Litigation Due Diligence Analysis

Dawson v. Brizeyda

By

WB

April 5, 2023

Table of Contents

[1. SUMMARY 8](#_Toc130368692)

[2. PARTIES/SIGNIFICANT FIGURES 8](#_Toc130368693)

[3. STATEMENT OF FACTS / EVIDENTIARY SUPPORT 11](#_Toc130368694)

[4. yn\_notable\_provisions\_govdocs\_table == "Yes" NOTABLE PROVISIONS OF THE GOVERNING DOCUMENTS###yn\_notable\_provisions\_agreement\_table == "Yes" NOTABLE PROVISIONS OF ONE OR MORE OPERATIVE AGREEMENTS###yn\_notable\_provisions\_govdocs\_table == "No" or yn\_notable\_provisions\_agreement\_table == "No"RESERVED### 13](#_Toc130368695)

[5. ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT 14](#_Toc130368696)

[6. CIVIL CODE § 5200 DOCUMENT DEMAND 15](#_Toc130368697)

[7. ADDITIONAL DOCUMENTS NEEDED FROM CLIENT 16](#_Toc130368698)

[8. THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST 17](#_Toc130368699)

[9. MUST NOT USE HOA’S PRIVILEGED DOCUMENTS 19](#_Toc130368700)

[9.1. Can Client Waive the Privilege? 19](#_Toc130368701)

[9.2. Does the CRPC Require the Firm to *Return* the Privileged Documents? 20](#_Toc130368702)

[9.3. Does Providing Privileged Documents to the Firm Constitute a Fiduciary Breach by Client? 21](#_Toc130368703)

[10. radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner" POTENTIAL CAUSES OF ACTION & THE STRENGTHS/WEAKNESSES OF EACH###radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "Yes" POTENTIAL CROSS-CLAIMS & THE STRENGTHS/WEAKNESSES OF EACH### 21](#_Toc130368704)

[10.1. Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. Code, § 5975 21](#_Toc130368705)

[10.2. Breach of Contract 24](#_Toc130368706)

[10.3. Implied Covenant of Good Faith and Fair Dealing 25](#_Toc130368707)

[10.4. Breach of Other Governing Documents 27](#_Toc130368708)

[10.5. Negligence 29](#_Toc130368709)

[10.6. Breach of Fiduciary Duty 32](#_Toc130368710)

[10.7. Nuisance 35](#_Toc130368711)

[10.8. Trespass 39](#_Toc130368712)

[10.9. Interference with Prospective Business Advantage 42](#_Toc130368713)

[10.10. Interference with Contract 44](#_Toc130368714)

[10.11. Intentional Misrepresentation (Fraud) 45](#_Toc130368715)

[10.12. Negligent Misrepresentation 49](#_Toc130368716)

[10.13. Intentional Infliction of Emotional Distress (“IIED”) 51](#_Toc130368717)

[10.14. Violation of Open Meeting Act 52](#_Toc130368718)

[10.15. Declaratory Relief 54](#_Toc130368719)

[10.16. Violation of Election Laws (Civ. Code, § 5100 et seq.) 58](#_Toc130368720)

[10.17. Assault 62](#_Toc130368721)

[10.18. Battery 63](#_Toc130368722)

[10.19. Defamation 65](#_Toc130368723)

[10.20. Civil Stalking 67](#_Toc130368724)

[10.21. Violation of Statute (Dog Bite) 69](#_Toc130368725)

[10.22. False Imprisonment 71](#_Toc130368726)

[10.23. Invasion of Privacy 72](#_Toc130368727)

[10.24. Express Indemnity 74](#_Toc130368728)

[10.25. Equitable Indemnity 76](#_Toc130368729)

[10.26. Failure to Permit Inspection of Records 77](#_Toc130368730)

[10.27. Quiet Title 78](#_Toc130368731)

[10.28. Slander of Title 80](#_Toc130368732)

[10.29. Cancellation of Instrument 81](#_Toc130368733)

[10.30. Reformation of Instrument 82](#_Toc130368734)

[10.31. Partition 84](#_Toc130368735)

[10.32. Conversion 85](#_Toc130368736)

[10.33. Trespass to Chattels 87](#_Toc130368737)

[10.34. Open Book Account 89](#_Toc130368738)

[10.35. Money Had and Received 90](#_Toc130368739)

[10.36. Account Stated 91](#_Toc130368740)

[10.37. Goods and Services Rendered 92](#_Toc130368741)

[10.38. Unjust Enrichment 93](#_Toc130368742)

[10.39. Rescission 94](#_Toc130368743)

[10.40. Financial Elder Abuse (Welf. & Inst. Code, § 15610.30) 95](#_Toc130368744)

[10.41. Negligent Hiring 97](#_Toc130368745)

[10.42. Negligent Supervision 99](#_Toc130368746)

[10.43. Unfair Business Practices (Bus. & Prof. Code, § 17200 et seq.) 102](#_Toc130368747)

[10.44. Receipt of Stolen Property (Penal Code § 496) 104](#_Toc130368748)

[10.45. Misrepresentation in Connection with Sale of Security (Corp. Code, § 25401) 105](#_Toc130368749)

[10.46. Recovery Against Contractor’s Bond 108](#_Toc130368750)

[10.47. Breach of Independent Wholesale Representatives Act (Civ. Code, § 1738.10 et seq) 109](#_Toc130368751)

[10.48. Violation of California Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.) 113](#_Toc130368752)

[10.49. Malicious Prosecution 114](#_Toc130368753)

[10.50. Abuse of Process 117](#_Toc130368754)

[10.51. Insurance Bad Faith 120](#_Toc130368755)

[10.52. Medical Malpractice 123](#_Toc130368756)

[10.53. Legal Malpractice 126](#_Toc130368757)

[10.54. Fraudulent Transfer (Uniform Fraudulent Transfer Act—Civil Code, § 3439 et seq.) 131](#_Toc130368758)

[10.55. Civil Harassment 134](#_Toc130368759)

[10.56. 135](#_Toc130368760)

[radio\_client\_plaintiff\_defendant == "Defendant/Respondent" 136](#_Toc130368761)

[11. POTENTIAL AFFIRMATIVE DEFENSES 136](#_Toc130368762)

[11.1. BJR (Lamden) 136](#_Toc130368763)

[11.2. Statute of Limitations 138](#_Toc130368764)

[11.3. Equitable Estoppel 144](#_Toc130368765)

[11.4. Unclean Hands 144](#_Toc130368766)

[11.5. Laches 144](#_Toc130368767)

[11.6. Negligence (Comparative Fault) 145](#_Toc130368768)

[11.7. Apportionment 145](#_Toc130368769)

[11.8. Negligence (Sudden Emergency) 146](#_Toc130368770)

[11.9. Assumption of Risk 146](#_Toc130368771)

[11.10. Contract (Force Majeure) 147](#_Toc130368772)

[11.11. Contract (Duress) 147](#_Toc130368773)

[11.12. Contract (Fraud) 148](#_Toc130368774)

[11.13. Contract (Frustration of Purpose) 149](#_Toc130368775)

[11.14. Contract (Lack of Consideration) 149](#_Toc130368776)

[11.15. Contract (Failure of Consideration) 150](#_Toc130368777)

[11.16. Contract (Illegality) 150](#_Toc130368778)

[11.17. Contract (Impossibility) 151](#_Toc130368779)

[11.18. Contract (Impracticability) 151](#_Toc130368780)

[11.19. Contract (Mistake of Law) 152](#_Toc130368781)

[11.20. Contract (Mistake of Fact) 152](#_Toc130368782)

[11.21. Contract (Novation) 153](#_Toc130368783)

[11.22. Contract (Statute of Frauds) 153](#_Toc130368784)

[11.23. Contract (Unconscionability) 154](#_Toc130368785)

[11.24. Contract (Undue Influence) 155](#_Toc130368786)

[11.25. Contract (Accord and Satisfaction) 155](#_Toc130368787)

[11.26. Waiver 156](#_Toc130368788)

[11.27. Failure to Mitigate 156](#_Toc130368789)

[11.28. Lack of Damages 157](#_Toc130368790)

[11.29. Failure to State a Claim 157](#_Toc130368791)

[11.30. No Causation 158](#_Toc130368792)

[11.31. Justification 158](#_Toc130368793)

[11.32. Ratification 159](#_Toc130368794)

[11.33. Litigation Privilege (Civ. Code, § 47) 159](#_Toc130368795)

[11.34. Consent 160](#_Toc130368796)

[11.35. Necessity 160](#_Toc130368797)

[11.36. Private Necessity 161](#_Toc130368798)

[11.37. Equitable Easement 161](#_Toc130368799)

[12. STRATEGIC CONSIDERATIONS 162](#_Toc130368800)

[12.1. Statute of Limitations 162](#_Toc130368801)

[12.2. Applicability of Davis-Stirling Act 162](#_Toc130368802)

[12.3. Jurisdiction 163](#_Toc130368803)

[12.3.1. Arbitration 163](#_Toc130368804)

[12.3.2. Personal Jurisdiction 163](#_Toc130368805)

[12.3.3. Subject Matter Jurisdiction 164](#_Toc130368806)

[12.4. Standing 164](#_Toc130368807)

[12.5. Anti-SLAPP Analysis 166](#_Toc130368808)

[12.6. Pre-Filing Requirements 175](#_Toc130368809)

[12.7. Attorneys’ Fees and Costs 176](#_Toc130368810)

[13. FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS 177](#_Toc130368811)

# SUMMARY

Dawson alleges that Brizeyda made false and defamatory statements on an online forum, thus causing him economic and mental damages.

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# PARTIES/SIGNIFICANT FIGURES

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

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.

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# STATEMENT OF FACTS / EVIDENTIARY SUPPORT

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

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# RESERVED

RESERVED.

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# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

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

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# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

At this time, the Firm does not need Client to provide any additional documents. This section of the LADD, however, may be amended from time to time if Client locates additional documents, or if a third party produces additional documents.

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# 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** |
| Minutes from the executive session dated 3/5/20 re Client’s disciplinary hearing. | These minutes, which are not available to non-directors outside the context of litigation, will show that the Board acted arbitrarily and capriciously in disciplining Client. | PMC Management |
| \* | \*\* | \* |
| \* | \*\* | \* |
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The table above may be amended from time to time as new information comes to light.

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# POTENTIAL CAUSES OF ACTION &THE STRENGTHS/WEAKNESSES OF EACH

## 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.)

Remedies—

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

— Injunctive Relief is available. Courts can fashion equitable relief to remedy negligent conditions. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.)

— Damages for emotional distress are only available in connection with bodily injury. (*Potter v. Firestone Tire & Rubber* (1993) 6 Cal.4th 965.) Such relief, when available, arises out of a claim for *negligent infliction of emotional distress*, which often involve “bystander situations”—e.g., witnessing injury to a family member. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064.) Emotional distress damages for negligence *without* injury (e.g., fear of illness such as cancer if exposed to toxic substances threatening cancer) available if defendant acted with malice, fraud, or oppression, and the fear is based on knowledge corroborated by reliable medical or scientific evidence. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000.)

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

Applicable Statute of Limitations—

— Two years for personal injuries. (Code Civ. Proc., § 335.1.)

— Three years for claims related to injury to property. (Code Civ. Proc., § 335.1.)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *negligence*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

— \*\*\*

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

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Interference with Prospective Business Advantage

Elements—Interference with Prospective Business Advantage

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

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

Remedies—

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

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

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

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

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

Applicable Statute of Limitations—

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

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *interference with prospective business advantage*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Interference with Contract

Elements— Interference with Contract

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

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

Remedies—

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

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

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *interference with contract*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), you should cite to that/those provision(s) here (no need to quote or provide a snip).

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

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

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

Elements—IIED

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

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

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

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

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

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

Remedies—

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

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

Applicable Statute of Limitations—

— The statute of limitations for IIED is two years. (Code Civ. Proc., § 335.1.)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *IIED*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Defamation

Elements—Defamation

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

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

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

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

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

Remedies—

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

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

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

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

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

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *defamation*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), you should cite to that/those provision(s) here (no need to quote or provide a snip).

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

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Civil Stalking

Elements—Civil Stalking

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

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

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

Remedies—

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

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

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

Applicable Statute of Limitations—

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

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *civil stalking*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), you should cite to that/those provision(s) here (no need to quote or provide a snip).

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

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Civil Harassment

Elements—Civil Harassment

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

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

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

Remedies—

— What are the available remedies.

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

Applicable Statute of Limitations—

— What is the statute of limitations for this claim?

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *civil harassment*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

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# STRATEGIC CONSIDERATIONS

## 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 **July 1, 2024** (the *earliest* of the applicable non-expired statutes of limitations deadlines given the desired causes of action).

## Jurisdiction

### Arbitration

Since Client did not execute any contract containing a binding arbitration provision, Client may file the lawsuit in the superior court of Orange County.

### Venue

Orange County is the correct venue for this lawsuit.

## 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).

## 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).)

Analysis—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application/Conclusion—

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

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

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

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

The facts of this case do not trigger any pre-filing requirements.

## Attorneys’ Fees and Costs

Because the causes of action discussed above are not subject to a statute that awards the prevailing party its attorneys’ fees, and because there is likewise no applicable contract containing such a provision, Client is not currently entitled to reimbursement of attorneys’ fees upon prevailing.

That does not, however, mean that Client won’t be entitled to seek some or all such fees under another legal theory (e.g., Code of Civ. Proc., § 2033.420; *Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675; *Barnett v. Penske Truck Leasing Co., L.P.* (2001) 90 Cal.App.4th 494, 497-99 [holding that if a party unreasonably denies a request for admission and the propounding party later proves the denied matter, the court, upon the propounding party’s motion, must order the responding party to pay the fees and costs that the propounding party incurred in proving the denied matter].)

— The order is mandatory unless the court finds that (i) an objection to the request was sustained or a response to the request was waived under Code of Civil Procedure section 2033.290, (ii) the admission sought was not of substantial importance, (iii) the responding party had reasonable grounds to believe that he or she would prevail on the matter, or (iv) there was other good reason for failing to make the admission. (Code Civ. Proc., § 2033.420(b).)

• An issue of “substantial importance” is one that, if not proven, would have changed the results of the case. (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 752, fn. 20, citing *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 634–35).)

— This type of motion may be granted if the responding party denied the request for admission for lack of information but actually had sources of information available and failed to make a reasonable investigation. (*Doe v. Los Angeles County Dept. of Children & Family Services, supra,* 37 Cal.App.5th at 691.)

— If the responding party merely objected to the at-issue request or gave an incomplete response, the propounding party must first move to compel a further response to the request. Failing to do so waives the propounding party’s ability to move under Code of Civil Procedure section 2033.420(a). (*American Federation of State, County, & Municipal Employees v. Metropolitan Water District of Southern California* (2005) 126 Cal.App.4th 247, 268.)

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

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# FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS

None at this time.

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.

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

1. Although many think that doesn’t make sense in light of the fact that a cause of action for *negligent* interference with prospective business advantage does exist, because the California Supreme Court has yet to disprove the *Fifeld Manor* case, it remains “good” law. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 349.) [↑](#footnote-ref-1)