V Section 5.5</p>	<p><b><u>5.5 ENFORCEMENT OF MAINTENANCE:</u></b></p> <p>In the event the Unit Owner fails to maintain his Unit as herein required, or makes any structural addition or alteration, or change without the required consent, or otherwise violates or threatens to violate the provisions hereof, the Association shall have the right to proceed in a court of competent jurisdiction for an injunction to seek compliance with the provisions hereof. The Association has the irrevocable right of access to each unit during reasonable hours, when necessary, for the maintenance, repair, or replacement of any Common Elements or for making emergency repairs which are necessary to prevent damage to the Common Elements or to another unit or units.</p>

Declaration Article VIII Section 8.9	<p><b><u>8.9 OWNERS' INDIVIDUAL INSURANCE POLICIES:</u></b></p> <p>Unit Owners may obtain insurance coverage at their own expense to protect against claims due to accidents within or on his Unit and casualty insurance on the contents within each Unit. Said policies shall provide that the coverage afforded is in excess over the amount recoverable under any other policy covering the same property without rights of subrogation against the Association.</p> <p>At the Board of Directors sole option, Unit Owners may be required to obtain a flood policy for their individual unit in an amount set by the Board. Each of these policies shall name the Association as an additional insured.</p>
Declaration Article XI Section 11.1	<p>A. A Condominium Unit shall not be used for commercial purpose but only as provided in the Bylaws, and for no other purposes. Use of a portion of a Unit as a private office, so long as customers or clients are not visiting the Unit, shall not be a commercial use. The Unit Owner shall not permit or suffer anything to be done or kept in his Unit which will increase the rate of insurance on the Condominium Property or which will obstruct or interfere with the rights of the other Unit Owners or annoy them by unreasonable noise or otherwise; nor shall the Unit Owner commit or permit any nuisances, immoral or illegal acts in or about the Condominium Property. No clothes lines or similar devices shall be allowed on any portion of the Condominium Property by any person, firm or corporation without the written consent of the Board of Directors. No grilling or barbecuing is permitted on the balconies.</p>
Bylaws Article II, Section 2.7	<p>I. To enforce by legal means the provisions of the Condominium Act, the Declaration and the Bylaws.</p>
Rules and Regulations (May 2019) Preamble	<p>The Rules and Regulations hereinafter enumerated as to the Condominium Property, the Common Elements, the Limited Common Elements and the Condominium Units shall be deemed in effect until amended by the Board of Directors of the Association, and shall apply to and be binding upon all Unit Owners. The rules and regulations shall be consistent for all Condominiums operated by the Association. The Unit owners shall, at all times, obey said Rules and Regulations and shall use their best efforts to see that they are faithfully observed by their families, guests, invitees, vendors, lessees and persons over whom they exercise control and supervision.</p>
Rules and Regulations (May 2019) Rule 5	<p>5. No garments, towels, rugs, planters, wind chimes, or decorations of any kind, may be hung from the windows, window sills, railings, stairways, gutters, roofs, partition walls, privacy walls or any other portion of Units. Within the screened lanai, a towel drying rack not attached to the walls or ceilings may be used within said space for the purpose for which it was intended. No rugs, etc., may be dusted from the windows, stairways, privacy walls or partition walls of the Units; rugs may be cleaned within the units and not within any other portion of the Condominium Property.</p>

<p>Rules and Regulations (May 2019)</p> <p>Rule 15</p>	<p>15. Vehicles parked in violation of these parking rules may be towed at the Unit Owner's expense. Each Unit shall have one garage space and one designated additional space allowing two vehicles per unit. Unit owners are responsible to see that their family, household members, tenants, guests, visitors and invitees follow the parking rules. The unit owner shall defend, indemnify, and hold the Association harmless in case of claims against the Association by any of the Unit owner's family, household members, tenants, guests, visitors and invitees. No parking is allowed except in the garages, designated parking space appurtenant to the Unit, and designated guest parking spaces. No one may park in a parking space appurtenant to and assigned to a Unit without permission of the Unit owner. Only one vehicle is allowed in each parking space, and no single vehicle may occupy more than one parking space or encroach on an adjacent parking space, grass, or landscaped areas or roadway. All vehicles being garaged on the premises must be operable and have current registrations. No vehicle maintenance work may be performed on the Condominium property. Only motor vehicles that can fit in the garage appurtenant to the Unit, with the door fully closed, may be parked anywhere on the condominium Property overnight. No boats, campers, trailers, recreational vehicles, jet skis, or recreational equipment may be stored on the Condominium Property overnight, except within an enclosed garage and only if the storage of same does not require a vehicle registered to that Unit occupant to be parked in a guest parking space overnight. Commercial vehicles may only be kept in the Unit's garage. Only private passenger vehicles may be parked outside of the garage. Residents must park at least one vehicle being kept on the Condominium Property in the garage appurtenant to their Unit. Guests may not use a guest parking space for overnight parking unless the garage and assigned parking space for the Unit that the guest is visiting are both occupied by motor vehicles. Tenants may only keep two (2) vehicles on the Condominium Property and may not use the guest parking spaces for overnight parking of their vehicles that are being garaged on the premises on a permanent basis. Residents whose guests will be staying longer than three (3) consecutive nights must register the guests' vehicle with the Property Manager and shall obtain written permission from the Association. No registration is required for early use of the guest parking spaces, but vehicles parked in the guest parking spaces between the hours of 10pm and 6am that have exceeded the three (3) consecutive night limit or limitations stated on written authorization, may be towed at the owner's expense. If a resident is unauthorized to be parked in a guest spot overnight, they may be towed at owner's expense.</p>
<p>Rules and Regulations (May 2019)</p> <p>Rule 16</p>	<p>16. Residents may have one (1) small domesticated pet (dog or cat) that shall not exceed 30 pounds, as well as two small caged birds, provided they are not kept, bred, or maintained for commercial purposes in their units. All four-legged pets shall be kept on a leash while outside the resident's unit, and can only be walked in areas designated as pet walking areas. Pet owners will pick-up solid waste from said pet. In the event that any pet on the premises should constitute a nuisance, in the opinion of a majority of the Board of Directors, then the Resident, when so notified in writing, shall be required to immediately remove said pet from premises. The Board of Directors may waive this provision and permit certain approved pets on the premises.</p>

Rules and Regulations (May 2019)	21. The Board of Directors may, pursuant to F.S. 718.303 (3) impose fines in such reasonable sums as they deem appropriate, not to exceed \$100.00 per violation, \$1,000.00 in the aggregate, against Unit Owners for violation of the condominium documents, including the rules and regulations, by Owners or the guests or lessees. Each day of a continuing violation shall be a separate violation. No fine shall be levied until the Owner(s) has been given an opportunity for a hearing. The hearing must be held before a committee of other Unit Owners. If the committee does not agree with the fine, the fine may not be levied.
Rule 21	

The table may or may not contain all the significant provisions of Client’s governing documents. Its sole purpose, in fact, is to make creating the LADD more convenient. 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 governing documents might strengthen (or weaken) Client’s case.

**5.**  
**ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT**

None at this time. This section may be updated as additional information becomes available.

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

**6.**  
**ADDITIONAL DOCUMENTS NEEDED FROM CLIENT**

A copy of any and all invoices, estimates, receipts, proposals, and contracts relating to the repair and replacement of portions of the Unit that sustained water damage or mold remediation re same.

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.

**7.**  
**THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST**

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

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8/11/2022	COA Inspection of Upstairs Unit	
	All documents and communications relating to the inspection of the Upstairs Unit, from February 19, 2020 to present.	
	All invoices, estimates, receipts, proposals, and contracts relating to the repair and replacement of the air conditioner servicing the Upstairs Unit, from February 19, 2020 to present.	
	All medical records and bills relating to Ms. Bolufe's mental health treatment for the emotional distress of the water leaks and related concerns.	

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

## 7.1. Breach of Governing Documents

### Elements—Breach of CC&Rs.

- The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association. *Valencia Rsrv. Homeowners Ass'n, Inc. v. Boynton Beach Assocs., XIX, LLLP*, 278 So. 3d 714, 716 (Fla. 4<sup>th</sup> DCA 2019). Restrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. *Coral Lakes Cmty. Ass'n, Inc. v. Busey Bank, N.A.*, 30 So. 3d 579, 584 (Fla. 2<sup>nd</sup> DCA 2010). Restrictive covenants are interpreted according to the “clear and ordinary meaning” of their terms and in favor of the free use of real property. Any ambiguities are construed in favor of the property owner and against those attempting to enforce the covenant. *Roebuck v. Sills*, 306 So. 3d 374, 380 (Fla. 1<sup>st</sup> DCA 2020). Restrictive covenants will be enforced when they are “clear, reasonable and have lawful purpose.” *McInerney v. Klovstad*, 935 So. 2d 529, 531 (Fla. 5<sup>th</sup> DCA 2006). While covenants restraining free use of realty are not favored, restrictive covenants are enforced so long as they are not contrary to public policy, do not contravene any statutory or constitutional provisions, and so long as the intention is clear and the restraint is within reasonable bounds. *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 308–09 (Fla. 2<sup>nd</sup> DCA 1966).
- A cause of action for breach of contract accrues and the limitations period commences at the time of the breach. *See Grove Isle Ass'n, Inc. v. Grove Isle Associates, LLLP*, 137 So. 3d 1081, 1095 (Fla. 3d

DCA 2014). However, where an obligation is continuing in nature, a party's ongoing nonperformance constitutes a continuing breach while the contract remains in effect. *See Id.*

- Each day in which common elements are not fixed, especially when there is knowledge of what's happened, is another day in which an Association breaches its duty to maintain the common elements. *See Escadote I Corp. v. Ocean Three Condo. Ass'n, Inc.*, 307 So. 3d 938, 942 (Fla. 3d DCA 2020).
- Florida law requires a condominium owners association to be governed by, and comply with, its governing documents. §718.303(1), Fla. Stat. (2019). Members of the COA have a statutory and contractual right to bring an action against a COA to redress a failure or refusal to comply with the governing documents. *Ibid.* The prevailing party may obtain reasonable attorneys' fees and costs. *Ibid.*
- As set forth under the Declaration Article V of the COA:

#### Section 5.3 Units – Unit Owners' Responsibilities:

- A. To maintain, repair or replace at his expense all portions of his unit, except the portions to be maintained, repaired, or replaced by the Association. The portions of a unit to be maintained, repaired, or replaced by the Unit Owner as his expense shall include but not be limited to the following: Major appliances such as dishwasher, washer, dryer, disposal, microwave, refrigerator, oven, stove, water heater, air conditioner whether or not such items are within the actual unit; floor coverings, except floor slabs; interior fixtures such as electrical and plumbing fixtures; inside paint and other inside wall finishes. Operation of Mechanical Equipment and its installation shall be done in a manner that will not cause annoyance to the residents of other Units.
  - B. To maintain, repair, and replace at his expense all portions of the interior of the balconies attached to his Unit as a limited Common Element. This obligation to maintain, repair, and replace shall not however, be deemed to include alterations to the exterior of those Limited Common Elements or to areas within the Limited Common Elements which are visible from the exterior of the building. Unit Owners shall maintain, repair, and replace all hurricane shutters.
  - C. Not to make or cause to be made any structural addition or alterations, decoration, repair, replacement or change to the Common Elements and/or the Limited Common Elements or to any outside or exterior portion of the building or other structures, whether a part of that Unit, the Common Elements and/or Limited Common Elements.
- As set forth under the Declaration Article V of the COA:

#### Section 5.5 Enforcement of Maintenance:

In the event the Unit Owner fails to maintain his Unit as herein required, or makes as structural addition or alteration, or change to without required consent, or otherwise violates or threatens to violate provisions hereof, the Association shall have the right to proceed in a court of competent jurisdiction for an injunction to seek compliance with the provisions hereof. The Association has the irrevocable right of access to each unit during reasonable hours, when necessary, for maintenance, repair, or replacement of any Common Elements or for making emergency repairs which are necessary to prevent damage to the Common Elements or to another unit or units.

— As set forth under the Declaration Article XI of the COA:

#### Section 11.1

A. A Condominium Unit shall not be used for commercial purposes but only as provided in the Bylaws, and for no other purposes. Use of a portion of a Unit as a private office, so long as customers or clients are not visiting the Unit, shall not be a commercial use. The Unit Owner shall not permit or suffer anything to be done or kept in his Unit which will increase the rate of insurance on the Condominium Property or which will obstruct or interfere with the rights of the other Unit Owners or annoy them by unreasonable noise or otherwise; nor shall the Unit Owner commit or permit any nuisances, immoral or illegal acts in or about the Condominium Property.

— As set forth under the Bylaws, Article II of the COA:

#### Section 2.7 (Powers and Duties of the Board):

I. To enforce by legal means the provisions of the Condominium Act, the Declaration and the Bylaws.

#### Applicable Statute of Limitations—

- The statute of limitations on a legal or equitable action on a contract, obligation, or liability founded on a written instrument, which includes CC&Rs and enforcement of a restriction, is five years. (Fl. Stat. § 95.11(2)(b)).
- A cause of action for breach of contract accrues and the limitations period commences at the time of the breach. *See Grove Isle Ass'n, Inc. v. Grove Isle Associates, LLLP*, 137 So. 3d 1081, 1095 (Fla. 3d DCA 2014). However, where an obligation is continuing in nature, a party's ongoing nonperformance constitutes a continuing breach while the contract remains in effect. *See id.*

#### Remedies—



- It is well-settled that the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract. The injured party is entitled to recover all damages that are causally related to the breach so long as the damages were reasonably foreseeable at the time the parties entered into the contract. *Capitol Env't Servs., Inc. v. Earth Tech, Inc.*, 25 So. 3d 593, 596 (Fla. 1<sup>st</sup> DCA 2009).
- 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.

##### As against the COA:

- The COA has a duty to ensure its members' (including Dittmer's) compliance with its governing documents, including the Declaration. The Declaration provides for Dittmer's responsibility to maintain his unit in good condition and free of leaks that may affect the COA and its membership, including Clients. As a result of three leaks in Dittmer's unit, Client's property suffered significant water damage over several years. They were displaced from their home and forced to pay mold remediation and hotel costs out-of-pocket. Due to COA's failure to enforce the Declaration against Dittmer by failing to require him to adequately maintain and repair his unit, the COA will be liable for breaching the above provisions in the Declaration.
- Similarly, the COA has a duty to enforce the parking, pet limit, stair railing, and balcony railing provisions of the Declaration. Due to the COA's failure to enforce same over several years, the COA will be liable for breaching the above provisions in the Declaration.

##### As against Dittmer:

- As members of the COA, Clients are entitled to enforce the CC&Rs against the Association and their fellow members. There can be no doubt that Dittmer, as a member of the COA, is bound by such provisions.
- The Declaration states that it is Dittmer's obligation to maintain his unit in good condition and free of leaks that may affect the COA and its membership, including Clients. As a result of three leaks in Dittmer's unit, Client's property suffered significant water damage over several years. They were displaced from their home and forced to pay mold remediation and hotel costs out-of-pocket. Assuming the veracity of their contentions (i.e., that the leaks resulted from Dittmer's unit), Dittmer's and his insurance carrier's refusal to take responsibility for Client's damages without ever performing an inspection is wrongful, and Dittmer's failure to adequately maintain his unit constitutes a breach of the Governing Documents.

- Similarly, Dittmer is bound by the parking, pet limit, stair railing, and balcony railing provisions of the Declaration. Dittmer’s failure to comply with these other provisions constitutes a breach of the Governing Documents.
- As to Exoticare, Inc. (Dittmer’s exotic pet service business), the Declaration prohibits the use of the Upstairs Unit for a commercial purpose. Dittmer operates an exotic pet business that includes boarding, breeding, and selling exotic animals from within the Upstairs Unit. The name of his business is Exoticare, Inc. A complaint was filed against Dittmer in 2014 for “selling ‘exotic’ animals from location.” The complaint states that Dittmer admitted to selling exotic pets from the Upstairs Unit from time to time despite being aware that it violated his Business Tax Receipt requirements (formerly known as occupational license). Despite filing Articles of Dissolution, Dittmer continues to hold himself out as a “Reptile Concierge Specialist” providing exotic pet services from the Upstairs Unit (as evidenced on the business’s FaceBook page).

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

- At this time, this cause of action is supported by the facts and the law with respect to the breaches that impact Clients as well as the selective enforcement against Dittmer. The COA has an obligation to enforce the maintain provisions against all owners within the community. The COA’s repeated failures to comply with its contractual duties to enforce covenants is sufficient to state a cause of action for breach of contract. *Barefield v. Lafayette Oaks Homes Ass’n, Inc.*, 422 So. 2d 969, 970 (Fla. 1<sup>st</sup> DCA 1982).

## 7.2. Negligence

Elements—Negligence.

- The elements of a cause of action for negligence are (i) a legal duty requiring a party to conform to a certain standard of conduct for the protection of others against unreasonable risks; (ii) a breach of that duty; (iii) breach was proximate cause of injury or damage; (iv) actual loss or damage. *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla. 2003).

Remedies—

- In any action brought in the circuit court to recover damages for personal injury or wrongful death, the amount of general damages shall not be stated in the complaint, but the amount of special damages, if any, may be specifically pleaded and the requisite jurisdictional amount established for filing in any court of competent jurisdiction. *Florida Statute § 768.042*.
- When a property owner owes a non-delegable duty of care to a plaintiff who obtains a verdict assigning negligence to the owner and a party contracted by the owner, the owner becomes jointly

and severally liable for the negligence attributed to the contracted party. *Walters v. Beach Club Villas Condo., Inc.*, 301 So. 3d 343, 348 (Fla. 3<sup>rd</sup> DCA 2020).

- 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 this negligence action is four years. *Florida Statute § 95.11(3)(a)*.

#### Application—Application of the Law to Client’s Facts.

As against the COA:

- The COA was placed on notice on May 16, 2022 about the dangerous conditions fostered by the broken stair railings throughout the community. The COA failed to act on the information. On June 11, 2022, the COA was put on notice that Dittmer removed a section of stair railing leading to the Upstairs Unit. The COA failed to act on the missing section of stair railing and unnecessarily exposed the community to a hazardous situation.
- The COA was aware of the numerous leaks in the Upstairs Unit and failed to act on its knowledge. The COA allowed the situation to continue and failed to hold Dittmer accountable for his failure to maintain the Upstairs Unit. The COA has a duty to ensure the members comply with the governing documents, including the Declaration and it failed in that duty despite its actual knowledge of Dittmer’s breach.

As against Dittmer:

- Dittmer and Lynn have a duty to maintain their unit in good condition and free of leaks that may affect the COA and its membership, including Clients. As a result of three separate leaks in the Upstairs Unit, Client’s property suffered significant water damage over several years. They were displaced from their home and forced to pay mold remediation and hotel costs out-of-pocket. Assuming the veracity of Clients’ contentions (i.e., that the leaks resulted from Dittmer’s unit), Dittmer and his insurance carrier refusal to take responsibility for Clients’ damages without ever performing an inspection is wrongful. Dittmer and Lynn were negligent by failing to maintain the Upstairs Unit in a good condition, causing the water intrusions into the Unit and the resulting damages to Clients

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

- At this time, this cause of action is supported by the facts and the law. Dittmer and Lynn, as residents of the Upstairs Unit, have a duty to prevent water leaks in the Upstairs Unit from intruding into and causing damage to their neighbor’s property. Dittmer and Lynn breached this duty

repeatedly by failing to correct the water leak and prevent further water intrusion into the Unit. The water intrusions were the direct and proximate cause of significant water damages to Clients' property. *See Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla. 2003).

### **7.3. Breach of Fiduciary Duty**

#### **Elements—Breach of Fiduciary Duty.**

- The elements necessary to state a cause of action for breach of fiduciary duty are: (i) existence of a fiduciary duty; (ii) a breach of that duty, and (iii) damage proximately caused by that duty. *Sola v. Markel*, 320 So. 3d 326, 328 (Fla. 5<sup>th</sup> DCA 2021).
- The officers and directors of an association have a fiduciary relationship to the members who are served by the association. *Florida Statute § 720.303(1)*. Within 90 days after being elected or appointed to the Board, each director shall certify in writing to the Secretary of the association that he or she has read the association's declaration of Covenants, articles of incorporation, by-laws, and current written rules and policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. *Florida Statute § 720.3033(1)(a)*.
- For a director to be shielded from personal liability, the underlying decision must have been (i) within the scope of the association's authority; and (ii) reasonable, i.e., not arbitrary, capricious, or in bad faith. *Hollywood Towers Condo. Ass'n v. Hampton*, 40 So. 3d 784 (Fla. 4<sup>th</sup> DCA 2010).
- As set forth under the Declaration Article V of the COA:

#### **Section 5.5 Enforcement of Maintenance:**

In the event the Unit Owner fails to maintain his Unit as herein required, or makes as structural addition or alteration, or change to without required consent, or otherwise violates or threatens to violate provisions hereof, the Association shall have the right to proceed in a court of competent jurisdiction for an injunction to seek compliance with the provisions hereof. The Association has the irrevocable right of access to each unit during reasonable hours, when necessary, for maintenance, repair, or replacement of any Common Elements or for making emergency repairs which are necessary to prevent damage to the Common Elements or to another unit or units.

- As set forth under the Bylaws, Article II of the COA:

#### **Section 2.7 (Powers and Duties of the Board):**

- I. To enforce by legal means the provisions of the Condominium Act, the Declaration and the Bylaws.

## Remedies—

- If the breach of fiduciary duty results in a breach of CC&Rs, then compensatory (money) damages and injunctive relief may be available.
- A failure to perform a promise does not constitute fraud which would give rise to punitive damages, absent specific purpose in defendant not to perform contract at time it was entered. *Rogers v. Mitzi*, 584 So. 2d 1092, 1094 (Fla. 5<sup>th</sup> DCA 1991).
- A constructive trust is an equitable remedy which a court may impose when property is acquired through fraud. *Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1<sup>st</sup> DCA 2008). A constructive trust is an equitable remedy available in cases dealing with breaches of fiduciary duty, such as an instrument that restores property to its rightful owner and prevents unjust enrichment. *Id.*
- Homeowners association did not specifically plead the wrongful act doctrine in its complaint against one of its Board members and his long-time friend, whose unsuccessful lawsuit against the association the Board member had facilitated in effort to defraud the association, and thus association could not recover, under the doctrine, the attorney fees it incurred in that unsuccessful suit, as special damages for Board member's breach of fiduciary duty, where association's complaint merely alleged that it had suffered damages, including attorney fees, as a direct and proximate cause of Board member's material and substantial breach of fiduciary duty (see *Fla. R. Civ. P. 1.120*). *Cinco v. Coquina Palms Homeowners Assoc., Inc.*, 325 So. 3d 137, 139 (Fla. 5<sup>th</sup> DCA 2020).
- Where a breach of fiduciary duty is shown but no actual damages are proved, nominal damages may be awarded. *Highsmith v. ECAA, LLC*, 138 So. 3d 544, 544 (Fla. 1<sup>st</sup> DCA 2014).
- Where the allegations of a complaint show the invasion of a legal right, the plaintiff on the basis thereof may recover at least nominal damages. *Land & Sea Petroleum Holdings, Inc. v. Leavitt*, 321 So. 3d 810, 816 (Fla. 4<sup>th</sup> DCA 2021). Nominal damages are in effect zero damages and are defined as those damages flowing from the establishment of an invasion of a legal right where actual compensatory damages have not been proven. *Id.* A party may be entitled to nominal damages, notwithstanding the absence of evidence regarding the correct measure of damages. *Id.* A nominal damages award is appropriate when there is a breach of contract, breach of fiduciary duty, or an aiding and abetting a breach of fiduciary duty cause of action. *Id.* at 817.
- 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 on breach of fiduciary duty is four years. *Florida Statute § 95.11(3)(k)* or *Florida Statute § 95.11(3)(p)*.

### Application—Application of the Law to Client's Facts.

- There is no question the COA's Board owes a fiduciary duty to its members. As is covered above in the breach of governing documents section of this LADD, the Board breached its fiduciary duties when it failed to enforce the maintenance covenants against Dittmer. Similarly, the COA Board breached its fiduciary duties by failing to enforce the parking, pet limit, stair railing, and balcony railing provisions of the Governing Documents. Clients and other members of the COA's property have suffered a decrease in value due to the lack of maintenance of the common elements as it relates to the stair railings and balcony railings and constant parking violations. The COA was negligent when it failed to act on any of the repeated violations of the governing documents, i.e., the damaged and missing stair rails, the leaks from the Upstairs Unit.

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

- As to the Upstairs Unit, the COA Board's actions (or inactions) meet all of the elements required to prove that they breached fiduciary duties to Clients. The COA Board failed to uphold its duty to enforce the Declaration provisions governing unit maintenance against all members of the condominium association.
- Regarding the remaining issues with the common elements (i.e., stair railings, balcony railings, and parking violations), the COA Board's actions (or inactions) similarly meet all of the elements required to prove that they breached fiduciary duties to Clients. The COA failed to uphold its duty to maintain the common elements and enforce the Declaration provisions governing parking against all members of the condominium association. According to Clients, the HOA President is one such member who repeatedly violated the parking provisions.

## **7.4.**

### **Breach of Implied Covenant of Good Faith and Fair Dealing**

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

- Under Florida law, there is an implied promise of good faith and fair dealing that may exist in any given contract. (*Sepe v. City of Safety Harbor*, 761 So.2d 1182, 1184 (Fla. 2d DCA 2000).) This means that neither party will do anything to unfairly interfere with the right of any other party to the contract to receive the contract's benefits. The purpose of the implied covenant is "to protect the reasonable expectations of the contracting parties." (*Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999).) The implied covenant of good faith "is a gap filling default rule" which comes into play "when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." The implied covenant attaches to the performance of a specific or express contractual provision. (*Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So.2d 787, 792 (Fla. 2d DCA 2005).)

- There are two restrictions on causes of action for the breach of good faith and fair dealing. First, the implied covenant of good faith should not be invoked to override the express terms of the agreement between the parties. *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001). Second, a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached. *Id.*

#### Remedies—

- The implied covenant of good faith “is a gap filling default rule” which comes into play “when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards.” See *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So.2d 1, 3 (Fla. 2<sup>nd</sup> DCA 2007)(quoting *Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So.2d 652, 654 (Fla. 2<sup>nd</sup> DCA 2004). The implied covenant attaches to the performance of a specific or express contractual provision. (*Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So.2d 787, 792 (Fla. 2d DCA 2005).
- 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 on Breach of Covenant of Good Faith and Fair Dealing is four years. *Florida Statute § 95.11(3)(k)* or *Florida Statute § 95.11(3)(p)*.

#### Application—Application of the Law to Client’s Facts.

- The HOA has a duty to comply with its governing documents, including the Declaration. By failing to adhere to the governing documents, the HOA has breached its contract with the Clients. Expressly, the Declaration provides that “[t]he Association has the irrevocable right of access to each unit during reasonable hours, when necessary, ... **for making emergency repairs which are necessary to prevent damage to ... another unit** or units. (Emphasis added). The HOA violated an express term of Article V, Section 5.5 of the Declaration when it failed to enforce the maintenance of Dittmer’s unit, and specifically when the HOA failed (on numerous occasions) to access Dittmer’s unit to make emergency repairs to the leaking air conditioner. The HOA’s breach of the express provision of the Declaration unfairly interferes with Clients’ right to receive the contract’s benefits. Clients’ rights must be protected, especially given their ongoing exposure to repeated toxic black mold infestation and the serious health threat it poses to Clients and their young children. Further, this cause of action is not being invoked to override the express terms of the governing documents, but rather, to ensure that they’re properly enforced.
- Dittmer has a duty to comply with the governing documents, including the Declaration. By failing to adhere to the governing documents, Dittmer has breached his contract with the Clients. Expressly,



the Declaration imposes a responsibility upon each unit owner “[t]o maintain, repair or replace at his expense all portions of his unit, except the portions to be maintained, repaired, or replaced by the Association.” And to be clear, the Declaration specifically contemplates the maintenance, repair, replacement of major appliances within the unit, stating, “**The portions of a unit to be maintained, repaired, or replaced by the Unit Owner as [sic] his expense shall include** but not be limited to **the following: Major appliances such as** dishwasher, washer, dryer, disposal, microwave, refrigerator, oven, stove, water heater, **air conditioner** whether or not such items we [sic] within the actual unit ....” Dittmer’s breach of this express provision of the Declaration unfairly interferes with Clients’ right to receive the contract’s benefits. Clients’ rights must be protected, especially given their ongoing exposure to repeated toxic black mold infestation and the serious health threat it poses to Clients and their young children. Further, this cause of action is not being invoked to override the express terms of the governing documents, but rather, to ensure that they’re properly enforced.

- Dittmer additionally breached his duty to comply with the governing documents by using the Upstairs Unit for his exotic pet care business. Dittmer’s breach of the express provision prohibiting commercial use of his unit unfairly interferes with Clients’ right to receive the contract’s benefits. Clients’ rights must be protected. Further, this cause of action is not being invoked to override the express terms of the governing documents, but rather, to ensure that they’re properly enforced.

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

- The implied covenant applies when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards. The HOA failed to adhere to the governing documents and has breached its contract with Client, as explained above. Because the Declaration carves out an express provision requiring the HOA to intervene and make emergency repairs to prevent damage to the Unit, Clients have a strong claim for breach of the implied promise of good faith and fair dealing against the HOA.
- Clients also have a strong claim for breach of the implied promise of good faith and fair dealing against Dittmer. Because the Declaration carves out an express provision requiring Dittmer to maintain, repair, and replace at his expense all portions of the Upstairs Unit, including the air conditioner, Clients have a strong claim for breach of the implied promise of good faith and fair dealing against Dittmer. Similarly, the Declaration carves out an express prohibition against using a unit for “commercial purpose.” Thus, Clients have a strong claim for breach of the implied promise of good faith and fair dealing against Dittmer for running his exotic pet service business from the Upstairs Unit.
- At this time, this cause of action is supported by the facts and the law.



## **8. STRATEGIC CONSIDERATIONS**

### **8.1. Jurisdiction**

#### **8.1.1. Arbitration**

Arbitration is not applicable to the matter at this time. The parties participated in settlement negotiations through September, 2023, but settlement failed after the third water leak into the Unit.

#### **8.1.2. Personal Jurisdiction**

There is Personal Jurisdiction over the Defendants in this matter under Florida Statute §48.193(1)(a).

#### **8.1.3. Subject Matter Jurisdiction**

The Twentieth Judicial Court in Collier County has subject matter jurisdiction over this civil dispute because the matter exceeds \$50,000.

### **8.2. Standing**

Based upon the information/evidence that Clients have provided thus far, Clients have standing to pursue every cause of action described above against each of the intended defendants.

### **8.3. Pre-Filing Requirements**

Clients must establish that the matter exceeds \$50,000; otherwise, the county court will have Subject Matter Jurisdiction.

### **8.4. Attorneys' Fees and Costs**

If Clients prevail in litigation, they are entitled to attorneys' fees for breach of governing documents under Florida Statute § 718.303.

**9.**  
**FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS**

(i) Clients have potential valid claims for failure to enforce governing documents (against COA), breach of Declaration (against Dittmer), breach of the implied covenant of good faith and fair dealing (against COA and Dittmer), breach of fiduciary duty (against COA) and negligence (against Dittmer and Lynn).

(iv) Clients' claims against the COA and Dittmer are strong, assuming the veracity of Clients' contention that the leaks did, in fact, originate from Dittmer's unit. Per the Declaration and Florida law, Dittmer is obligated to maintain his unit in good condition and prevent harm to the neighboring properties. By the same token, the COA has a duty to enforce its governing documents and ensure Dittmer's compliance with same. Both the COA and Dittmer breached their duties, resulting in damage to Clients and their Property.

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

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Reviewed and Approved by: [REDACTED]