Litigation Due Diligence Analysis

BidMail v. Repro X-Press, Inc. et al.

By

JG

October 10, 2024

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# SUMMARY

TBD

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# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| BidMail, Inc. (“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 |
| Repro X-Press, Inc.  | Software Licensee |

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

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

# STATEMENT OF FACTS / EVIDENTIARY SUPPORT

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

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

# NOTABLE PROVISIONS OF ONE OR MORE OPERATIVE AGREEMENTS

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

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.

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# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

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

— TBD

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

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# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

The Firm needs to ask Client for the following documents:

— TBD

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.

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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

## Breach of Contract

Elements—Breach of Contract

— “The essential elements of a claim of breach of contract, whether express or implied, are the contract, plaintiff’s performance or excuse for non-performance, defendant’s breach, and the resulting damages to plaintiff.” (*Darbun Enterprises Inc. v. San Fernando Community Hosp.* (2015) 239 Cal.App.4th 399, 409; *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.)

Remedies—

— Compensatory (money) damages are available for all expected harm caused by the breach. (Civ. Code, § 3300.) In other words, damages must be reasonably foreseeable. (Civ. Code, § 3300; *Erlich v. Menezes* (1999) 21 Cal.4th 543.)

— Emotional distress damages are generally *not* available *unless* the breach caused bodily harm or a serious emotional disturbance was a particularly likely result. (*Erlich v. Menezesm, supra,* 21 Cal.4th at 558; *Plotnik v. Meihous* (2012) 208 Cal.App.4th 1950 [breach of settlement agreement by hitting dog with baseball bat].)

— Specific performance is an available remedy for breach if the non-breaching party desires to affirm the contract. (Civ. Code, § 1680; *Kassir v. Zahabi* (2008) 164 Cal.App.4th 1352.)

— Rescission (accompanied by restitution) is available in certain circumstances. (Civ. Code, § 1692.) Mutual rescission is available if all parties consent. (Civ. Code, § 1689(a).) Unilateral rescission is available by statute for mistake, fraud, duress, undue influence, failure of or void consideration, or if the contract is unlawful or against public policy. (Civ. Code, § 1689(b).)

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

Applicable Statute of Limitations—

— For breach of verbal contracts, the statute of limitations is two years. (Code Civ. Proc., § 339.)

— For breach of *most* written contracts, the statute of limitations is four years. (Code Civ. Proc., § 337.)

— For breach of *negotiable instruments* (e.g., promissory notes), the statute of limitations is six years. (Comm. Code, § 3118.)

Application—Application of the Law to Client’s Facts

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

— \*\*\*

— \*\*\*

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

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

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

## Implied Covenant of Good Faith and Fair Dealing

Elements—Breach of the Implied Covenant of Good Faith and Fair Dealing

— The elements of a claim for breach of the implied covenant of good faith and fair dealing are: (i) the existence of a contract; (ii) the plaintiff’s performance of the contract or excuse for nonperformance; (iii) the conditions required for the defendant’s performance occurred or were excused; (iv) the defendant unfairly interfered with the plaintiff’s right to receive the benefits of the contract; and (v) the plaintiff was harmed. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350; *Racine & Laramie, Ltd. v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032.)

— Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. (Rest.2d Contracts, § 205.) “The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. [Citations.]” (*Carma Developers (Cal.), Inc., v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372.) “All that is required for an implied covenant claim is the existence of a contractual or relationship between the parties. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.)

— The “implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose.” (*Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75; accord *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 401.) A “breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself.” (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59.) Indeed, “breach of a specific provision of the contract is not . . . necessary’ to a claim for breach of the implied covenant of good faith and fair dealing.” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) An association’s duty of good faith extends to each member individually. (See *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642.) The essence of the good faith covenant is objectively reasonable conduct. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)

— The duty of a contracting party under the covenant of good faith and fair dealing is to act in a commercially reasonable manner. (*California Pines Property Owners Assn. v. Pedotti* (2012) 206 Cal.App.4th 384, 394-396; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)

— While *tortious* breach of the implied covenant is generally restricted to the insurance context, it is possible to establish such a breach *outside* the insurance context if: (i) the breach is accompanied by a common law tort (e.g., fraud, conversion, etc.); (ii) the means used to breach the contract (or its implied covenant) are tortious (e.g., involving deceit or coercion); or (iii) a party intentionally breaches the contract (or implied covenant) with the intent/knowledge that such a breach will cause severe and unmitigable harm to the other party in the form of mental anguish, personal hardship, or substantial consequential damages. (*Erlich v. Menezes* (1999) 21 Cal.4th 779.)

Remedies—

— General contractual remedies are available, including compensatory (money) damages. (Civ. Code, § 3300.)

— Tort damages are generally unavailable for real estate related matters other than leases and wrongful eviction claims that are classified as torts. (*Ginsburg v. Gamson* (2012) 205 Cal.App.4th 873.)

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

Applicable Statute of Limitations—

— Same as breach of contract. Four years for written contract (Code Civ. Proc., § 337), two years for oral contract (Code Civ. Proc., § 339), and six years for negotiable instrument (e.g., promissory note) (Comm. Code, § 3118).

Application—Application of the Law to Client’s Facts

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

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— \*\*\*

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

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

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

## Intentional Misrepresentation (Fraud)

Elements—Intentional Misrepresentation (and fraud)

— The elements of a cause of action for intentional misrepresentation are: (i) a misrepresentation; (ii) made with knowledge of its falsity; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)

• A false representation is the suggestion, as a fact, of something untrue by one who does not believe it to be true. (Civ. Code, § 1710(1).) In general, the statement must be of a past or present fact, not opinion, estimates or speculation. (*Neu-Visions Sports Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308-310.)

— The elements of an action for fraud and deceit based on a concealment are: (i) the defendant must have concealed or suppressed a material fact; (ii) the defendant must have been under a duty to disclose the fact to the plaintiff; (iii) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (iv) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; (v) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (*Marketing West Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal. App.4th 603, 612-613.)

— A promise made without intending to fulfill it—i.e., “promissory fraud”—is also actionable as fraud. In this situation, the “fact” being misrepresented is the speaker’s present intention to perform. (Civ. Code, § 1710(4); *Engalla v. Permanente Med. Group Inc.* (1997) 15 Cal.4th 951, 973 [a promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud].)

— Defendant must know the statement is false or act with reckless disregard of its truth or falsity. (*Lazar v. Sup.Ct. (Rykoff- Sexton Inc.)* (1996) 12 Cal.4th 631, 638; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 415 [scienter requirement satisfied if defendant has no belief in truth of statement and makes it recklessly, without knowing whether it is true or false].)

— Civil Code section 1709—“One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”

• Defendant must intend to induce the other party to act in reliance on the false information. (Civ. Code, § 1709; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith Inc.* (1998) 68 Cal.App.4th 445, 481.)

• Although Civil Code section 1709 does not list “reliance” as a required element of deceit, plaintiff must plead and prove that he or she actually and justifiably relied on defendant’s misrepresentation. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1091.)

— Civil Code section 1710—Defines deceit (as used in § 1709), and includes three different types of deceit, including a promise made without any intention of performing (see above). Actual reliance is a component of “justifiable reliance.” (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 737.) A plaintiff must have been justified in believing defendant’s statements. (*Gray v. Don Miller & Assocs. Inc.* (1984) 35 Cal.3d 498, 503.) Actual reliance is shown if the misrepresentation substantially influences plaintiff’s decision to act. (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678.) A plaintiff who does not believe the representations made to him or her cannot establish actual reliance. (*Buckland v. Threshold Enterprises Ltd.* (2007) 155 Cal.App.4th 798, 806-808.)

— There are three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable person standard. (*Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 312–313*.) Second, if the matter is material, reasonableness must take into account the plaintiff’s own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)

— Forbearance can constitute reliance if plaintiff decided not to do something based on the misrepresentations. (*Small v. Frist Cos. Inc.* (2003) 30 Cal.4th 167.)

— While the standard to determine the reasonableness of the reliance is subjective (i.e., the “reasonable person” standard doesn’t typically apply, and thus being gullible is often not a bar to establishing reliance)—*Brownlee v. Vang* (1965) 235 Cal.App.2d 465—there is a limit to that subjective standard. A plaintiff cannot rely on representations that are so preposterous and “so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.” (*Blankenheim v. E.F. Hutton & Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)

— Plaintiff must plead and prove that defendant’s fraud was the cause of plaintiff’s injury (*Service by Medallion Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818) and that his or her damages were proximately caused by defendant’s tortious conduct (Civ. Code, §§ 1709, 3333, 3343; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 65-66.)

Remedies—

— Different measures of compensatory (money) damages are available depending upon the nature of the claim. In general, for compensatory damages, defrauded plaintiffs are limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received. (*Alliance Mortgage. Co. v. Rothwell* (1995) 10 Cal.4th 1226 [damages include difference between value given and value received, plus consequential pecuniary loss caused by reliance on misrepresentation].)

— For claims involving the purchase, sale, or exchange of real property, Civil Code section 3343 governs. Essentially, the plaintiff is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he or she received, together with any additional damages arising from the particular transaction, including any of the following: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) an amount that would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud; and (iii) where the defrauded party was induced by reason of the fraud to sell or otherwise part with the property in question, an amount which would compensate him or her for profits or other gains that might reasonably have been earned by use of the property had he or she retained it.

• Additional damages are available for lost profits if the plaintiff was tricked into selling an income property. (Civ. Code, § 3343(a)(4).)

• The statute does not permit a plaintiff to recover the difference between the value of the property as represented and the actual value of the property, nor does it prevent the plaintiff to obtaining equitable remedies he or she might also be entitled to. (Civ. Code, § 3343(b).)

• In real property transactions, emotional distress damages are not recoverable. (Civ. Code, § 3343.)

— For fraud involving fiduciary relationships, a broader spectrum of damages is available, typically benefit of the bargain damages. (Civ. Code, §§ 1709, 3333.)

— Damages for emotional distress are available for some types of fraud that don’t involve real property. (*Sprague v. Frank J. Sanders Lincoln Mercury, Inc.* (1981) 120 Cal. App. 3d 412, 417 [“general damages for mental pain and suffering are recoverable in a tort action of deceit”].) For negligent misrepresentation cases, no emotional distress damages are available *unless* plaintiff suffers physical injury. (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th, 793, 798-799.)

— Punitive damages are awardable where plaintiff shows by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790; *Branch v. Homefed Bank, supra,* 6 Cal.App.4th at 799.)

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

Applicable Statute of Limitations—

— Where the essence of a claim is that defendant’s act constituted actual or constructive fraud, the claim is subject to the three-year limitations period. (Code Civ. Proc., § 338.)

— Otherwise, the statute of limitations is four years. (Code Civ. Proc., § 343; *William L. Lyon & Associates Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.)

Application—Application of the Law to Client’s Facts

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

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

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

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

## Negligent Misrepresentation

Elements—Negligent Misrepresentation

— The elements of a claim for *negligent* misrepresentation are nearly identical to those required to allege intentional misrepresentation (or fraud), except that the second element requires the absence of reasonable grounds for believing the misrepresentation to be true instead of knowledge of its falsity. The elements, therefore, are: (i) a misrepresentation; (ii) made with no reasonable basis to believe the representation is true; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 231.)

Remedies—

— For compensatory (money) damages, defrauded plaintiffs are generally limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received in return, plus consequential pecuniary loss caused by reliance on misrepresentation. (*Alliance Mortg. Co. v. Rothwell* (1995) 10 Cal.4th 1226.)

— For misrepresentations involving the purchase and sale of real property, damages are governed by Civil Code section 3343. The defrauded party is entitled to recover the difference between the actual value given and the actual value of what they received, together with any additional damage arising from the particular transaction, including: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) amounts for loss of use and enjoyment of the property proximately caused by the fraud; and (iii) in the case of a party induced to sell income property, profits or other gains that might reasonably have been earned by use of the property had the person retained it. (Civ. Code, § 3343(a).) Additional damage calculations apply if the defrauded party was induced to purchase income property. (*Ibid.*) Damages are *not* calculated as the difference between what was represented and what the property is actually worth. (Civ. Code, § 3343(b).)

— Punitive damages and emotional distress damages are not available in the absence of physical injury. (*Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220, 1227; *Branch v. Homefed Bank* (1992) 6 Cal.App.793, 799-800.)

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

Applicable Statute of Limitations—

— Three years. (Code Civ. Proc., § 338(d).)

Application—Application of the Law to Client’s Facts

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

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

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## 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.

Remedies—

— The remedy for a declaratory relief cause of action is a judicial declaration specifying the rights and obligations of the parties. (Code Civ. Proc., § 1060.)

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

Applicable Statute of Limitations—

— The statute of limitations governing a request for declaratory relief is the one applicable to an ordinary legal or equitable action based on the same claim. (*Mangini v. Aerojet–General Corp.* (1991) 230 Cal.App.3d 1125, 1155.)

Application—Application of the Law to Client’s Facts

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

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

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

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## Conversion

Elements—Conversion

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

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

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

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

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

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

Remedies—

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

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

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

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

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

Applicable Statute of Limitations

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *conversion*.

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

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

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

## Open Book Account

Elements—Open Book Account

— To prevail on a claim for open book account, plaintiff must show that (i) plaintiff and defendant engaged in a financial transaction; (ii) plaintiff kept an account of the debits and credits from the transaction; (iii) defendant owes plaintiff money on the account; and (iv) the amount owed. (Code Civ. Proc. § 337a; *State Compensation Insurance Fund v. Readylink Healthcare, Inc.* (2020) WL 3118580.)

Remedies—

— Compensatory damages in the amount due on the account can be recovered. (Civ. Code, § 3300.)

— Even if the contract based on the account does not provide for the recovery of attorneys’ fees and costs, the prevailing party is entitled to a specific amount for their attorneys’ fees. (Civ. Code, 1717.5(a).) The amounts available are detailed in Civil Code section 1717.5(a).

Applicable Statute of Limitations

— The statute of limitations for an open book account track the statute for breach of contract. Consequently, if the claim is based on a written instrument, the deadline is four years (Civ. Code, § 337), and if the open book account is based on an oral instrument, the deadline is two years (Code Civ. Proc., § 339). The claim accrues on the date of the last entry in the account. (Code Civ. Proc., § 337(2); *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 966.)

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 *open book account*.

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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.”

## Money Had and Received

Elements—Money Had and Received

— To prevail on a claim for money had and received, plaintiff must prove that defendant not only received money that belonged to plaintiff, but that plaintiff should be repaid on equitable grounds. (*Avidor v. Sutter’s Place, Inc.* (2013) 212 Cal.App.4th 1439, 1454.)

Remedies—

— The remedy is the restitution of the sum wrongfully retained. (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937.)

Applicable Statute of Limitations

— The statute of limitations is two years. (Code Civ. Proc., § 339(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 *money had and received*.

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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.”

## Account Stated

Elements—Account Stated

— To prevail on a claim for account stated, plaintiff must prove (i) prior transactions between the parties; (ii) that there is an agreement between the parties that the items of the account are true; and (iii) that there is a balance due and owing. (*Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.)

Remedies—

— Plaintiff is entitled to the amount due on the account. (Civ. Code, § 3300.)

Applicable Statute of Limitations

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *account stated*.

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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.”

## Goods and Services Rendered

Elements—Goods and Services Rendered

— To prevail on a claim for goods and services rendered, plaintiff must prove that (i) defendant requested that plaintiff perform services or deliver goods for defendant’s benefit; (ii) plaintiff complied with defendant’s request; and (iii) defendant failed to pay plaintiff for the services or goods. (*E. J. Franks Construction Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1127-28.)

Remedies—

— Under quantum meruit principles, plaintiff is entitled to the reasonable value of the services or goods. (*E. J. Franks Construction Inc., supra,* 226 Cal.App.4th at 1128.)

Applicable Statute of Limitations

— The statute of limitations is two years. (Code Civ. Proc., § 339(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 *goods and services rendered*.

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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.

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## Unjust Enrichment

Elements—Unjust Enrichment (Quantum Meruit)

— Unjust Enrichment is technically not a cause of action or a remedy; it is a general principle that is synonymous with restitution. (*Rutherford Holdings LLC v. Plaza Del Ray* (2014) 223 Cal.App.4th 221, 231.) Restitution through unjust enrichment requires (i) the receipt of a benefit and (ii) unjust retention of that benefit at the expense of another. (*Prakashpalan v. Engstom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132.)

• Restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 388.)

Remedies—

— Plaintiff is entitled to the return of the thing taken or withheld or its monetary equivalent. (*Federal Deposit Insurance Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346.)

Applicable Statute of Limitations

— The statute of limitations depends upon the underlying wrong. For example, in a case of unjust enrichment resulting from mistake or fraud, the three-year statute of limitations applies. (Code Civ. Proc., § 338(d); *Federal Deposit Insurance Corp. v. Dintino, supra*, 167 Cal.App.4th at 347.)

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 *unjust enrichment*.

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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.

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

Elements—Unfair Business Practices aka Unfair Competition

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

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

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

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

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

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

Remedies—

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

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

Applicable Statute of Limitations

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

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *unfair business practices*.

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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.

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

Elements— Uniform Fraudulent Transfer Act (UFTA)

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

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

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

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

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

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

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

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

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

Remedies—

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

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

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

Applicable Statute of Limitations—

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

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

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *fraudulent transfer*. If one or more provisions of a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

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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 **TBD** (the *earliest* of the applicable non-expired statutes of limitations deadlines given the desired causes of action).

## Jurisdiction

### Arbitration

Section 2.6 and Section 2.6.6 of the Software License Agreement contains a binding arbitration provision that appears to apply to all the issues and players relevant to the dispute. Consequently, legal action related to the issues in dispute must be litigated in the manner directed by that provision and may be compelled or confirmed in the superior court (most likely in Orange County).

### Venue

As was discussed above, at least as it applies to our Client, the parties to the Software License Agreement agreed to submit all disputes to binding arbitration in Orange County, so that is the correct venue.

## 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).)

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.

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

Sections 2.6 and 2.6.6 of Software License Agreement (as amended by the 2024 Amendment) contain mediation and arbitration clauses. Client has not yet complied with the requisite pre-filing requirements. That will need to be done prior to filing the action.

## Attorneys’ Fees and Costs

The prevailing party is entitled to attorneys’ fees and costs under Section 2.5 of the Software License Agreement. The prevailing party is also entitled to attorneys’ fees and costs under Civil Code section 1717 and Code of Civil Procedure section 1032.

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

TBD

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

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