

Litigation Due Diligence Analysis

Malec v. San Marcos View Estates HOA

By
JG
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1. SUMMARY

Client owns the real property located at 150 S. Rancho Santa Fe Road, Unit 148, San Marcos, CA 92078 (the “Property”), which is within San Marcos View Estates Community Association, a mobile home community that is designated a common interest development and therefore is subject to the Davis-Stirling Act.

Client contends that the HOA is not complying with the Davis-Stirling Act and governing documents in many respects. For example, the HOA has not provided Client with copies of meeting minutes that they requested and are entitled to. The HOA has also unlawfully precluded Client from attending board meetings. In addition, the HOA has failed to properly maintain the common areas, including by failing to conduct mold remediation, failing to remedy electrical issues, and unilaterally acting to restrict usage of common areas.

2. PARTIES/SIGNIFICANT FIGURES

Name of Party / Significant Figure	Significance to Underlying Matter/Dispute
David Malec (“Malec”) and Sarah Rosenfield (“Rosenfield”) (“Client”)	Client
San Marcos View Estates Community Association (“HOA”)	HOA
Castle Breckenridge	Property Manager

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.

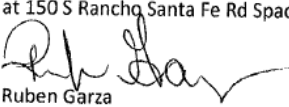
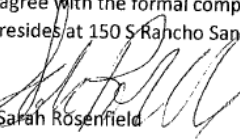
3. STATEMENT OF FACTS / EVIDENTIARY SUPPORT

Date / NA	Fact	Evidence Supporting That Fact
October 2009	Mr. Malec moved into the Property. At the time, he was told that the common area recreational room was closed for renovations.	ADDITIONAL INFO FOR THE DEMAND ¹
2020	Ms. Rosenfield acquired title to the Property.	ADDITIONAL INFO FOR THE DEMAND
Sometime before 2021	A roof leak destroyed corporate documents with mold. The boxes had no date or label and had not been properly prepared for archive or secured to ensure they were protected from the elements, or otherwise.	ADDITIONAL INFO FOR THE DEMAND
1/18/21	Marquis W. Huntsman raised financial questions to be addressed by board meeting action, including: — Lack of supervision in bill payments, causing a \$17k water bill to be paid twice. — Missing deposit from Wells Fargo account.	2021-01-08 task management –
On or about 2/22/21	President Gary Lamb resigned.	Client's note re board's misconduct from 2019 to 2023
4/12/21	Board meeting was held. Discussions regarding reopening of the clubhouse. Ms. Rosenfield inquired about accounts exceeding FDIC Guarantee.	SMVE 2021 OS Minutes
5/24/21	Debra Dailey (“Ms. Daley”), the HOA property manager at Castle Breckenridge, advised the board that they could not hold private meetings (presumably, in executive session). Ms. Dailey dissolved all committees. Meeting dates and times were moved without a membership vote.	ADDITIONAL INFO FOR THE DEMAND Client's note re board's misconduct from 2019 to 2023

¹ All documents are referenced by their title in Client’s file.

September 2021	Armando Raymundo (the maintenance manager) with Electrical Pedestal (who Client suspects is an unlicensed contractor – <i>the Firm was unable to locate this business on the CSLB website</i>) conducted an inspection.	ADDITIONAL INFO FOR THE DEMAND
At or around the same time	Client observed/became aware of “continued water leak issues.”	ADDITIONAL INFO FOR THE DEMAND
11/15/21	<p>Board meeting was held.</p> <p>According to Client, members questioned the board’s changing of the meeting time without membership discussion since the new meeting times were inconvenient for members to attend meetings. Ms. Rosenfield voiced these concerns:</p> <p><u>XI. Post-Business Open Forum – 3 Minute Limit / Speaker - All Members</u></p> <p>a. Sarah Rosenfield, Sp. 148 made comments saying the Board should change the time for Open Forum to the start of the Meeting. Second item to change the Meeting time to 6 pm instead of 5 pm. She also wondered about planning for the Christmas party.</p>	<p>SMVE 2021 OS Minutes</p> <p>ADDITIONAL INFO FOR THE DEMAND</p>
On or about 12/31/21	<p>Cambaliza McGee (independent CPA) prepared a report re the HOA’s financial statements. Relevant findings include, without limitation:</p> <p>At December 31, 2021, the Association has recorded an allowance for uncollectible assessments of \$0. This allowance represents an estimated amount which was calculated using historical collection information. Under ASC 606, assessments and other fees that cannot be collected with certainty are now charged against the respective revenue rather than bad debt expense. Bad debt expense will still be used to account for uncollectible receivable balances that were recorded in prior periods.</p> <p>For the year ended December 31, 2021, the Association’s monthly assessments were \$190 per lot. For 2022, the monthly assessments are budgeted to remain at \$200 per lot.</p> <p>The Association recognizes revenue from members as the related performance obligations are satisfied. A contract liability is recorded when the Association has the right to receive payment in advance of the satisfaction of performance obligations which specifically pertains to Replacement Fund assessments. The contract liability balance at the beginning of the year and end of the year was \$1,126,669 and \$1,249,643, respectively.</p> <p>The Association may elect to file its federal income tax return as either a regular corporation [under Internal Revenue Code Section 277] or as a homeowners association [under Internal Revenue Code Section 528]. For the year ended December 31, 2021, the Association elected to file as a homeowners association, where generally the association is taxed only on income unrelated to membership dues and assessments [such as investment income less related expenses]. For California purposes, the Association also qualifies for tax exempt status as a homeowners association and pays a tax of 8.84% on income not related to membership dues and assessments. For the year ended December 31, 2021, the federal and State income tax liability was \$0 respectively.</p> <p>An independent study of the Association’s replacement funding program was conducted in October 2021 and recommended annual contributions to the replacement fund (from assessments) of \$157,040 (68.16 per lot per month). The study’s recommendations were based on estimates of remaining useful lives, current replacement costs, and amounts accumulated in the replacement funds. For the year ended December 31, 2021, the Association collected \$108,000 from assessments for replacement fund purposes and has budgeted to fund \$144,000 for 2022. The table included in the unaudited supplementary information on future major repairs and replacements is based on the study.</p> <p>The Association maintains bank accounts at financial institutions that are insured by the Federal Deposit Insurance Corporation (“FDIC”) up to \$250,000. However, at December 31, 2021 the Association maintained funds at a financial institutions whereby the cumulative balances on account exceeded FDIC insurance limits by \$727,592.</p>	<p>Financial Audit 2021 of SMVE</p>

January 2022	Though John MacDonald was not the HOA Secretary, he appeared in the minutes as a board Member.	ADDITIONAL INFO FOR THE DEMAND
February 2022	<p>The HOA closed a room inside the clubhouse that was used for recreational purposes. This room previously contained a pool table and small library. Since then, this room has been used as a storage area for physical documents and maintenance equipment.</p> <p>The fence on the West side of the clubhouse was put up where there used to be a horseshoe pit and used for dog walking, with a lock to prevent access.</p>	<p>ADDITIONAL INFO FOR THE DEMAND</p> <p>Client's note re board's misconduct from 2019 to 2023</p>
2/22/22	Open meeting was held. Among other things, the board filled vacancies on that occasion, reported on the reason the ballot package needed to be resent to the membership, and reminded the members there is no cumulative voting.	Malec – Atty General Docs
March 2022	Ms. Rosenfield was denied 'point of order' to discuss the election and was told she would be unplugged from the Zoom meeting if she continued. Ms. Rosenfield left the meeting.	ADDITIONAL INFO FOR THE DEMAND
At or around the same time	<p>Client was informed of a secret meeting where the resignations of Jay Ancona and Ruben Garza from the Board of Directors were accepted. (<i>Garza disputes that he resigned. Rather, he claims he was removed without a vote</i>) At that time, the board appointed John MacDonald as Secretary, Martha Galbraith as Vice President, and Dolly Hird as President and Treasurer. Ms. Dailey claimed this was a standard reorganization practice.</p> <p>Anette Hill and Dorthea Guillory were illegally elected?</p> <p>(According to Client, this reorganization resulted in a board composed of four legally elected and <i>three improperly appointed directors</i>.)</p> <p>Ms. Dailey had Armando Raymundo distribute the board packets and the board members had to sign for the board packets in person. However, contrary to Castle Breckenridge contract which says that packets would be provided to the board seven days in advance. Ms. Dailey's procrastination delayed until Friday after 3:00PM to get the packets to Mr. Raymundo. If he could not find [a board member] between 3-4 pm on Friday afternoon, [the board] would not get the packet until Monday with a Monday meeting at 1:00 pm (which not enough time to properly prepare for the meeting.) When Ms. Rosenfield brought this up at the beginning of several meetings as a point of order, <i>security was called on her and once even the Sheriff</i>.</p>	ADDITIONAL INFO FOR THE DEMAND
April 2022	At an open meeting, members commented about the recreation room still being closed.	ADDITIONAL INFO FOR THE DEMAND
6/14/22	Ms. Rosenfield sent a letter to the HOA's counsel regarding her concerns over the board members' breaches of fiduciary duty. The HOA then charged her \$383.50 for reviewing that letter.	<p>2022_06_14 Rosenfield to SMVE Board</p> <p>2022_05_12 Malec Letter to HOA re Legal Fee</p>

		SMVE Financials
7/19/22	Mr. Malec emailed all board members requesting to see all minutes from 2019, 2020, 2021, and 2022, as well as the membership list.	Malec - Atty General Docs
7/26/22	Ms. Dailey emailed Mr. Malec asking him to review the 5/24/21 minutes re the board's decision to pass their responsibility to Castle Breckenridge. Ms. Dailey also transmitted to Mr. Malec an attachment named "Minutes Matrix" (presumably, containing the minutes that Client requested).	Malec - Atty General Docs
8/8/22	<p>Ruben Garza (presumably, a neighbor) and Ms. Malec prepared the following statement:</p> <p>I Ruben Garza, Director on Board of Directors for San Marcos, View Estates hereby endorse and agree with the formal complaint request submitted by David Malec a member of the association who resides at 150 S Rancho Santa Fe Rd Space 148 San Marcos, Ca 92078.</p>  <p>Ruben Garza</p> <p>I Sarah Rosenfield, Director on Board of Directors for San Marcos, View Estates hereby endorse and agree with the formal complaint request submitted by David Malec a member of the association who resides at 150 S Rancho Santa Fe Rd Space 148 San Marcos, Ca 92078.</p>  <p>Sarah Rosenfield</p>	Malec - Atty General Docs
In or about October 2022	Client submitted a complaint regarding the HOA to the CA Dept. of Justice. The attorney general eventually closed the matter after notifying the HOA. The HOA responded to Client's complaint noting, among other things, that it had provided Client with all meeting minutes requested, the membership list, and an explanation regarding the HOA's decision to issue new ballots without language allowing cumulative voting.	Malec - Atty General Docs 2022_11_01 Attorney General
10/11/22	Mr. Malec and Ms. Dailey exchanged emails regarding his intent to request IDR.	2022_11_01 IDR Emails Malec - Dailey
11/12/22	Open meeting was held. Discussions regarding the HOA's finances, plumbing, and an upcoming election, etc.	2022_11_21 Minutes
2023	The board canceled six meetings and changed times and dates for some other meetings. Members could only speak for two minutes at the end of the meeting.	Client Email
2023	<p>The reserve funds were used for operating funds in the amount of \$300,000 and were not repaid in one year.</p> <p>(This may not be completely accurate, as the 2023 Budget Report reflects \$216,269.47 in reserve expenses that year.)</p>	Client Email 2023 Budget Fiscal Year Analysis

2023	Castle Breckenridge never distributed the annual budget to the membership. (This document was subsequently provided to the Firm on or about March 21, 2024.)	Client Email 2022 Proforma Budget for 2023
1/5/23	Clients' former counsel, Parker Stanbury, sent an attorney letter to the HOA officially disputing Steven Bank's legal fee and demanding an IDR under Civil Code §5915.	Parker Stanbury's 2023-01-05 letter
1/10/23	Mr. Stanbury sent a follow-up letter, contending the same. The letter advised the HOA that it could not refuse to meet and confer with the HOA's member to resolve a dispute.	Parker Stanbury's 2023-01-10 letter
1/30/23	Open meeting was held. Discussions regarding the HOA's finances, etc.	2023_01_30 Agenda and Financials
3/27/23	Mr. Malec submitted his candidate statement.	David Malec Candidate Statement
5/24/23	Ms. Dailey used Alliance Bank to float all accounts they manage under the Castle Breckenridge line of credit.	Client's note re board's misconduct from 2019 to 2023
6/1/23	<p>Mr. Malec wrote to the board as follows:</p> <p><i>In accordance with various California State Statutes, I am requesting copies of the following records from January 1, 2021, to May 31, 2023.</i></p> <p>Financial Records</p> <p>Financial Documents by Civil Code 5300 (see attached)</p> <p>Budget, Reserves, Lien Policies, insurance, financial statements including but not limited to Balance Sheets, Income and Expense Reports, Budget Comparison and General Ledger.</p> <p>Salaries paid to employees, vendors or contractors shall be set forth by job classification or title not by employee's name or social security number.</p> <p>State and Federal Tax Returns</p> <p>Reserve account balances and payments from reserves and invoices, receipts, cancelled checks, purchase orders approved by the association, credit card statements for credit cards issued in the name of the association, statements for services rendered, and reimbursement requests submitted to the association.</p> <p>MINUTES</p> <p>All original approved minutes.</p> <p>It is requested these copies be certified and provided prior to July 5, 2023</p> <p>PURPOSE OF REQUEST</p> <p>My request is to help me decide whether I should file suit against San Marcos View Estates or not.</p>	2023_06_01 Request for SMVE Books and Records
August 2023	Ms. Rosenfield discovered water intrusion and mold in the storage room.	Client Email
10/23/23	Ms. Rosenfield emailed Ms. Dailey to inform her of the following outstanding issues:	Lawsuit Summary - Causes of Action

	<p>(i) misplacement of the HOA’s board meeting minutes; (ii) mold in the storage area; (iii) selection of an auditor for 2023 and copy of 2022 audit; (iv) discussion of the 2024 budget and decision by November 2023; and (v) breakdown of the reserve funds and confirmation of what the reserve funds were used for, when, and how the HOA intends to pay it back.</p> <p>Client also recommended that the board subscribe to HOA Leader.</p>	
10/30/23	<p>Board meeting was held. Ms. Dailey told Ms. Rosenfield she was disruptive, and the board decided to remove her from attending meetings and voting. When Ms. Rosenfield was leaving the room, Ms. Dailey called her back “to hear what the individual board members had to say”. Ms. Dailey had asked for negative comments from each board member. Ms. Rosenfield was told she could not respond to any comments or explain to defend herself.</p>	ADDITIONAL INFO FOR DEMAND
November-December 2023	<p><i>The Board told Ms. Rosenfield that she could not attend the board meeting. The board tried to improperly remove Ms. Rosenfield from the Board. Ms. Rosenfield was refused a board packet for the January 2024 meeting.</i></p> <p>No board meetings were held those months.</p>	<p>Client Email</p> <p>Client's note re Board's misconduct from 2019 to 2023</p>
11/22/23	<p>The Firm sent the HOA a Notice of Representation letter with a Civil Code section 5200 Demand for Records (the “Demand for Record”) requesting that the HOA produce the following association records:</p> <ul style="list-style-type: none"> — The HOA’s latest reserve study and all of the reserve account balances and records of payments made from reserve accounts. (Civ. Code, § 5200(a)(7).) — The Governing Documents. (Civ. Code, § 5200(a)(11).) — Invoices, bills, receipts, and statements from any HOA vendor. These would, of course, include the amounts paid to lawyers for legal expenses, as well as receipts for petty cash disbursements. (Civ. Code, § 5200(b).) — Signed contracts between the HOA and any vendor or contractor related to common area maintenance and/or repairs. (Civ. Code, § 5200(a)(4).) — Written board approval of vendor or contractor proposals or invoices related to common area maintenance and/or repairs. (Civ. Code, § 5200(a)(5).) — A copy of the budget comparison. (Civ. Code, § 5200(a)(3)(C).) — A copy of any interim financial statements, balance sheet, income & expense statements, or the general ledger. (Civ. Code, § 5200(a)(3)(A), (B), and (D).) — “Enhanced association records,” including: (i) invoices, receipts, and canceled checks for payments made by the HOA; (ii) purchase orders approved by the HOA; (iii) 	Demand for Records

	<p>statements for services rendered; and (iv) reimbursement requests submitted to the HOA related to common area maintenance and/or repairs. (Civ. Code, § 5200(a)(13) and (b).)</p> <p>— Agendas and minutes of meeting of the members, the board, and any committees appointed by the board under Corporations Code section 7212 for the past three calendar years. (Civ. Code, § 5200(a)(8).)</p> <p>— Annual budget documents required by Civil Code section 5300 et seq. for fiscal year 2023.</p> <p>In addition to the above, this correspondence notified the HOA of its history of improper interference with Client’s right to ban them from attending the board’s open and executive session meetings based on the reasoning that they were disruptive at previous meetings.</p>	
11/27/23	<p>The HOA held an open meeting. The board meeting was scheduled to begin at 1pm. Client arrived at 12:45pm. <i>When Client arrived, the HOA President, Dolly Hird (“Ms. Hird”), told them that they could not be there.</i> Client took the Firm’s notice of representation with them to specifically point out the part about the board being unable to prevent them from attending the meeting. Ms. Hird responded that she would not read anything.</p> <p><i>At 12:50pm, Mr. Malec was approached by a Deputy Sheriff who was requesting that Malec leave the meeting.</i> Mr. Malec showed the Deputy Sheriff the notice of representation letter and at 12:55pm, he was told by the site manager, Armando Raymundo, that the meeting was canceled.</p> <p>Another resident told Mr. Malec that there was a meeting at the home of the Treasurer (Lot 48), which was apparently an executive session meeting.</p>	<p>Client's note re 2023-11-27 board meeting</p> <p>Client's note re board's misconduct from 2019 to 2023</p>
1/18/24	<p>Two months after receiving the Demand for Records, the HOA’s counsel produced some (but not all) records requested in the Demand. Notably, the accompanying correspondence stated, among other things: “The Association is reviewing its records, and I anticipate the production will occur by the end of next week.”</p>	Opposing Counsel Correspondence
1/26/24	<p>The HOA’s site manager verbally told Client that the HOA would hold an open meeting the following Monday (January 29) at 1:00 p.m.</p>	Client Email
1/29/24	<p>Board meeting was held. Client was not properly notified of this meeting.</p> <p><i>Client was denied access to this meeting. During this encounter, the security guard blocked the door and would not let Client in or speak to them, except telling them “[y]ou cannot enter.”</i> He had on a body camera and recorded Client. After a few minutes of fruitless efforts to challenge the denial, Client left.</p> <p>Ms. Rosenfield did not receive any Director board packets for the last two meetings, or any financial statements, or any communications about The Board of Directors communications with each other.</p>	Client's note re 2024-01-29 board meeting

2/6/24	<p>The Firm requested the outstanding documents from the HOA, which included a copy of the budget comparison and annual budget documents. The HOA’s counsel replied that “the Association’s efforts are continuing,” and suggested that Client obtain the financial reports, open session meeting minutes, and meeting agendas on the HOA’s online portal.</p> <p>Shortly after, Client browsed the portal and saw newly uploaded ex post facto documents. The record of meeting minutes on the HOA’s online portal illustrated that:</p> <ul style="list-style-type: none"> • All the 2020 meeting minutes (with September 2020 meeting minutes missing) were posted on October 30, 2021 • The minutes for meetings from January to September 2021 were posted on October 30, 2021 (with June 2021 meeting minutes missing). The minutes for October and November 2021 meeting were uploaded on January 21, 2022. • There were only seven meeting minutes for 2022, in which the April 2022 meeting minutes were posted on July 26, 2022, and the meeting minutes for July to September 2022 were posted on January 25, 2024 (i.e., after the HOA received our demand for documents.) • April, June, August, and October 2023 meeting minutes were posted on January 25, 2024, and September and November 2023 meeting minutes were posted on February 29, 2024. 	<p>Client Email</p> <p>MINUTES RECORD TO WEBSITE</p>
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2/22/24	<p>The HOA posted a notice of its annual meeting, scheduling it for March 25, 2024. Candidate statements were submitted concurrently. Ms. Rosenfield's statement states as follows:</p> <p>ISSUE: Board Meeting's: The current Board of Directors has cancelled six meetings this year and the others have had changed times and dates. Members can only speak for two minutes at the end of the meeting.</p> <p>SOLUTION: <i>Open forum should be held at the beginning of the meeting and members speaker slips should be made available for members to speak on all agenda items to promote free and open communication, meeting agenda should be provided one week prior to the meeting date. Meetings should be at 6:00 or 7:00 PM so working members can attend, this was working and is reasonable. This was the custom for the last decade or more.</i></p> <p>ISSUE: Parking</p> <p>This is a tough one. There are just too many cars in the park. It was originally designed for a senior family per unit. No provisions were made for parking when the park was converted to a family park.</p> <p>SOLUTION: <i>Form a committee to explore what can be done. There can be creative solutions.</i></p> <p>ISSUE: The Billard and Recreation Room</p> <p>This is a great room that has not been used for over a decade. SMVE promised this to us when we bought our properties. In addition to other funds there is a \$90,000 in reserves for the maintenance and renovation of this room should increase property values of the park.</p> <p>SOLUTION: <i>Formation of a committee to oversee the reopening of the billard and recreation room.</i></p> <p>ISSUES: Financials for 2024</p> <p>No budget has been produced by our management company Castle Breckenridge per SMVE Bylaws which was due by November 2023. The Board of Directors has run up a deficit of \$80,000 last year. Reserve funds were used for operating fund items must be repaid in one year. A discussion of this was going to be paid back has never been held despite my request in October 2023. The reserve funds have been used for operating funds in the amount of \$300,000. Once again, how is this going to be paid back?</p> <p>SOLUTION: <i>We must live within our means or have special assessments for each member. This means. dividing our deficit by 192 units. YOU DO THE MATH!!!!</i></p> <p>ISSUE: The Audit Status</p> <p>2021. Draft audit provided with no final document,</p> <p>2022; no audit.</p> <p>2023; No audit awaiting a firm to be hired to complete.</p> <p>SOLUTION: <i>Bylaws clearly state that the audit in final form is to be provided to the board and all its members for the preceding calendar year. JUST DO IT! Members have a right to know where the money is going.</i></p> <p>ISSUE: Maintenance / Infrastructure As we all know, we have experienced power outages repairing of sewage and water lines are causing utility shutoffs and sinkholes. The park is known about this for over 20 years and our infrastructure is over 50 years old, yet there is no committee plan to oversee this problem that is only to get worse.</p> <p>SOLUTION: <i>Form a committee made-up of board members and residents to monitor and develop a plan for renovation. Not another board of directors - 'RANT' -ATTY'</i></p>	2024-02-27 @ 13_27 (13_27) - img20240227_1230548 8
2/26/24	<p>The board held its monthly open session meeting and failed to notify Client of the meeting in advance. But Client heard about the meeting from other HOA members. When they went to the meeting, the security guard once again refused to grant them access and physically blocked their entry.</p>	2024-02-27 @ 13_27 (13_27) - NOTES TO FILE FEB 27 Client's note re 2024-02- 26 board meeting
3/21/24	<p>The HOA's counsel produced additional financial records for the fiscal year 2022. The HOA's counsel also sent board meeting minutes for years 2017-2021, even though the request was for minutes for the past three calendar years.</p>	HOA Document Production

3/25/24	<p>The HOA posted its annual meeting agenda:</p> <ol style="list-style-type: none"> 1. Close of Registration & Call to Order by the President 5:00 PM 2. Introduction of Appointed Inspectors of Election 3. Quorum determination by the Inspector of Election 4. Nominations from the Floor 5. Close of Polls and Counting of Ballots – Inspector of Election 6. Introduction of Current Board 7. Introduction of Candidates for Board 8. Approve Minutes – Prior Annual Meeting 9. Any other matter that may lawfully be brought before the Members 10. Election Outcome by Inspector of Election 11. Adjournment 6:00 PM * <p>The HOA subsequently canceled the annual election due to a lack of quorum.</p>	<p>2024-02-27 @ 13_27 (13_27) - img20240227_12305488</p> <p>Client Email</p>
Second week of April 2024	<p>Client received an HOA notice in the mail regarding an executive session scheduled for April 16, 2024, which was the first time the HOA notified Mr. Rosenfield of this meeting.</p> <p>The April 2024 open meeting was canceled without any explanation.</p>	Update to Sara 7824
4/24/24	Ms. Rosenfield received an email from Ms. Dailey. The email reported a planned transition of the HOA's bank accounts from Alliance Association Bank to Axos Bank. But the board neither discussed nor voted on this transition, indicating that Ms. Hird made the decision unilaterally.	Client Email
Subsequently	The HOA scheduled an open board meeting for May 27, 2024. The meeting was subsequently cancelled and not rescheduled for the next Monday in June, contrary to the language in the HOA Bylaws.	Update to Sara 7824
June 2024	The HOA interviewed multiple property management candidates without providing notice to many of the directors, including Ms. Rosenfield. During one meeting, Ms. Hird took an additional vote on the termination of CBM. Ms. Hird falsely accused Ms. Rosenfield of ruining the relationship with the election company when she "cussed and swore at him and threatened him."	Update to Sara 7824
6/18/24	Ms. Rosenfield emailed Ms. Dailey:	Post Mediation Communication

	<p>As discussed, due to my lack of access to information I am requesting financial statements and board packets. In addition, I am requesting the following minutes. 10/22, 11/22, 10/23, 11/23 and 1/24, 2/24 and 3/24.</p> <p>All board packets info from 11/23 through and including 4/24. Also, all Executive Session minutes for that same period.</p> <p>Request the final year end financial statements for 2021, 2022, 2023</p> <p>Please provide this by email to sarahemails9@gmail.com or call me at 760-527-3050 to make other arrangements.</p> <p>In addition, copies of any contracts approved in my absence. Please provide all information by 6/21/24 so that I am prepared for the 6/24/24 meeting.</p>	
7/22/24	<p>Ms. Hird emailed Client:</p> <p>You never know what is really going on because You DO NOT GET INVOLVED WITH THIS BOARD , OUTSIDE OF MEETINGS.</p> <p>I will not go into it because you only care about Sarah.</p> <p>I spoke with Dave Lynn about sending the email I sent and he appreciated it, BUT NO YOU HAD TO CALL HIM.</p> <p>YOU FAILED TO TELL HIM YOU WERE NOT A SIGNATURE ON THE ACCOUNT. SO HE GAVE YOU INFORMATION , THAT BY LAW</p> <p>WASN'T SUPPOSE TO GIVE OUT!</p> <p>I always give full discloser to the Board . I don't have a hidden agenda like you do . You don't ask questions , instead you accuse and point fingers.</p> <p>I am Not the only one who signs those checks and why they were paid out.. Maybe IF YOU WERE INVOLVED YOU WOULD HAVE ANSWERS!</p> <p>Your emails are a form of abuse , harassment , threatening and it needs to stop.</p> <p>You have a ATTORNEY to ask questions to our ATTORNEY,. STOP HARASSING SMVE BOARD!</p> <p>Client prepared a draft response to this email: “</p> <p>If anyone does not know what is going on, it is you. You have never educated yourself on the by-laws, Robert Rules of Order or State Laws. I don't get involved with the other board members outside of meetings because discussion of board of directors matters may be an illegal meeting. Furthermore, I'm never invited to meet with you outside of meetings.</p> <p>I wish I could only care about myself and my husband, then I would not waste time trying to help the Board to do what is right.</p> <p>I called David Lynn because I have not seen any financial statements in three months. I told him who I was and my position on the board and my concerns for the association. All board members have a right to review all documents and physical property of the corporation per the by-laws and state laws.</p> <p>You do not give full disclosure to the board because you make decisions outside of board meetings.</p> <p>If I was included in the secret meetings, I would know what you are planning to do.</p> <p>My emails are not abusive, I am trying to perform my fiduciary responsibility to the membership of this association. I do not harass or threaten.</p>	<p>2024_07_22 Dolly-Sarah re Communication with Accountant</p> <p>Answer to Dolly email of 72224</p>

	<p>I am a member of this board duly elected by the membership and whether you like it or not I will continue to conduct my business with this board in accordance with State Law and the by-laws.</p> <p>Having the July board meeting at 6:00pm to accommodate working folks would bring us into compliance and everyone up to date. TRANSPARENCY</p> <p>When are the final interviews for the property manager contract? Are any scheduled? The 1st of August is coming up quickly.”</p>	
9/30/24	<p>The Board held an open meeting. Meeting minute was provided to Client. Relevant discussions include, without limitation:</p> <p>3. There was a discussion of mold in the Back Room. Three bids were presented. Green Planet \$9,000 for one area, Serve Pro \$10,700 and Ramm for \$11,208. Motion by Dolly to proceed with Ramm proposal to fix the mold problem. Seconded by John. All 7 Board Members approve.</p> <p>4. There was discussion of bids for roofing the 3 Common Area Buildings and Laundry Room issues. A roofer told the Board that damage was from water and not termites.</p>	Post Mediation Communication
10/28/24	The Board held an open meeting. Meeting minute was provided to Client.	Post Mediation Communication
10/24/24	<p>Ms. Rosenfield emailed the Board:</p> <p>There are several items that I have previously asked to be put on the agenda.</p> <ol style="list-style-type: none"> 1. The bank account was set up without proper board action. The Board must make a RESOLUTION at an open Board Meeting to open an account or elect signatories. This was not done. 2. There must be an election of officers. This was not done. This is a By-Laws violation for 6 months. - We must vote on this. If in doubt, ask Mr. Banks for clarification. 3. Armando, Pedro and Bob Rathmell were hired without a board vote. We need to vote on this action. <p>Establish positions and duties, and job description.</p> <p>Establish whether positions are temporary or permanent." At will" or by contract.</p> <p>Vote on any budget changes, and where the money is coming from to pay these people.</p>	Post Mediation Communication

	<p>Who reports to whom. Chain of Command, with Organizational Chart.</p> <p>4. I request all bank statements and financial condition since dismissing Castle Breckenridge in April. The whole Board needs to know what is going on.</p> <p>5. All payments to and from the reserves need to be made before the next meeting and must be approved by the Board.</p> <p>Monies should not be moved from the reserves until the Board has reviewed and voted on the exact amount, and purpose to be moved.</p> <p>This can be done at a regular meeting or emergency session of the Board.</p> <p>6. I would like to see the Accounts Payable Ledger. Also, the accounts overdue should be included in the board packet.</p> <p>The big question: How much are we in debt and how much is owed to SMVE by the residents and what is the plan for collection. And how much is owed to the reserves?</p> <p>7. The meeting should be moved to a more convenient time. Both Martha and Maria have work conflicts. As do most of the members. Let's try at 6:00 pm for a while.</p> <p>By law the membership should be able to attend the meeting and HEAR what business is being conducted on their behalf by the board.</p>	
10/31/24	<p>Ms. Rosenfield emailed the Board:</p> <p>The cancellation of the Board meeting on Monday, October 28, 2024 was unfortunate and very inconvenient. I drove 180 miles to attend the meeting, to find out at 1:00 pm there was no meeting, no quorum, and no officer to chair a meeting.</p> <p>In addition, four members were there for the meeting.</p> <p>We must get on schedule and get to work solving problems as a board instead of creating more problems. The practice of having secret meetings must stop.</p> <p>This is a mess.</p> <p>I request a Board Meeting held on November 4, 2024 at 1:00 PM. and further requesting the items I noted on my email of last week be added to the agenda.</p> <p>Dorothea Guillory (Board treasurer – “Ms. Guillory”) emailed Ms. Rosenfield:</p> <p>As far as I know there were 3 board members</p> <p>Present. So therefore the vice president said there no meeting because no quorum. What secret meeting are you always talking about? practice what you preach. Most of the board member are working together at the office trying to get paperwork together. You are a board your help would be appreciated.</p>	Post Mediation Communication
11/3/24	<p>Ms. Rosenfield and Ms. Guillory exchanged emails:</p> <p>Sarah Rosenfield <sarahemails9@gmail.com> Sun, Nov 3, 2024 at 1:58 PM To: Dot Guillory <dotg46@gmail.com></p> <p>I do not help with office work because you and Dolly are having secret meetings which you should not be doing. If there is too much work we should call all board member to help and come up with a solution. If you want help please ask me just give a little notice so Dave can drive me in. We need to work as a board one unit. Have you ever thought of forming committees i.e. transition committee. Have you scheduled any training with Mr. Banks. I will be in town next week.</p> <p>Dot Guillory <dotg46@gmail.com> Sun, Nov 3, 2024 at 4:33 PM To: Sarah Rosenfield <sarahemails9@gmail.com></p> <p>You don't know what me and Dolly do everyday. This secret meeting thing you need to get out of your head. I talk to a lot of people on and off the board a does that mean it's a secret meeting? You know the office hours so you can always go there to see if help is needed the same way the other board members do.</p>	Post Mediation Communication
	<u>Misc:</u>	ADDITIONAL INFO FOR DEMAND

	<ul style="list-style-type: none"> — According to Client, the HOA has historically failed to: (i) distribute its interim financial statements and/or annual budget report to the membership; (ii) conduct reserve studies (although it appears the HOA did conduct a reserve study in 2021); (iv) conduct an audit of its finances; (v) review the financial records on a quarterly basis; and (v) distribute meeting minutes to the membership within 30 days of the meeting. — When Ms. Rosenfield attends meetings, Ms. Hird antagonizes her and makes false statements about Ms. Rosenfield in the presence of other members. — Client has provided us with three photos of the HOA's common areas, including where the closed recreation room is located. 	Photos
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This table may be amended from time to time as new information/evidence comes in. To the extent that such new information necessitates any significant revisions to Client's litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

4. NOTABLE PROVISIONS OF THE GOVERNING DOCUMENTS

Document Name Article / Section No.	Text of the Selected Article/Sections No.
CC&Rs Section 1.10	1.10. Condominium. "Condominium" means an estate in real property as defined in California Civil Code §1351(f) consisting of an undivided interest in common in a portion of the Project and a separate interest in space called a Unit, hereinafter defined, the boundaries of which are described in the Condominium Plan. The Ownership of each Condominium shall include the Ownership of a Unit and of a 1/192 undivided interest in the Common Area as a tenant in common and Membership in the Association.

<p>CC&Rs</p> <p>Section 2.2.B</p>	<p>B. <u>Association Common Area</u>. The remainder of the property constitutes and shall be referred to herein as "Common Area" or "Common Areas," and includes, without limitation, all of the elements set forth in Section 1.7. Each Owner shall have, as appurtenant to his Unit, an undivided 1/192nd interest in the Common Areas. The Ownership of each Condominium shall include a Unit and such undivided interest in the Common Area. The Common Interest appurtenant to each Unit is declared to be permanent in character and cannot be altered without the consent of all the Owners affected, as expressed in an amended Declaration. Such undivided Common Interest cannot be separated from the Unit to which it is appurtenant, and any conveyance or transfer of the Unit includes the undivided Common Interest, the Owner's Membership in</p> <p>the Association, and any other benefits or burdens appurtenant to that Owner's Condominium. Each Owner may use the Common Areas in accordance with the purposes for which they are intended without hindering the exercise of or encroaching upon the rights of any other Owners.</p>
<p>CC&Rs</p> <p>Section 5.1.A</p>	<p>The Association shall maintain, repair, replace (when necessary), restore, operate, and manage all of the Common Area and all facilities; improvements, furnishings, equipment, and landscaping on the Common Area, and all property that may be acquired by the Association. Maintenance shall include, without limitation, painting, maintaining, cleaning, repairing, and replacing of all Common Areas, including exterior glass surfaces, landscaping, and parking areas. The responsibility of the Association for maintenance and repair shall not extend to repairs or replacements arising out of or caused by the willful or negligent act or omission of an Owner, or his or her guests, tenants, or invitees or the Owner's pets; except if the repair is covered by the insurance carried by the Association, the Association shall be responsible for making the repairs, and the responsible Owner shall pay any deductible pursuant to the insurance policy. If the Owner fails to make the payment, then the Association may make the payment and shall charge the responsible Owner, which charge shall bear interest at the rate of 12 percent per annum (but no greater than the maximum rate allowed by law) until paid in full. Any repairs arising out of or caused by the willful or negligent act of an Owner, or his or her guests, tenants or invitees or the Owner's pets, the cost of which is not covered by insurance carried by the Association, shall be made by the responsible Owner, provided the Board approves the person actually making the repairs and the method of repair. If the responsible Owner fails to take the necessary steps to make the repairs within a reasonable time under the circumstances, the Association shall make the repairs and charge the cost to the responsible Owner, which cost shall bear interest at the rate of 12 percent per annum (but no greater than the maximum rate authorized by law) until paid in full. If an Owner disputes his or her responsibility for the repairs, the Owner shall be entitled to notice and a hearing as provided in the Bylaws before any charge may be imposed.</p> <p>The Association shall have the Common Area periodically inspected for wood destroying pests and organisms and shall take appropriate corrective measures. The Association shall have the authority to require the temporary removal of occupants of a Unit as may be necessary in connection with the treatment of wood-destroying pests or organisms, pursuant to the procedures described in California Civil Code §1364(d) or any successor statute. The costs of any temporary relocation shall be borne by each Unit Owner who is required to move.</p> <p>The Association shall keep all landscaping on the Common Area to a height that does not impede the view of the Unit Owners; however, the Association shall not be required to alter landscaping that existed on the date that this Declaration was recorded in order to improve the view or other amenity of a unit Owner. The Association shall not cause to be placed or built any structure on the Common Area that impedes the view of any Unit Owner unless just compensation is paid for such view infringement.</p>

CC&Rs Article VII, Section 7.17	Nothing shall be stored, grown, or displayed in the Common Area, including decks, balconies, and patios, that are not approved in advance by the Architectural Control Commjttee.
Bylaws Article III, Section 3.1	3.1. Annual Meeting. The annual meetings of the Members shall be held on the Second Tuesday of February of each calendar year at the hour of 7:30 P.M. If the day for the annual meeting of the Members is a legal holiday, the meeting will be held at the same hour on the first following day that is not a legal holiday (excluding Saturday and Sunday).
Bylaws Article III, Section 3.2	3.2. Special Meetings. Special meetings of the Members shall be promptly scheduled at any time by the Board in response to the vote of a majority of the Board of Directors, or in response to a request by the Chair of the Board, the President, or upon written request of the Members representing 5 percent of the total voting power of the Association. The special meeting shall be held not less than 35 or more than 90 days after adoption of the resolution or receipt of the request. Only that business stated in the notice of meeting given pursuant to Section 3.3 of these Bylaws shall be transacted at the special meeting.
Bylaws Article IV, Section 4.4	4.4. Removal; Vacancies. Unless the entire Board is removed from office by the vote of a majority of the Association Members, an individual director shall not be removed prior to the expiration of that director's term of office if the votes cast against that director's removal would be sufficient to elect that director if voted cumulatively at an election at which the same total number of votes were cast and the entire number of directors authorized at the time of the most recent election of directors were then being elected. A director who was elected solely by the votes of Members may be removed from office prior to the expiration of that director's term only by the votes of a majority of Members. In the event of death or resignation of a director, the vacancy shall be filled by approval of the Board at a duly held meeting, or by the sole remaining director. The successor director shall serve for the unexpired term of the predecessor director. The Members may elect a director at any time to fill any vacancy not filled by the directors. A vacancy created by removal of a director can be filled only by election of the Members.
Bylaws Article V, Section 5.1	5.1. Nomination. Nomination for election to the Board of Directors shall be made by a Nominating Committee. Notice to the Members of the annual meeting during which the election is to occur shall include the names of all those who are nominees at the time the notice is sent. Nominations may also be made from the floor at the annual meeting. The Nominating Committee shall consist of a Chair, who shall be a member of the Board of Directors, and two or more Members of the Association. The Nominating Committee shall be appointed by the Board of Directors not less than 30 days prior to each annual meeting of the Members, to serve until the close of that annual meeting. The Nominating Committee shall make as many nominations for election to the Board of Directors as it shall in its discretion determine, but not less than the number of vacancies that are to be filled. All candidates shall have reasonable opportunity to communicate their qualifications to Members and to solicit votes.

<p>Bylaws</p> <p>Article VI, Section 6.5.</p>	<p>6.5. Open Meetings. Except as provided in paragraphs 6.6 and 6.7 of these Bylaws, all meetings of the Board shall be open to all Members, but Members other than directors may not participate in any discussion or deliberation unless expressly authorized by a majority of a quorum of the Board. However, the Board shall establish a reasonable time limit for all Members of the Association to speak to the Board of Directors at any meeting of the Board of Directors, and permit any Member of the Association to speak at any meeting of the Board of Directors within that time limit.</p>
<p>Bylaws</p> <p>Article VI, Section 6.10</p>	<p>6.10. Action without Meeting. Any action required or permitted to be taken by the Board of Directors may be taken without a meeting (and without prior notice to Members as provided in section 6.2 of these Bylaws), if all members of the Board, individually or collectively, consent in writing to that action. Action by written consent shall have the same force and effect as a unanimous vote of the Board of Directors. Written consent or consents shall be filed with the minutes of the proceedings of the Board. An explanation of the action taken shall be posted at a prominent place or places within the Common Area within three days after the written consents of all Board members have been obtained. If the Common Area consists only of an easement or is otherwise unsuitable for posting the explanation of the action taken, the Board shall communicate that explanation by any means it deems appropriate.</p>
<p>Bylaws</p> <p>Article VIII, Section 8.1.A</p>	<p>8.1. Association Duties. The Association shall, as provided in these Bylaws or as the Board may otherwise direct, through its Managing Agent, undertake the following duties and responsibilities:</p> <p>A. <u>Maintenance.</u> Perform the maintenance described in paragraph 5.1.A of the Declaration;</p>
<p>Bylaws</p> <p>Article VIII, Section 8.1.F</p>	<p>8.1. Association Duties. The Association shall, as provided in these Bylaws or as the Board may otherwise direct, through its Managing Agent, undertake the following duties and responsibilities:</p> <p>F. <u>Enforcement.</u> Enforce these Bylaws and the Declaration;</p>

<p>Bylaws</p> <p>Article VIII, Section 8.1.G</p>	<p>G. <u>Records</u>. Cause to be kept a complete record of all acts and affairs of the Association and to present a statement of them to the Members at the annual meeting of the Members, or at any special meeting when the statement is requested in writing by one-fourth of the Class A Members; keep adequate and correct books and records of account, minutes of proceedings of its Members, Board, and committees, and a record of its Members giving their names and addresses and classes of membership;</p>
<p>Bylaws</p> <p>Article IX, Section 9.6</p>	<p>9.6. <u>Vacancies</u>. A vacancy in any office may be filled by appointment by the Board. The officer appointed to the vacancy shall serve for the remainder of the term of the officer he or she replaces.</p>
<p>Bylaws</p> <p>Article XI, Section 11.1.</p>	<p>11.1. <u>Inspection by Members</u>. The membership register (including names, mailing addresses, telephone numbers, and voting rights), accounting books and records, and minutes of meetings of the Members, of the Board (including drafts and summaries), and of committees shall be made available for inspection and copying by any Member of the Association, or by his or her duly appointed representative, at any reasonable time and for a purpose reasonably related to his or her interest as a Member, at the office of the Association or at any other place within the Project the Board may prescribe. Board minutes, proposed minutes, or a draft or summary of those minutes (other than those from an executive session) shall be available to Members within 30 days of the meeting, and shall be distributed to any Member upon request and upon reimbursement of the costs in making that distribution.</p>
<p>Bylaws</p> <p>Article XI, Section 11.2.</p>	<p>11.2. <u>Rules for Inspection</u>. The Board shall establish reasonable rules with respect to:</p> <p>A. Notice given to the custodian of the records by the Member desiring to make the inspection;</p> <p>B. Hours and days of the week when that inspection may be made;</p> <p>C. Payment of the cost of reproducing copies of documents requested by a Member.</p>

<p>Bylaws</p> <p>Article XI, Section 11.4.</p>	<p>11.4. Documents Provided by Association. Upon written request, the Association, through the Managing Agent, or if there is no Managing Agent, through the Secretary, shall, within 10 days of the mailing or delivery of that request, provide the Owner of a Unit with a copy of the governing documents of the Project, a copy of the most recent budget and statements of the Association distributed pursuant to paragraph 12.1, together with a true statement in writing from an authorized representative of the Association as to the amount of the Association's current regular and special Assessments and fees, as well as any Assessments levied upon the Owner's interest that are unpaid on the date of the statement, including late charges, interest, and costs of collection that, as of the date of the statement, are or may be made a lien upon the Owner's Condominium. For providing the foregoing, the Board may impose a fee that may not exceed the reasonable cost to prepare and reproduce the requested documents.</p>
<p>Bylaws</p> <p>Article XII, Section 12.1</p>	<p>12.1. Budgets, Financial Statements and Reports. The Association shall cause to be prepared and distributed budgets, financial statements, and reports to each Member as follows:</p> <p>A. A pro forma operating budget for each fiscal year shall be distributed not less than 45 nor more than 60 days before the beginning of the fiscal year consisting of at least the following:</p> <p>(1). Estimated revenue and expenses on an accrual basis;</p> <p>(2). A summary of the Association's reserves based upon the most recent review or study conducted pursuant to paragraph 12.2 of these Bylaws, which review or study shall be printed in bold type and include all of the following:</p>
<p>Bylaws</p> <p>Article XII, Section 12.1.B</p>	<p>A report consisting of the following shall be distributed within 120 days after the close of the fiscal year: (1) a balance sheet as of the end of the fiscal year; (2) an operating (income) statement for the fiscal year; (3) a statement of changes in financial position for the fiscal year; (4) for any fiscal year in which the gross income to the Association exceeds \$75,000, a copy of a review of the financial statement of the Association prepared in accordance with generally accepted accounting principles by a licensee of the California State Board of Accountancy; (5) any information required to be reported under California Corporations Code §8322.</p>
<p>Bylaws</p> <p>Article XII, Section 12.5</p>	<p>The Board shall review on at least a quarterly basis a current reconciliation of the Association's operating and reserve accounts, the current year's actual reserve revenues and expenses compared to the current year's budget, and an income and expense statement for the Association's operating and reserve accounts. In addition, the Board shall review the latest account statements prepared by the financial institutions where the Association has its operating and reserve accounts. For purposes of these Bylaws, "reserve accounts" means moneys that the Association's Board has identified for use to defray the future repair or replacement of, or additions to, those major components that the Association is obligated to maintain.</p>

<p>Bylaws</p> <p>Article XII, Section 12.3</p>	<p>12.3. Reserve Account Fund Management. The Board shall not expend funds designated as reserve funds for any purpose other than the repair, restoration, replacement, or maintenance of major components that the Association is obligated to repair, restore, replace, or maintain and for which the reserve fund was established, or litigation involving those major components. However, the Board may authorize the temporary transfer of money from a reserve fund to the Association's general operating fund to meet short-term cash-flow requirements or other expenses, provided that the Board has made a written finding recorded in the minutes of the Board explaining the reason that the transfer is needed, and describing when and how the money will be repaid to the reserve fund. The transferred funds shall be restored to the reserve fund within one year of the date of the initial transfer, except that the Board may, upon making a finding supported by documentation that a delay would be in the best interests of the Project, delay the restoration until the time that the Board reasonably determines to be necessary. The Board shall exercise prudent fiscal management in maintaining the integrity of the reserve account, and shall, if necessary, levy a special Assessment to recover the full amount of the expended funds within the time limits required by this paragraph. This special Assessment is subject to the limitation imposed by paragraph 4.4 of the Declaration. The Board may, at its discretion, extend the date the payment on the special Assessment is due. An extension shall not prevent the Board from pursuing any legal remedy to enforce the collection of an unpaid special Assessment. When the decision is made to use reserve funds or to temporarily transfer money from the reserve fund to pay for litigation, the Association shall notify the Members of the Association of that decision in the next available mailing to all Members pursuant to California Corporations Code §5016, and of the availability of any accounting of those expenses. Unless the Project Documents impose more stringent standards, the Association shall make an accounting of expenses related to the litigation on at least a</p> <p>quarterly basis. The accounting shall be made available for inspection by Members of the Association at the Association's office.</p>
<p>Bylaws</p> <p>Article XII, Section 12.4</p>	<p>12.4. Reserve Account Withdrawal Restrictions. At least two signatures shall be required for the withdrawal of moneys from the Association's reserve accounts. Signatures shall be those of members of the Board or one member of the Board and one officer who is not a member of the Board.</p>
<p>Bylaws</p> <p>Article XII, Section 12.5</p>	<p>12.5. Review of Financial Records. The Board shall review on at least a quarterly basis a current reconciliation of the Association's operating and reserve accounts, the current year's actual reserve revenues and expenses compared to the current year's budget, and an income and expense statement for the Association's operating and reserve accounts. In addition, the Board shall review the latest account statements prepared by the financial institutions where the Association has its operating and reserve accounts. For purposes of these Bylaws, "reserve accounts" means moneys that the Association's Board has identified for use to defray the future repair or replacement of, or additions to, those major components that the Association is obligated to maintain.</p>

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

- When was Ms. Rosenfield elected to the Board? (Provide details including when vote occurred, what was the vote (number of votes in support and against) to vote her in, etc.)
- What “water leak issues” did Client observe/become aware of in or about September 2021? Are they still ongoing?
- On what basis does the client assert that board members Annette Hill and Dorteia Guilroy were illegally elected? Does Client mean “illegally appointed? Did that occur at the same secret “reorganization meeting” in 2022?
- Is the recreation room *still* closed? Did it ever reopen? If so, when? What about the other common room inside the clubhouse? What about the common area that was used to play horseshoe?
- How does Client know the 2023 reserve expenses were not repaid in a year?
- How exactly did the board improperly try to remove Ms. Rosenfield in or about November 2023?
- When was the HOA's last election? In what other years did the HOA fail to hold elections?

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

6.

CIVIL CODE § 5200 DOCUMENT DEMAND

The HOA produced some documents in response to a Civil Code section 5200 demand. Documents that should've been included in the HOA's production appear to continue to be missing (*see* below).

7. ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

The Firm needs to ask Client for the following documents:

- Deed to Client's property.
- 2022 meeting minutes and agendas (to the extent one or more minutes and agendas are currently available to Client).
- 2023 meeting minutes and agendas (to the extent one or more minutes and agendas are currently available to Client).
- 2024 meeting minutes and agendas (to the extent one or more minutes and agendas are currently available to Client).
- Castle Breckenridge contract.
- Photo of the common area that was used to play horseshoe.

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.

8. 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.

Document/Information	Significance of the Document/Information	Identity of Third Party
None at this time.		

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

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.²
- Must be stored in a separate folder in “Client Docs” called “HOA Privileged Docs.”

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

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 has 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

² For this reason, some potentially privileged documents provided by Client (e.g., email exchanges between board members regarding the HOA's business affairs) are not identified in this LADD.

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

- Article I, Section 1.10 of the CC&Rs provides that each homeowner owns 1/192 undivided interest in the HOA’s Common Area.
- In turn, Article II, Section 2.2.B of the CC&Rs provides that “[t]he Common Interest appurtenant to each Units cannot be altered without the consent of all the Owners affected.”
- Finally, Article V, Section 5.1.A of the CC&Rs mandates that the HOA shall maintain, repair, operate, manage and replace all of the Common Area. Maintenance shall include, without limitation, painting, maintaining, cleaning, repairing, and replacing all Common Areas.
- The recreational room, clubhouse room, and the “area that was used to play horseshoe” are common area spaces. As illustrated by the foregoing provisions and California law, the HOA has a duty to adequately maintain these common areas. The HOA has breached its CC&Rs by failing to maintain and/or restricting the members’ (including Client’s) use of these common areas. This arguably results in a diminution of Clients’ property’s value and lost use and enjoyment of Clients’ property (i.e., Client sustained damage as a result of the HOA’s breaches).

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

- Given the evidence at our disposal, Client has a viable claim for breach of CC&Rs.
- At this time, this cause of action is supported by the facts and the law.

10.2.

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 them for its contractual breaches above and below. Client’s damages, therefore, would likewise track the damages discussed above.

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

- Given the evidence at our disposal, Client has a viable claim for breach of the implied covenant.
- At this time, this cause of action is supported by the facts and the law.

10.3.

Breach of Other Governing Documents

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

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

Remedies—

- While typically injunctive in nature, courts may fashion remedies to enjoin any ongoing breaches. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.) Additionally, compensatory (money) damages are available if plaintiff incurred monetary damages. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1385; Civ. Code, §§ 3281, 3300.)
- As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

- Article III, Section 3.1 of the HOA's Bylaws mandates that the HOA should hold annual meeting on the second Tuesday of February of each calendar year at 7:30 PM.
- Article VI, Section 6.5 of the Bylaws states that all board meetings shall be open to all members, and members have the right to speak at any board of Directors meeting within a reasonable time limit.
- Article VI, Section 6.10 of the Bylaws only permits actions to be taken without a meeting if all members of the board consent in writing to that action.
- Article VIII, Section 8.1.A of the Bylaws explicitly requires that the HOA owes the duty to performance maintenance.
- Article VIII, Section 8.1.F. of the Bylaws prescribes that the HOA is obligated to enforce the Bylaws and the CC&Rs.
- Article VIII, Section 8.1.G. the Bylaws states that the HOA shall keep a complete record of its acts and affairs, and keep adequate and correct books and records of account, the board's meeting minutes and the committee's proceedings.
- Article XI, Section 11.1. of the Bylaws states that the HOA shall make the meeting minutes and accounting books and records available for members' inspection.
- Article XI, Section 11.4. of the Bylaws requires that the HOA provide a copy of the HOA's most recent budget within 10 days of receipt of the homeowners' written request.
- Article XII, Section 12.1 of the Bylaws requires that the HOA distribute a pro forma operating budget for each fiscal year within 45-60 days before the new fiscal year begins. Further, at the end of each fiscal year, the HOA shall prepare an estimate of reserves funds and statement of the anticipated special assessments for the future repair and replacement falling under the HOA's responsibility.
- Article XII, Section 12.3 prohibits the board to expend reserve funds for any purpose other than the repair, restoration, replacement, and maintenance of common areas.
- Article XII, Section 12.4 only permits withdrawals from the HOA's reserves accounts if at least two signatures are obtained by one board member and one officer who is not a board member.
- Article XII, Section 12.5 of the Bylaws holds that the HOA shall conduct a quarterly review of the HOA's financial records and a reconciliation of the reserve accounts.
- Here, the HOA will be liable for breaching the foregoing provisions in its Bylaws because it has, among other things: (i) historically failed to approve, prepare, and distribute annual budget reports; (ii) historically failing to conduct a reconciliation of the reserve accounts; (ii) historically failed to hold elections; (iii) unlawfully prohibited Client (who are members in good standing) to participate in open

session board meetings; (iv) failed to perform maintenance in the common area; (v) failed to allow members' inspection of accounting books and records; (vi) held secret executive session meetings and appointed/removed board members at such meetings; (vii) deprived Ms. Malec (a board member) of her right to attend executive session meetings; and (viii) misused and/or mis accounted its reserve funds (which is to be confirmed upon the Firm obtaining further financial records in discovery). This also arguably results in a diminution of Client's property value and loss of use and enjoyment of Clients' property.

— With respect to the HOA's restriction of the members' time to speak at open meetings to 3 minutes, California law allows boards to impose reasonable time limits on individual speakers to ensure the meeting runs efficiently (though any time limits must be consistently applied to all members). A time limit of each member to three to five minutes of speaking time per agenda or non-agenda item may be deemed reasonable. If the board, however, has been consistently allowing its members to speak for 3 minutes or less regardless of the number of items on the agenda and/or raised by the members outside of the agenda, this may constitute a further breach of the Bylaws, which also arguably results in a diminution of Client's property value and loss of use and enjoyment of Clients' property.

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

- Given the evidence at our disposal, Client has a strong claim for breach of Bylaws.
- At this time, this cause of action is supported by the facts and the law.

10.4. 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 has a general duty of care to its members, including Client (see, e.g., Civil Code section 1714), as well as a duty to abide by its contractual obligations. By engaging in the foregoing inactions, it may be argued that the HOA was negligent, resulting in diminution of the Property value and loss of use and enjoyment of Clients’ property.

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

- Given the evidence at our disposal, Client has a viable claim for negligence.
- At this time, this cause of action is supported by the facts and the law.

10.5. 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

- See analysis above regarding the HOA’s contractual breaches, as it is equally applicable here.
- In addition, the HOA has breached its fiduciary duties by: (i) failing to hold annual elections; and (ii) failing to distribute its interim financial statements and/or annual budget report to the membership (including Client);³ (iii) failing to conduct reserve studies;⁴ (iv) failing to conduct an audit of its finances;⁵ (v) failing to review the financial records on quarterly basis;⁶ (vi) failing to provide proper

³ See Civil Code section 5300(a).

⁴ See Civil Code section 5500.

⁵ It should be noted that an annual review (audit) of the HOA’s finances is only required to the extent the HOA’s gross income exceeds \$75,000. See Civil Code 5305.

⁶ See Civil Code section 5500.

notice of its open meetings to its members;⁷ (vii) failing to provide proper notice of its executive session meetings to Ms. Rosenfield;⁸ and (viii) failing to distribute meeting minutes to the membership within 30 days of the meeting.⁹ These breaches likewise (arguably) result in a diminution of the Property's value and loss of use and enjoyment of Clients' property.

- As for the HOA's historical failure to conduct reserve studies, the latest study was done in 2021 and a new one is due this year. Due to the four-year statute of limitations, Client's claim arising from the HOA's failure to conduct reserve studies prior to 2021 (e.g., in 2018) is time-barred. If the HOA fails to conduct a reserve study by the end of 2024, the HOA will be further liable for breaching its fiduciary duties in this regard.
- Further, the HOA improperly sought to forbid Client from participating in open meetings, effectively silencing Client, who attempted to air their grievances towards the HOA's misconduct. It is apparent that the HOA's decision to restrict Client's right to attend the meetings in bad faith, arbitrarily and capriciously, in breach of its duty of care and duty of loyalty.
- Moreover, at the April 2021 board meeting, questions arose about the accounts exceeding FDIC guarantee, indicating that the board may have breached its fiduciary duty by letting the bank accounts balance exceeding the FDIC (the Firm, however, is unable to confirm this at this time based on the documents available to it). It is recommended that the HOA should spread the association's money across various FDIC insured institutions. It may be argued that the HOA did not exercise reasonable care to manage the association's funds, rendering it further liable for breaching its fiduciary duties.
- As for the HOA's "closing" of cumulative voting 2022, the HOA's governing documents do not require cumulative voting. Cumulative voting is optional under Corporation Code §7615 (a) and Civil Code §5115 (e). Accordingly, this does not result in a breach of fiduciary duty by the HOA.

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

- Given the evidence at our disposal, Client has a strong claim for breach of fiduciary duty.
- At this time, this cause of action is supported by the facts and the law.

⁷ See Civil Code section 4920.

⁸ See Civil Code section 4920.

⁹ See Civil Code section 4950.

10.6. 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.
- Article XIV, Section 14.6 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 rationale 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

- It may be argued that the HOA’s above actions and inactions unreasonably and significantly interfere with Client’s use and enjoyment of the Property, thereby constituting a continuing nuisance and resulting in depreciation of the value of the Property.

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

- Given the evidence at our disposal, Client has a viable claim for nuisance.

10.7. Violation of Open Meeting Act

Elements—Violation of Open Meeting Act

- Relevant statutes: (i) Civil Code section 4910; (ii) Civil Code section 4930; and (iii) Civil Code section 4950.
- Civil Code section 4910: The board shall not take action on any item of business outside of a board meeting, and meetings cannot be conducted “electronically” unless in an emergency, and even then only if all the directors sign a consent.
- Civil Code section 4930: Except under certain enumerated circumstances (see the statute for details), the board may not discuss or take action on any item at a non-emergency meeting unless the item was placed on the agenda included in the notice that was distributed to the members of the HOA.
- Civil Code section 4950: The minutes, including drafts/proposed minutes, and summaries of minutes at all meetings other than executive sessions, shall be available to members within 30 days of the meeting. Members are entitled to copies of such documents if they reimburse the HOA for the cost of the copies. The annual policy statement must detail the process to obtain these documents.

Remedies—

- The statute itself provides for declaratory and/or injunctive relief. The injunction would most likely set aside the Board’s action. (Civ. Code, § 4955.) A court can impose a \$500 penalty on the HOA. (*Ibid.*)
- As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

- The board’s holding of closed-doors, unofficial, nonemergency executive session meetings and failure to provide meeting minutes within 30 days constitutes a violation of the Open Meeting Act. For these reasons, the HOA will also be held liable for violating this statute. Client will, therefore, be entitled to the appropriate injunctive relief and statutory penalties, subject to the one-year statute of limitations (i.e., to the extent such violations occur within a maximum of one year prior to Client’s filing of a lawsuit).

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

- Given the evidence at our disposal, Client has a viable claim for violation of the open meeting act.
- At this time, this cause of action is supported by the facts and the law.

10.8.

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/or must act to: (i) conduct regular meetings, keep minutes of such meetings, and prepare and distribute annual budget reports to the membership moving forward; (ii) cause to be conducted an audit of its finances; (iii) restore, maintain, and properly manage the common area; (iv) produce all documents that it should produce under Civil Code 5200; (v) allow members to speak up at open meetings for a reasonable amount of time; and (vi) cease from restricting Client’s ability to righteously participate in the open meetings. The HOA, however, appears to dispute the foregoing contentions
- The actual controversy between Client and the HOA involves continuing omissions that have and will continue to have consequences. The actual controversy is ripe for judicial intervention, as the HOA is causing Client harm. While the other causes of action may address the harm to Client, they do not request an affirmative determination as set forth above. Accordingly, declaratory relief is necessary.

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

- Given the evidence at our disposal, Client has a viable claim for declaratory relief.
- At this time, this cause of action is supported by the facts and the law.

10.9.

Failure to Permit Inspection of Records

Elements—Failure to Permit Inspection of Records

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

Remedies—

- If the plaintiff can prove that the HOA failed to allow him or her to inspect the records, the plaintiff can obtain injunctive relief ordering the HOA to allow the inspection. Additionally, if the HOA’s

refusal is deemed to have been unreasonable, the plaintiff may be entitled to a civil penalty of up to \$500 for each separate request that was denied, as well as all of his or her attorneys' fees and costs. (Civ. Code, § 5235(a).)

- Given the potentially low value of this claim, it likely needs to be brought in small claims court if it is the plaintiff's only cause of action. (Civ. Code, § 5235(b).)
- An HOA may recover its fees and costs if the court determines that the claim was frivolous, unreasonable, or without foundation. (Civ. Code, § 5235(c).)

Applicable Statute of Limitations—

- A claim for failing to allow the records to be inspected must be brought within three years. (Code Civ. Proc., § 338(a).)

Application—Application of the Law to Client's Facts

- As examined above, it appears that the HOA has historically refused to supply Client with association records that they are entitled to. While the HOA ultimately produced some (but certainly not all) of the records identified in Client's most recent demand for records (prepared by the Firm) and in an untimely manner, the HOA continues to refuse to fully comply with such demands. Client is entitled to the requested records as members of the association and the HOA's failure to turn over the records appears to be wholly unjustified. To date, it appears that the HOA has failed to produce the following records, which should exist given the HOA's statutory duty to prepare and keep these records:
 - (i) Reserve account balances and records of payments made from reserve accounts. (Civ. Code, § 5200(a)(7).);
 - (ii) Invoices, bills, receipts, and statements from any HOA vendor;
 - (iii) Signed contracts between the HOA and any vendor or contractor related to common area maintenance and/or repairs. (Civ. Code, § 5200(a)(4).);
 - (iv) Written board approval of vendor or contractor proposals or invoices related to common area maintenance and/or repairs. (Civ. Code, § 5200(a)(5).);
 - (v) All budget comparisons. (Civ. Code, § 5200(a)(3)(C).);
 - (vi) All interim financial statements, balance sheet, income & expense statements, or the general ledger. (Civ. Code, § 5200(a)(3)(A), (B), and (D).);

(vii) “Enhanced association records,” including: (a) invoices, receipts, and canceled checks for payments made by the HOA; (b) purchase orders approved by the HOA; (c) statements for services rendered; and (d) reimbursement requests submitted to the HOA related to common area maintenance and/or repairs. (Civ. Code, § 5200(a)(13) and (b).); and

(viii) All agendas and minutes of meeting of the members, the board, and any committees appointed by the board under Corporations Code section 7212 for the past three calendar years. (Civ. Code, § 5200(a)(8).) [Specifically, the HOA failed to produce the 2024 and 2023 minutes and agendas];

- The HOA has never offered a plausible explanation relating to the HOA’s failure to comply with the above request for documents. To date, Client and the Firm have no idea whether the documents were deliberately withheld and for what reason(s). Although the HOA posted some (but again, not all) of these documents on its portal, months after Client’s written request, the HOA’s untimely and inadequate response violated the statute.
- Accordingly, in addition to the attorneys’ fees and costs incurred by Client in attempting to acquire such records, the HOA may be liable for a total statutory penalty of an amount corresponding to no less than eight separate statutory requests that the HOA failed to comply with as set forth above.

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

- Given the evidence at our disposal, Client has a viable claim for failure to permit inspection of records.
- At this time, this cause of action is supported by the facts and the law.

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 **November 22, 2026** (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 San Diego 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 San Diego 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 IX, Section 9.1 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 anticipates the HOA will argue that Client did not suffer any actual losses/damages as a result of its foregoing actions and inactions examined above. As litigation progresses and closer to trial, the Firm will be required to consult/retain with an expert (e.g., a real estate appraiser) to conclusively determine the amount of diminution of the Property's value and lost use and enjoyment of the Clients' property, among other things, due to the HOA's misconduct.

Additionally, to the extent that Ms. Rosenfield is currently on the board, she should recuse herself from any and all discussions and voting in situations related to this present dispute with the HOA, as she clearly has personal and financial interests that could influence her judgment, thereby creating a conflict of interest (which may also constitute a breach of Ms. Rosenfield's fiduciary duties).

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.
