Litigation Due Diligence Analysis

Chin

By

SS

October 2, 2023

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# SUMMARY

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# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| Jane Chin (“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 |
| Michael Smith | Neighbor |

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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# 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&Rs  Article IX, Section 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. |
| Purchase Agreement  Section 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:

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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:

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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

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

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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).

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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.”

## 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.”

## 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.”

## Breach of Fiduciary Duty

Elements—Breach of Fiduciary Duty

— The elements of a claim for breach of fiduciary duty are: (i) the existence of a fiduciary relationship; (ii) its breach; and (iii) damage proximately caused by that breach. (*Tribeca Companies, LLC v. First American Title, Ins.* (2015) 239 Cal.App.4th 1088.)

— Associations owe a fiduciary duty to their members. (*Raven’s Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642.)

— Directors of an association are fiduciaries and are thus required to exercise due care and undivided loyalty for the interests of the association. (*Francis T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513; *Mueller v. Macban* (1976) 62 Cal.App.3d 258, 274.)

— HOAs have an affirmative duty to enforce the restrictions in their governing documents. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111.)

— Among its acts, directors may not make decisions for the association that benefit their own interests at the expense of the association and the entire membership. (*Raven’s Cove Townhomes, Inc. v. Kruppe Development Co.* (1981) 114 Cal.App.3d 783, 799.) This is typically referred to as “self-dealing.”

Remedies—

— If the breach of fiduciary duty results in a breach of CC&Rs, then compensatory (money) damages and injunctive relief may be available.

— If the breach results in damage to property, available compensatory damages are the cost to remedy defects and for loss of use during the period of injury. (*Raven’s Cove Townhomes Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 802.)

— Civil Code § 3333: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

— Equitable remedies such as constructive trust, rescission, and restitution are available when the defendant has been unjustly enriched by the breach. (*Miester v. Mensinger* (2014) 230 Cal.App.4th 381.)

— Punitive damages may be available if the breach constitutes constructive fraud. (Civ. Code., § 3294; *Hobbs v. Bateman Eichler, Hill Richards Inc.* (1985) 164 Cal.App.3d 174.)

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

Applicable Statute of Limitations—

— A claim for breaching a fiduciary duty must be brought within four years of the breach. (Code Civ. Proc., § 343; *William L. Lyon & Assoc, Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.) If the breach of fiduciary duty stems from the defendant’s fraud (even if pleaded as breach of fiduciary duty), which has a statute of limitations of only three years, the claim must be brought within *three* years. (Code Civ. Proc., § 338; *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.)

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *breach of fiduciary duty*. 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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## Nuisance

Elements—Nuisance

— The elements for a private nuisance claim are: (i) plaintiff’s interest in property; (ii) defendant’s creation of the nuisance; (iii) unreasonable interference with plaintiff’s use or enjoyment of property; (iv) causation; and (v) damages. (Civ. Code, §§ 3479, 3491; *San Diego Gas & Electric Co. v. Sup. Ct.* (1996) 13 Cal.4th 893, 937.)

— Simply put, a cause of action for private nuisance requires the plaintiff to prove that the defendant interfered with his or her use and enjoyment of the property. (*Adams v. MHC Colony Park, L.P.* (2014) 224 Cal.App.4th 601, 610; *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302-303.)

— A person’s unreasonable, unwarrantable, or unlawful use of his or her own property in a way that interferes with the rights of others is a nuisance. (*Hutcherseon v. Alexander* (1968) 264 CA2d 126.)

— A nuisance occurs where the invasion of the property of another is intentional and unreasonable, or is unintentional but caused by negligent or reckless conduct, or is from an abnormally dangerous activity. An *intentional* nuisance requires proof of malice or actual knowledge that harm was substantially certain to follow from the activity. The conduct is not a nuisance if it is intentional but reasonable, or is accidental and not within one of the above definitions of a nuisance. Where negligence and nuisance causes of action rely on the same facts dealing with lack of due care, the nuisance claim is a negligence claim.

— If the interference is substantial *and* unreasonable (so much so that it would be offensive or inconvenient to the “normal” person), then almost any disturbance of the enjoyment of someone’s property could constitute a nuisance. (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302-303 citing *Koll-Irvine Center Property Owners Assn v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [“an interference need not directly damage the land or prevent its use to constitute a nuisance; private plaintiffs have successfully maintained nuisance actions against airports for interferences caused by noise, smoke and vibrations from flights over their homes ... and against a sewage treatment plant for interference caused by noxious odors....”].)

— Nuisances are characterized as either permanent or continuing. The nature of the claim and available damages are different for either type of nuisance. The crucial distinction between a permanent and continuing nuisance is whether the nuisance is abatable—i.e., capable of being remedied at reasonable cost and by reasonable means. (See *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1093; *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 84.)

— Nuisance v. Trespass. Nuisance is based on a property’s owner’s use of his or her own property in a way that adversely affects other property owners. Typical examples of a nuisance include things like excessive noise, vibration, odors, etc. Trespass refers to a physical invasion of property, either by persons entering the property, or a substance that is dumped, has drained onto, or under the property (e.g., drainage, toxic spills, etc.), or the encroachment of a physical object, such as a structure built over a property line.

Remedies—

— Remedies are different, depending upon whether the nuisance is *permanent* or *continuing*.

• For *permanent* nuisances, compensatory (money) damages are available. The usual measure of such damages is the diminution in fair market value of the affected property. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 292 [jury decides fair market value before and after creation of nuisance].) A plaintiff may also recover the present value of losses or expenses he or she may, with reasonable certainty, incur in the future because of the nuisance. (*Id. at* 295.) A plaintiff must recover all past, present, and future damages in one suit. (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271-272.)

• For *continuing* nuisances, the compensatory (money) damages are different. A plaintiff can only recover actual damages *through the date of the suit* (i.e., plaintiff cannot recover damages for diminution in value) because there is no certainty the nuisance will continue. The rational for that is apparently that if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that the nuisance will continue. (*Gehr v. Baker Hughes Oil Field Operations Inc.* (2008) 165 Cal.App.4th 660, 668.) Which leads to the most common remedy for ongoing nuisances—abatement. A continuing nuisance is ongoing and can be abated at any time via injunction. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868-871.)

— Emotional distress damages are also a possibility. (See *Kornoff v. Kingsburg Cotton Oil Co.*, *supra*, 45 Cal.2d at 272; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 986, fn.10; *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 287-288; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464 [damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort].) Mental distress is an element of loss of enjoyment. (*Sturges v. Charles L. Harney Inc.* (1958) 165 Cal.App.2d 306, 323.)

— Punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Hassoldt v. Patrick Media Group Inc.* (2000) 84 Cal.App.4th 153, 169-170.)

— Declaratory relief may be available in nuisance cases. (Code Civ. Proc., § 1060; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984.)

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

Applicable Statute of Limitations—

— Three years for property damage resulting from a nuisance. (Code Civ. Proc., § 338(b); *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 743-745.)

— Two years for personal injuries resulting from a nuisance. (Code Civ. Proc., § 335.1.)

— Commencement of running of the statute can be an issue.

• For private *continuing* nuisances, each repetition of a continuing nuisance is considered a separate wrong that commences a new period in which to bring an action based on the new injury. (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996), 44 Cal.App.4th 1160.)

• For a *permanent* nuisance (e.g., a building, fence, buried sewer, or structure located on the property of another), the three year statute of limitations begins to run *when the nuisance first occurred*.

Application—Application of the Law to Client’s Facts

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

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## Trespass

Elements—Trespass

— “A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it.” (*Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233.) “The essence of the cause of action for trespass is an ‘unauthorized entry’ onto the land of another.” (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1778) [trespass where wastewater was injected from defendant’s property to plaintiff’s, interfering with plaintiff’s mineral estate].

— An action for trespass may technically be maintained only by one whose right to possession has been violated (see generally, Prosser, Law of Torts, (4th ed.) § 13, p. 69; *Uttendorffer v. Saegers* (1875) 50 Cal. 496, 497–498); however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest. (*Rogers v. Duhart* (1893) 97 Cal. 500, 504–505)[citations]” (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774.) In other words, a plaintiff asserting a claim for trespass must have a possessory interest in the land at issue; mere ownership is not sufficient. (*Dieterich Int’l Truck Sales, Inc. v. J.S. & J. Servs. Inc.* (1992) 3 Cal.App.4th 1601, 1608–10.)

— Where possession is an issue, courts have held that “whether plaintiff’s relationship to the land amounts to possession within the meaning of the foregoing principles is a question of fact to be determined by the jury (*O’Banion v. Borba* (1948) 32 Cal.2d 145; *Walner v. City of Turlock* (1964) 230 Cal.App.2d 399; *Brumagim v. Bradshaw* (1870) 39 Cal. 24), unless it can be said as a matter of law that the evidence upon that issue is palpably insufficient to support a verdict for plaintiff. (*O’Keefe v. South End Rowing Club* (1966) 64 Cal.2d 729; [Citations]” (*Williams v. Goodwin* (1974) 41 Cal.App.3d 496, 509.)

— Like nuisances, trespasses can be characterized by either permanent or continuing. The principles governing the permanent or continuing nature of a trespass or nuisance are the same, and the cases discuss the two causes of action without distinction (although the distinction has implications for the statute of limitations and remedies available). (See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583.) The key to classifying a trespass as continuing or permanent is whether it is likely to be discontinued or abated at a later date. (*Id. at* 592.)

Remedies—

— As is the case with nuisances, the remedies for *prior* trespasses and an *ongoing* trespasses are different.

• For a *prior* act of trespass, the measure of compensatory (money) damages includes the: (i) value of the property’s use during the time it was wrongfully occupied (not more than five years before filing suit); (ii) reasonable cost of repair or restoration of the property to its original condition; and (iii) costs of recovering possession. (Civ. Code, § 3334(a).) The value of a property’s use is the greater of its reasonable rental value or the benefits obtained by the person wrongfully occupying the land. (Civ. Code, § 3334(b); *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, *supra*, 153 Cal.App.4th at 604.) The “reasonable” component means that a plaintiff will recover the lesser of the cost of repairing the damage and restoring the property to its original condition, or the diminution in the value of the property. (*Id.* at pp. 599-600.)

→ Damages for “annoyance and discomfort that would naturally ensue” from a trespass on a plaintiff’s land are also recoverable, and are intended to compensate plaintiff for the loss of peaceful enjoyment of the property. (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 273.) These damages are generally related to distress “arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like.” (*Kelly v. CB & I Constructors Inc.* (2009) 179 Cal.App.4th 442, 456.)

→ A plaintiff may recover damages for emotional distress and mental anguish proximately caused by a trespass. (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905; *Hensley v. San Diego Gas & Elec. Co.* (2017) 7 Cal.App.5th 1337, 1348-1352.) Emotional distress without physical injury is also compensable. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 986, fn.10.)

• With *continuing* trespasses, compensatory damages calculations are different because a plaintiff may only recover damages for *present and past injury to the property*. No award may be made for *future or prospective harm* because, as in the case of ongoing nuisances, a continuing trespass can be abated any time, ending the harm. (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592.) Only the “reasonable” cost of repairing or restoring the property to its original condition is recoverable. (Civ. Code, § 3334(a); see *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1103.)

— A trespass can be abated by an injunction in certain situations. In cases of encroachment, plaintiff may obtain a mandatory injunction ordering defendant to remove the encroachment. (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1251[condominium owner extended deck into common area and was ordered to remove it].)

— For all forms of trespass, 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); *Hassholdt v. Patrick Media Group Inc.* (2000) 84 Cal.App.4th 153, 169.)

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

Applicable Statute of Limitations—

— The limitations period for a trespass action is generally three years. (Code Civ. Proc., § 338(b).) When the claim accrues depends on whether the trespass is “permanent” or “continuing.”

• For *permanent trespass*, a claim accrues when the trespass occurs. Plaintiff must bring a single action for past, present, and future damages within three years (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592.)

• For *continuing trespass*, a new cause of action accrues each day the trespass continues, and a plaintiff must bring periodic successive actions if the trespass continues without abatement. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 869.)

Application—Application of the Law to Client’s Facts

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

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## 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 non-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

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## 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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## 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

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## 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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## 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.)

— 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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## 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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## Assault

Elements—Assault

— The elements of a cause of action for assault are: (i) the defendant acted with *intent* to cause harmful or offensive contact, or *threatened* to touch the plaintiff in a harmful or offensive manner; (ii) the plaintiff reasonably believed that he or she was about to be touched in a harmful or offensive manner (or even that the plaintiff reasonably believed that the defendant was about to carry out a threat); (iii) the plaintiff did not consent to the defendant’s conduct; (iv) the plaintiff was harmed by the conduct (e.g., the threatened contact); and (v) that the defendant’s conduct was a substantial factor in causing the plaintiff’s harm.” (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 890.)

Remedies—

— Compensatory (money) damages are available for harm proximately caused by the assault. (Civ. Code, §§ 3281-3288, 3333.)

— Emotional distress damages are also available in assault cases. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 649.)

— If plaintiff can prove, upon clear and convincing evidence, that defendant acted with oppression, fraud, or malice, then punitive damages are also available. (Civ. Code, § 3294.)

Applicable Statute of Limitations—

— The statute of limitations for assault arising out of anything *other than* domestic violence is two years. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.) The statute starts running from the time plaintiff anticipated the harm. (*Id*.)

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 *assault*. 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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## Battery

Elements—Battery

— The elements of a cause of action for battery are identical to those of *assault*, except that instead of there being an *intent* to “touch” or make unwanted contact, the “touching” or unwanted contact actually occurred. (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 890.)

Remedies—

— As in the case with the elements to assault, the *remedies* for battery are also identical to those of assault.

— Unlike assault, however, there are further remedies available if the battery occurred as part of any of the following torts: (i) civil harassment (Code Civ. Proc., § 527.6); (ii) workplace violence (Code Civ. Proc., § 527.8); or (iii) elder abuse (Welf. & Inst. Code, § 15657).

Applicable Statute of Limitations—

— The statute of limitations for battery is identical to that of assault (except that the time starts running from the time the “touching” or unwanted contact occurred).

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 *battery*. 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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## Defamation

Elements—Defamation

— **ANTI-SLAPP WARNING:** Despite the fact that defamation appears to be a viable claim under Client’s fact pattern, Client must understand that such claims often result in the filing of an anti-SLAPP motion (see detailed discussion below under Strategic Considerations). That *doesn’t* mean that Client won’t be able to defeat the anti-SLAPP. Client just needs to understand that opposing such motions can be expensive.

— 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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## 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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## Violation of Statute (Dog Bite)

Elements—Violation of Statute (Dog Bite)

— A dog owner is strictly liable for damages suffered by a plaintiff bitten by the owner’s dog regardless of whether the bite occurred in a public place or private place (assuming, of course, that if the bite occurred in a private place, the plaintiff had a lawful reason for being there). The owner is liable regardless of the dog’s former viciousness or the owner’s knowledge of such viciousness. (Civ. Code, § 3342(a); *Priebe v. Nelson* (2006) 39 Cal.App.4th 1112, 1120; *Davis v. Gaschler* (1992) 11 Cal.App.4th 1392, 1399.)

Remedies—

— Compensatory (money) damages are available for all harm proximately caused by the bite. (Civ. Code, §§ 3281-3288, 3333, 3342.)

Applicable Statute of Limitations—

— Two years from the date of injury. (Code of 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 *violation of statute (dog bite)*. 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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## False Imprisonment

Elements—False Imprisonment

— The elements of a tortious claim of false imprisonment are: (i) the non-consensual, intentional confinement of a person; (ii) without a lawful privilege (e.g., police); and (iii) that goes on for an “appreciable period of time, however brief.” (*Easton v. Sutter Coast Hosp.* (2000) 80 Cal.App.4th 485, 496.)

Remedies—

— Compensatory (money) damages are available and may include any or all of the following: (i) loss of time; (ii) business interruption; (iii) damage to reputation; (iv) emotional distress, including physical discomfort, illness, or injury; and (v) expenses to secure release from confinement. (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 650; *Scofield v. Critical Air Medicine Inc.* (1996) 45 Cal.App.4th 990.)

— Punitive damages are available if oppression, fraud, or malice are proven by clear and convincing evidence. (Civ. Code, § 3294; *Scofield v. Critical Air Medicine Inc.*, supra, 45 Cal.App.4th at 1009.)

Applicable Statute of Limitations—

— The statute of limitations is one year. (Civ. Code, § 340(c).) The statute begins to run upon the party’s release from confinement. (*Scannell v. County of Riverside* (1984) 152 Cal.App.3d 596, 606.)

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 *false imprisonment*. 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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## Invasion of Privacy

Elements—Invasion of Privacy

— There are four distinct types of activities that violate a plaintiff’s “right to privacy” and give rise to tort liability: (a) intrusion into private matters; (b) public disclosure of private facts; (c) publicity placing a person in a false light; and (d) misappropriation of a person’s name or likeness. (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129.)

• To prevail on a cause of action for invasion of privacy (i.e., *intrusion into private matters*), a plaintiff needs to prove that: (i) he or she had a legally protected privacy interest; (ii) he or she had a reasonable expectation of privacy in the place, conversation, or matter intruded upon; (iii) the defendant’s intrusion was intentional; (iv) the intrusion would be highly offensive to a reasonable person; (v) causation; and (vi) damages. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286; *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 926; also see *Nelson v. Tucker Ellis, LLP* (2020) 2020 WL 2123913, 7-8 citing *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 338.)

• To prove a claim for *public disclosure of private facts*, plaintiff must establish that: (i) defendant widely published; (ii) a private fact; (iii) that would be highly offensive to a reasonable person; (iv) the publication of which did not legitimately concern the public; (v) causation; and (vi) damages. (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 868.)

• To prove a claim for *false light publicity*, plaintiff must establish that: (i) defendant publicly communicated; (ii) a false matter about plaintiff; (iii) that would be highly offensive to a reasonable person; (iv) causation; and (v) damages. (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865.)

→ Courts have interpreted the “publicly” requirement to mean that the defendant communicated to a large number of people. (*Catsouras v. Department of California Highway Patrol, supra,* 181 Cal.App.4th at 904.)

→ Although there appears to be a split amongst the courts as to whether *private figures* need to prove actual malice to establish a false light-related invasion of privacy claim (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 239), that is certainly the case when it comes to a public figure, who must prove that he or she was exposed to hatred, contempt, ridicule, or obloquy. (*Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 678.)

→ Where the plaintiff is a public figure, he or she must also prove that the publication was made with *malice* (i.e., knowledge of its falsity or with a reckless disregard for the truth). (*Tilkey v. Allstate Insurance Company* (2020) 47 Cal.App.5th 1072.)

Remedies—

— Plaintiff may recover all damages proximately caused by the intrusion. (Civ. Code, §§ 3281, 3282, 3333.)

— Plaintiff may recover for emotional distress. (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1484-85.)

— Plaintiff may seek punitive damages if the intrusion was oppressive, fraudulent, or malicious. (Civ. Code, § 3294.)

— Injunctive relief is available. (See *Richardson-Tunnell v. School Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1066 (disapproved on other grounds by *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 815, fn. 8)].)

— Plaintiff need not first make a retraction demand. (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35.)

Applicable Statute of Limitations—

— Two years (invading someone’s privacy is a personal, rather than property, matter). (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 *invasion of privacy*. 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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## Express Indemnity

Elements—Express Indemnity

— To prevail on a claim for express indemnity, the indemnitee (the person who is entitled to indemnity protection and is thus bringing the claim for express indemnity) must prove: (i) the existence of a contract (oral or written) containing an indemnification provision; (ii) that he or she performed under the contract; (iii) that the indemnitor (the person who promised to indemnify the indemnitee) breached the contract (e.g., by refusing to provide indemnity protection to the indemnitee); and (iv) damages. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 699-700; Civ. Code, § 2772.)

Remedies—

— Compensatory (money) damages are available for all expected harm caused by the breach. (Civ. Code, § 3300.) For an express indemnity claim, this will most often take the form of the fees and costs incurred in defending against the third party’s underlying lawsuit, as well as any judgment levied against the indemnitee.

Applicable Statute of Limitations—

— If the indemnity provision is contained in a document, a claim for express indemnity must be brought within four years. (*Valley Crest Landscape Dev., Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 481; Code Civ. Proc., § 337(a).) If the indemnity provision is not contained in a document (i.e., if it was an oral promise to indemnify), a claim for express indemnity must be brought within two years. (Code Civ. Proc., § 339(1).)

• A claim for express indemnity does not accrue until the indemnitee actually either pays the third party, or incurs expenses for his or her defense that should’ve been covered by the indemnitor. When the underlying third party’s injury occurred is irrelevant. (*Valley Crest Landscape Dev., Inc., supra,* 238 Cal.App.4th at 481.)

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 *express indemnity*. 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.”

## Equitable Indemnity

Elements—Equitable Indemnity

— To prevail on a claim for equitable indemnity, the indemnitee (the person who is entitled to indemnity protection and is thus bringing the claim for express indemnity) must prove that the: (i) indemnitee is liable to a third party; (ii) indemnitor’s conduct was negligent or tortious; and (ii) indemnitor was equitably responsible for the third party’s liability (rather than the indemnitee being liable). (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217.)

— Equitable indemnity is similar to comparative fault in that liability to third party is apportioned between the indemnitee and the indemnitor. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 700.)

• Equitable indemnity typically arises when one party (the indemnitee) is ordered to pay a judgment to a third party (a plaintiff from a prior case), and the indemnitee’s liability stems from the indemnitor’s conduct. For example, Tim was driving his car when Brad negligently ran into the street. Tim swerved to avoid Brad but hit Jessica’s car. Jessica sued Tim. Tim now brings a claim for equitable indemnity against Brad. Tim could cross-claim against Brad during the pendency of the lawsuit with Jessica, or Tim could wait to see if Jessica obtained a judgment against him, and then pursue Brad.

Remedies—

— Proving a claim for equitable indemnity entitles the indemnitee to restitution from the indemnitor for the amount of fault attributable to the indemnitor. (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 989.)

Applicable Statute of Limitations—

— A claim for equitable indemnity must be brought within two years. (*Am. States Ins. Co. v. Nat'l Fire Ins. Co. of Hartford* (2011) 202 Cal.App.4th 692, 699; Code Civ. Proc., § 339(1).)

• A claim for equitable indemnity does not accrue until the indemnitee actually either pays the third party, or incurs expenses for his or her defense that should’ve been covered by the indemnitor. When the underlying third party’s injury occurred is irrelevant. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 378, fn. 12.)

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 *equitable indemnity*. 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.”

## Quiet Title

Elements—Quiet Title

— To prevail on a claim for quiet title, a plaintiff must prove that: (i) there is an adverse claim to the at-issue property; and (ii) the plaintiff possesses superior title to the at-issue property. (Code Civ. Proc., § 761.020; *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1010.)

— For all quiet title causes of action, the caption must include not only the named defendants/cross-defendants, but also language along the following lines: ALL PERSONS UNKNOWN, CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFF’S TITLE

— The complaint itself must be verified and include: (i) a description of the at-issue property; (ii) the title as to which a determination is sought; (iv) a description of the adverse claim(s); (v) the date of which the determination is sought; and (vi) a prayer for the determination of the title. (Code Civ. Proc., § 761.020.)

— The plaintiff must also record a lis pendens in the county with the county recorder where the at-issue real property is located. (Code Civ. Proc., § 761.010.)

Remedies—

— The primary remedy is a judgment establishing the priority of the plaintiff’s title as against all other interests. (Code Civ. Proc., § 764.010.)

— Compensatory damages are available for withholding property. (Code Civ. Proc., § 740.)

— Equitable relief is available. (Code Civ. Proc., § 760.040(c).)

— Punitive damages may be available if the plaintiff shows that the defendant acted oppressively, fraudulently, or maliciously. (Civ. Code, § 3294.) That being said, punitive damages in quiet title cases are rare.

Applicable Statute of Limitations

— No specific statute of limitations governs quiet title actions. The applicable statute of limitations is based on the theory of relief underlying the basis to quiet title. (*Salazar v. Thomas* (2015) 236 Cal.App.4th 467, 476.) So, for example, the statute of limitations to recover real property by an owner who is not currently in possession (e.g., to eject an unauthorized user or possessor) is five years (Code Civ. Proc., § 318), while the limitations period is three years if the basis for quiet title is fraud or mistake (Code Civ. Proc., § 338(d)). Likewise, if the basis of the claim was an improperly recorded document, the statue would be four years (to cancel the instrument). (Code Civ. Proc., § 343.)

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 *quiet title*.

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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.”

## Slander of Title

Elements—Slander of Title

— To prevail on a claim for slander of title, a plaintiff must prove that defendant: (i) made a publication that casts doubt on plaintiff’s title to property; (ii) without privilege or justification; (iii) that is false; and (iv) causes immediate and direct pecuniary loss. (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664.)

Remedies—

— Plaintiff is entitled to compensatory damages and may be entitled to punitive damages if the defendant acted oppressively, fraudulently, or maliciously. (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844; Civ. Code, § 3294.)

Applicable Statute of Limitations

— A claim for slander of title must be brought within three years. (Code Civ. Proc., § 338(g).)

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 *slander of title*.

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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.”

## Cancellation of Instrument

Elements—Cancellation of Instrument

— To prevail on a claim to cancel a recorded instrument, plaintiff must prove that: (i) the at-issue instrument is void or voidable; and (ii) there is reasonable apprehension that if the instrument is left outstanding it will cause serious injury, including financial loss. (*U.S. Bank NA v. Naifeh* (2016) 1 Cal.App.5th 767, 778; Civ. Code, § 3412.)

Remedies—

— The at-issue instrument will be declared void and ordered delivered up or canceled. (Civ. Code, § 3412.)

Applicable Statute of Limitations

— The statute of limitations is five years. (*Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1327; Code Civ. Proc., §§ 319, 328.)

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 *cancellation of instrument*.

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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.”

## Reformation of Instrument

Elements—Reformation of Instrument

— The main purpose of reformation (typically of a contract) is to make it conform to the “real agreement” (the agreement the parties actually intended upon entering into)—i.e., to reflect the intent of the parties. (*Jolley v. Chase Home Finance LLC* (2013) 213 Cal.App.4th 872, 908.)

— Basically, as long as no third party’s rights are prejudiced, an instrument may be reformed where, through fraud or mistake of the parties (or a mistake by one party that the other party knew about), a written contract doesn’t actually express the parties’ true intention. (*Jolley v. Chase Home Finance LLC*, supra, 213 Cal.App.4th at 908; Civ. Code, § 3399.)

Remedies—

— The instrument may be rewritten to express the parties’ intent as long as no third party’s rights are prejudiced. (Civ. Code, § 3399.)

Applicable Statute of Limitations

— The statute of limitations is 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 *reformation of instrument*.

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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.”

## Partition

Elements—Partition

— A partition action typically arises when one co-owner of property wants to sell their interest in the property but the other co-owner doesn’t want to sell. (*LEG Investments v. Boxler* (2010) 183 Cal.App.4th 484, 493; Code Civ. Proc., § 872.010.)

— Like a claim for partition, to prevail on a cause of action for partition, the plaintiff must allege/prove: (i) a description of the at-issue property (including its legal description and street address); (ii) plaintiff’s interests in the property; (iii) all other interests in the property; (iv) the estate to which partition is sought and a prayer for a partition of the interests; and (v) if plaintiff is seeking a sale, factual allegations justifying the sale of the property. (Code Civ. Proc., § 872.230.)

— Only the following people have standing to bring a partition action: (i) a co-owner of personal property; (ii) an owner of an estate of inheritance, an estate for life, or an estate for years in real property if the real property is owned by multiple people concurrently or in successive estates; and (iii) spouses or putative spouses for partition of community/quasi-community property. (Code Civ. Proc., § 872.210.)

— The plaintiff must also record a lis pendens in the county with the county record where the at-issue real property is located. (Code Civ. Proc., § 872.250.)

Remedies—

— The remedy comes in the form of a judgment that either physically divides the property (very rare), or, as is almost always the case when dealing with property that has physical structures built on it, ordering its sale and pro-rata allocation of proceeds. (Code Civ. Proc., § 872.210.)

— Injunctive relief is available to prevent waste, protect the property, and restrain unlawful interference with an ordered partition. (Code Civ. Proc., § 872.130.)

— The court may order an allowance, accounting, contribution, or compensatory adjustment among the parties on equitable grounds. (Code Civ. Proc., § 872.140.)

Applicable Statute of Limitations

— There is no statute of limitations for a partition action. (*Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1338.)

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 *partition*.

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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.”

## 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.”

## Trespass to Chattels

Elements—Trespass to Chattels

— To prevail on a claim for trespass to chattels, plaintiff must show (i) that plaintiff owned, possessed, or had a right to personal property; (ii) that defendant intentionally interfered with plaintiff’s use or possession of the property, (iii) that plaintiff did not consent to defendant’s interference, (iv) harm, and (v) causation. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1350-51.)

— The personal property at issue must be *tangible*. (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th 1342 at 1357.)

Remedies—

— Compensatory damages are available for actual damages and emotional distress resulting from the lost use or impairment of the property. (Civ. Code, § 3333; *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1605-07.) Nominal damages, however, are not available—i.e., the trespass must cause actual harm. (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th at p. 1351.)

— Injunctive relief is available to prevent future harm. (*Intel Corp. v. Hamidi, supra,* 30 Cal.4th at 1352.)

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

— If the following types of property are at issue, treble (triple) damages may be awarded:

• Timber. (Code Civ. Proc., § 733.)

• Injury to Cable Television Property. (Corps. Code, § 14400.)

• Stealing utility services. (Civ. Code, § 1882.1.)

Applicable Statute of Limitations

— A claim for trespass to chattels must be brought within three years, and the statute generally begins accruing when the trespass occurs. (Code Civ. Proc., § 338(c); *AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639.)

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 *trespass to chattels*.

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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.

— 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.”

## 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.

— 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.”

## Rescission

Elements—Rescission

— A contract may be rescinded by a party to the contract if (i) consent to the contract was mistakenly given or obtained through duress, menace, fraud, or undue influence; (ii) the contract’s consideration fails through the fault of the party as to whom he or she rescinds; (iii) the contract’s consideration becomes void; (iv) the contract’s consideration materially fails before it is rendered; (v) the contract is unlawful and the parties aren’t equally at fault; or (vi) performance of the contract will prejudice public interest. (Civ. Code, § 1689(b).)

Remedies—

— Rescission seeks to restore the parties to their status before the contract was entered into. (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1147.)

Applicable Statute of Limitations

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

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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.”

## Financial Elder Abuse (Welf. & Inst. Code, § 15610.30)

Elements—Financial Elder Abuse

— To prevail on a claim for financial elder abuse, plaintiff must prove that defendant: (i) took, secreted, appropriated, obtained, or retained an elder or dependent adult’s real or personal property for a wrongful use, with the intent to defraud, or both; (ii) assisted in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use, with the intent to defraud, or both; or (iii) took, took, secreted, appropriated, obtained, or retained an elder or dependent adult’s real or personal property by undue influence. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 174; Welf. & Inst. Code, § 15610.30(a).)

• “Elder” means a CA resident who is 65 or older. (Welf. & Inst. Code, § 15610.27.)

• “Dependent adult” means a CA resident between the ages of 17 and 64 who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. (Welf. & Inst. Code, § 15610.23.)

Remedies—

— In addition to compensatory (money) damages, as well as any damages provided by law, plaintiff is entitled to his or he reasonable attorneys’ fees and costs. (Welf. & Inst. Code, § 15657.5(a).)

— If defendant acted recklessly, oppressively, fraudulently, or maliciously, the “effect of death” limitations under Code of Civil Procedure section 377.34 don’t apply. (Welf. & Inst. Code, § 15657.5(b).)

— Plaintiff may also be entitled to punitive damages. (Welf. & Inst. Code, § 15657.5(c).)

Applicable Statute of Limitations

— An action for financial elder abuse must be brought within four years of when plaintiff knew or should have known of the facts constituting the financial abuse. (Welf. & Inst. Code, § 15657.7.)

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 *financial elder abuse*.

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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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## Negligent Hiring

Elements—Negligent Hiring

— An employer may be held liable to a third party for its own negligence in hiring an employee who is either/both incompetent or otherwise unfit. (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 citing *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.)

— To prevail on a claim for negligent hiring, plaintiff must prove that (i) defendant-employer hired the employee; (ii) the employee was unfit or incompetent to perform the work; (iii) defendant-employer knew or should have known that the employee was unfit or incompetent and that the hiring created a particular risk of harm; (iv) harm; and (v) defendant-employer’s hiring was a substantial factor in causing the harm. (*Phillips v. TLC Plumbing, Inc., supra,* 172 Cal.App.4th at 1139.)

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 also available in certain situations. 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.)

— Emotional distress damages are almost certainly not available. As was stated above regarding the claim for “Negligence,” because damages for emotional distress are only available in certain circumstances—i.e., bodily injury, whether direct or in a bystander situation, or fear of bodily injury where a defendant acted with malice, fraud or oppression—such facts must be present to justify damages for emotional distress. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000; *Burgess v. Superior Court, supra,* 2 Cal.4th 1064.)

Applicable Statute of Limitations

— The statute of limitations for negligent hiring is two years for personal injuries (Code Civ. Proc., § 335.1), and 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 *negligent hiring*.

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

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## Negligent Supervision

Elements—Negligent Supervision

— The elements for a claim of negligent supervision—sometimes referred to as “negligent retention”—are identical to those of negligent hiring.

Remedies—

— The remedies for negligent supervision/retention are identical to those of negligent hiring.

Applicable Statute of Limitations

— The statute of limitations for negligent supervision/retention is identical to that of negligent hiring.

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 supervision*.

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

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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.)

• Within the context of a 17200 claim, unfair, deceptive, untrue, or misleading advertising means any advertising that is communicated to plaintiff that is likely to deceive the public. (*Prata v. Superior Court, supra,* 91 Cal.App.4th at 1136.)

• Whether to include an additional cause of action for false advertising under Business and Professions Code section 17500 is still up for discussion. Because the False Advertising Act and the Unfair Competition Act (i.e., 17200) are so similar, it may not be worth while to include it as a separate claim. This is especially true given the fact that the statute of limitations is only three years, as opposed to the four year statute under 17200 (discussed below). The big difference between a claim under 17200 and one brought under 17500 is that with respect to the latter, one of the elements is that the defendant needed to have intended to dispose a consumer of the consumer’s real or personal property (or get a consumer to perform a service). (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950; Bus. & Prof. Code, § § 17500.)

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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## Receipt of Stolen Property (Penal Code § 496)

Elements—Receipt of Stolen Property

— To prevail on a civil claim for receipt of stolen property, plaintiff must prove that (i) the property was stolen; (ii) defendant knew that the property was stolen; and (iii) defendant bought or received the property. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, disapproved on another ground in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14; Pen. Code, § 496(a).)

Remedies—

— Plaintiff is entitled to treble (triple) damages, plus his or her reasonable attorneys’ fees and costs. (Pen. Code, § 496(c).)

Applicable Statute of Limitations

— A civil claim for receipt of stolen property must be brought within three years. (Code Civ. Proc., § 338.)

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 *receipt of stolen property*.

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

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## Misrepresentation in Connection with Sale of Security (Corp. Code, § 25401)

Elements— Misrepresentation in Connection with Sale of Security

— To prevail on a claim for misrepresentation in connection with a sale of security under California State law, a plaintiff must prove that: (i) a “security” was offered for sale in California; (ii) the offeror misrepresented a material fact in making the offer; and (iii) damages. (Corp. Code, § 25401.)

• “Sale” is defined very broadly to include “every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.” (Corp. Code, § 25017(a).) No actual exchange of consideration is required. (*People v. Kline* (1980) 110 Cal.App.3d 587, 596.)

• “Security” is also defined broadly to include all “traditional” securities (stocks, bonds, etc.), as well as investments contracts (where the investor provides “risk capital” that will be at risk rather than used for management). (*People v. Simon* (1995) 9 Cal.4th 493, 499.) Courts in California apply two distinct tests to determine whether an investment transaction is a security, and the two tests may be applied together or separately. If a transaction meets *either* test, the transaction will be deemed a security.

→ The first test is called the “risk capital” test, and it looks at whether the money being solicited will be used to develop a for-profit business. Courts consider a variety of factors, including whether the investors have any authority to effect the success (or failure) of the business and/or whether the investors’ money is substantially at risk “because it is inadequately secured.” (*Moreland v. Department of Corps.* (1987) 194 Cal.App.3d 506, 512; *Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 812 [country club membership is a security].)

→ The second test is called the “Howey (federal) test” (from a 1946 case called *SEC v. W.J. Howey Co*.), and it looks to whether the investment involves an investment of money in a common enterprise, where the profits are expected to come solely from the efforts of others. (*Moreland v. Department of Corps., supra*, 194 Cal.App.d3d at 512-513.)

• Although section 25401 technically only applies to offers/sales made within the State of California, this requirement is deemed satisfied if: (i) the offer *originates* in California; *or* (ii) the offer is directed to and received within California; *or* (iii) the acceptance of the offer is directed to an offeror located in California; *or* (iv) both the seller and buyer reside in California and the security is delivered in California. (Corp. Code, §25008.)

• Misrepresentation of material fact requires the defendant to have (i) intended to defraud; (ii) made a material misrepresentation of a material fact; (iii) that did (or intended to) deceive another person. (Corp. Code, §§ 25401, 25501, and 25401 for remedies.)

→ A fact is material if there is a substantial likelihood that a reasonable investor would consider the fact important in deciding whether to invest. (*People v. Butler* (2012) 212 Cal.App.4th 404, 421.)

• A plaintiff must prove that he or she has been damaged by the misrepresentation, and upon prevailing may seek the remedies referenced in Corp. Code section 25501.

Remedies—

— A plaintiff may sue either for rescission or for damages. (Corp. Code, § 25501.)

• If the *purchaser* sues for rescission, the purchaser is entitled to recover whatever consideration he or she paid for the security (plus interest at the maximum legal rate), minus any amount of income received from that security. If a *seller* sues for rescission, the seller may recover the security (once the seller repays the consideration, plus interest at the maximum legal rate), less the amount of any income received on the security by the defendant.

• A *purchaser* who sues for damages is entitled to receive the difference between the price paid for the security (plus interest at the maximum legal rate) and the value of the security at the time it was disposed by plaintiff, plus any amount of income the plaintiff received on that security. If a *seller* sues for damages, the seller is entitled to the difference between the value of the security at the time of the filing of the lawsuit, plus the amount of any income received on the security by the defendant, and the price at which the security was sold (excluding interest).

Applicable Statute of Limitations

— The earlier of two years from *discovery* of violation, or five years from the violation itself. (Corps. Code, § 25506(b).)

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 *misrepresentation in connection with sale of security*.

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

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## Recovery Against Contractor’s Bond

Elements—Recovery Against Contractor’s Bond

— To recover against a contractor’s bond, plaintiff must show that (i) the contractor violated the license law; and, if seeking recovery for the contractor’s willful and deliberate violation of the license law, (ii) harm proximately caused by the violation. (Bus. & Prof. Code, § 7071.5.)

— The following people have standing to recover against a contractor’s bond:

• A homeowner contracting for a home improvement upon his or her personal family residence who is damaged as a result of the contractor’s violation of Business and Professions Code section 7000 et seq. (Bus. & Prof. Code, § 7071.5(a).)

• A property owner contracting for the construction of a single-family residence not intended or offered for sale who is damaged as a result of the contractor’s violation of Business and Professions Code section 7000 et seq. (Bus. & Prof. Code, § 7071.5(b).)

• A person damaged by a contractor’s willful and deliberate violation of Business and Professions Code section 7000 et seq. or by the contractor’s fraudulent execution or performance of the construction contract. (Bus. & Prof. Code, § 7071.5(c).)

Remedies—

— Plaintiff can recover damages from the contractor’s surety on the license bond. (Bus. & Prof. Code, §§ 7108, 7120.)

— Additionally, plaintiff may seek to have the contractor’s license suspended or revoked by the court. (Bus. & Prof. Code, § 7106.)

Applicable Statute of Limitations

— A claim to recover against a contractor’s license bond must be brought within two years after the expiration or termination of the license. (Bus. & Prof. Code, § 7071.11.)

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 *recovery against a contractor’s bond*.

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

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## Breach of Independent Wholesale Representatives Act (Civ. Code, § 1738.10 et seq)

Elements—Breach of Independent Wholesale Representatives Act (Civ. Code, § 1738.10 et seq)

— To prevail on a claim for a violation of the Independent Wholesale Representatives Act, plaintiff must prove (i) that defendant is a manufacturer, jobber, or distributor engaged in business within CA; (ii) that plaintiff is not defendant’s employee; (iii) that defendant used plaintiff to solicit wholesale orders in CA; (iv) that plaintiff’s payment involves commissions; (v) causation; and (vi) harm. (Civ. Code, §§ 1738.10, 1738.13.)

• Keep in mind that in cases where the plaintiff is a California resident, and the employer is from out-of-state, in determining whether the courts in California can exercise personal jurisdiction over the employer, it’s *not* necessary to consider the normal factors used in determining personal jurisdiction because the statute itself specifically states that employers who enter into these types of agreements automatically submit to the personal jurisdiction of the courts.

— The written contract must include all of the following:

• The rate and method of computing the commission. (Civ. Code, § 1738.13(b)(1).)

• Details regarding when the commission will be paid. (Civ. Code, § 1738.13(b)(2).)

• The sales representative’s territory. (Civ. Code, § 1738.13(b)(3).)

• Any exceptions to the assigned territory or customers in that territory. (Civ. Code, § 1738.13(b)(4).)

• What chargebacks will be made against the commission, if any. (Civ. Code, § 1738.13(b)(5).)[[2]](#footnote-2)

— The statute requires that both parties be provided with a copy of the signed contract and that the sales representative sign an acknowledgment of receipt. (Civ. Code, § 1738.13(c).)

— In conjunction with receiving his or her commission, the employer must also provide the sales representative with the following written documentation:

• An accounting of the orders for which payment is made, including the customer’s name and invoice number. (Civ. Code, § 1738.13(d)(1).)

• Each order’s commission rate. (Civ. Code, § 1738.13(d)(2).)

• Information relating to any chargebacks included in the accounting. (Civ. Code, § 1738.13(d)(3).)

Remedies—

— Plaintiff is entitled to his or her compensatory (money) damages for a violation of the Independent Wholesale Representatives Act. (Civ. Code, § 3300.)

• As this cause of action sounds in contract, damages for emotional distress are not available. Likewise with respect to punitive damages. (*Power Standards Lab, Inc. v. Federal Express Corp.* (2005) 127 Cal.App.4th 1039, 1046-47.)

— Plaintiff is entitled to treble (triple) damages if defendant willfully failed either to (i) enter into a written contract with plaintiff or (ii) pay plaintiff’s commission as required by the written contract. (Civ. Code, § 1738.15.)

— And regardless of whether or not the contract contains an attorneys’ fees clause, the prevailing party is statutorily entitled to its reasonable attorneys’ fees and costs. (Civ. Code, § 1738.16.)

Applicable Statute of Limitations

— There is no case law addressing the statute of limitations for a claim under the Independent Wholesale Representatives Act. There are arguments that the four-year statute of limitations governing written contracts (Code Civ. Proc., § 337(a)) applies, and there are arguments that the three-year statute of limitations governing liability created by statute (Code Civ. Proc., § 338(a)) applies. ***Until the courts or Legislature clarifies this issue, use the shorter statute of limitations***.

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 independent wholesale representatives act*.

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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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## Violation of California Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.)

Elements—Violation of California Uniform Trade Secrets Act (“CUTSA”)

— To prevail on a claim for misappropriation of trade secrets under CUTSA, plaintiff must prove that (i) plaintiff owned the at-issue intellectual property; (ii) the intellectual property was a trade secret at the time of misappropriation; (iii) defendant acquired/used the trade secret through improper means; (iv) plaintiff was harmed; and (v) defendant’s misappropriation substantially caused plaintiff’s harm. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1665; Civ. Code, § 3426.1.)

• A “trade secret” is any information, including a formula, pattern, compilation, program, device, method, technique, or process that (i) derives independent economic value from not being known to the public; and (ii) is subject to reasonable efforts to maintain its secrecy. (Civ. Code, § 3426.1(d).)

Remedies—

— Plaintiff can recover its actual damages and for any unjust enrichment from the misappropriation. (Civ. Code, § 3426.3(a).) If those damages are unavailable, then plaintiff can recover a reasonable royalty. (Civ. Code, § 3426.3(b).)

— If defendant acted willfully or maliciously, plaintiff may be entitled to punitive damages in an amount not to exceed double the damages awarded under Civil Code sections 3426.3 (a) and (b). (Civ. Code, § 3426.3(c).)

Applicable Statute of Limitations—

— A claim for trade secret misappropriation under CUTSA must be brought within three years from when the misappropriation was or should have been discovered. (Civ. Code, § 3426.6.)

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 *violation of the CUTSA*. 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.

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## Malicious Prosecution

Elements— Malicious Prosecution

— **ANTI-SLAPP WARNING:** Despite the fact that malicious prosecution appears to be a viable claim under Client’s fact pattern, Client must understand that such claims often result in the filing of an anti-SLAPP motion (see detailed discussion below under Strategic Considerations). That *doesn’t* mean that Client won’t be able to defeat the anti-SLAPP. Client just needs to understand that opposing such motions can be expensive.

— To prevail on a claim for malicious prosecution, plaintiff must prove that (i) defendant commenced or directed the initiation of a prior action against plaintiff; (ii) the prior action lacked probable cause (or that defendant continued prosecuting the prior action without probable cause); (iii) defendant initiated the prior action with malice; and (iv) the prior action terminated in plaintiff’s favor. (*Medley Capital Corp. v. Security National Guaranty, Inc.* (2017) 17 Cal.App.5th 33, 45; *Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 872-873.)

— Malicious prosecution does not have to attack the entirety of the underlying action (i.e., all the causes of action alleged). Rather, a claim for malicious prosecution may be based on a single claim as long as the above-stated elements can be proven for that claim. (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333.)

— Certain types of proceedings, however, do *not* support malicious prosecution claims, including all of the following: (i) small claims (*Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 316); (ii) family law (*Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1525); (iii) petitions to enjoin harassment under Code of Civil Procedure section 527.6 (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1572); (iv) petitions to enjoin workplace violence under Code of Civil Procedure section 527.8 (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1423-24); (v) interpleaders (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 874-75); (vi) contractual arbitrations (*Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 312, 314); and (vii) contempt (*Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, 132.)

— Malicious prosecution and abuse of process are different claims. Malicious prosecution concerns meritless lawsuits or causes of action, whereas abuse of process deals with misusing the tools of litigation. (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 41-42; *Franklin Mint Co., supra,* 184 Cal.App.4th at 333.)

— Abuse of Process as a potential claim in Client’s case is discussed below.

Remedies—

— Plaintiff is entitled to (i) compensatory damages, including attorneys’ fees and costs incurred from defending against the prior action, (ii) emotional distress and mental anguish, and (iii) reputational harm. (*Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp.* (2003) 114 Cal.App.4th 906, 911); Civ. Code, § 3333.)

— Punitive damages are available if defendant is guilty of oppression, fraud, or malice. (Civ. Code, § 3294.)

Applicable Statute of Limitations—

— A claim for malicious prosecution must be brought within two years. (Code Civ. Proc., § 335.1; *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 196.)

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 *malicious prosecution*. 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.

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## Abuse of Process

Elements— Abuse of Process

— To prevail on a claim for abuse of process, plaintiff must prove that defendant (i) had an ulterior purpose for using the process; and (ii) willfully and improperly used the process. (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1579; *Brown v. Kennard* (2001) 94 Cal.App.4th 40, 893-894.)

— **ANTI-SLAPP WARNING: While Client’s facts *may* technically support a claim for Abuse of Process, which is why it was included in this LADD, for the reasons explained above, actually prosecuting an Abuse of Process cause of action is not a good idea, and should thus be avoided.**

— The litigation privilege (Civ. Code, § 47) applies to *abuse of process* claims if the conduct at issue falls within the privilege. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 520 [“[a]lthough initiating a meritless claim for an improper purpose can expose a party to damages for malicious prosecution, the mere initiation of a lawsuit, even for an improper purpose, does not support a claim for abuse of process”].)

• In fact, because Civil Code section 47’s litigation privilege is so absolute, causes of action for abuse of process are almost always precluded as a matter of law, and therefore subject the plaintiffs/cross-complainants to anti-SLAPP motions. This is why, at least in modern jurisprudence, the appropriate cause of action is malicious prosecution. (See *JSJ Ltd. Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1522.)

• In fact, it’s probably fair to say that the only time an abuse of process claim might be safe from an anti-SLAPP is where the abuse of process at issue does *not* involve *any* communicative conduct. (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366.)

Remedies—

— Plaintiff is entitled to his or her compensatory (money) damages, including mental suffering, to make plaintiff whole. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 14.)

— Plaintiff may be entitled to punitive damages if defendant acted fraudulently, maliciously, or oppressively (Civ. Code, § 3294), but *only* if plaintiff proves actual damages (e.g., compensatory damages). (Berkley v. Dowds (2007) 152 Cal.App.4th 518, 530 [holding that punitive damages were precluded as plaintiff’s claim for IIED failed to allege any wrongs for which plaintiff suffered a compensable injury]; *California v. Altus Finance S.A.* (9th Cir. 2008) 540 F.3d 992, 1001 [holding that compensatory damages are required to recover punitive damages]; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 238; *Mother Cobb’s Chicken Turnovers v. Fox* (1937) 10 Cal.2d 203, 205-206.) In other words, punitive damages are *not* recoverable unless actual money damages have also been awarded. (*Contractor’s Safety Ass’n v. Cal. Comp. Ins. Co.* (1957) 48 Cal.2d 71, 77.)

Applicable Statute of Limitations—

— A cause of action for abuse of process must be brought within two years. (Code Civ. Proc., § 335.1.)

Application—Application of the Law to Client’s Facts

— See Conclusion.

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

— For the reasons discussed above, we don’t believe that an Abuse of Process claim should be included in any forthcoming lawsuit.

## Insurance Bad Faith

Elements— Insurance Bad Faith

— To prevail on a claim for an insurer’s bad faith withholding of payment, plaintiff must prove that defendant (i) plaintiff’s benefits under the insurance policy were withheld; and (ii) the benefits withheld unreasonably or without a proper cause. (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209; *Hailey v. California Physicians’ Service* (2007) 158 Cal.App.4th 452, 472.)

• “Withholding of benefits” may consist not just of a whole cloth denial of benefits that are due to the insured, but also paying less than is due, and/or unreasonably delaying payments that are due. (*Major v. Western Home Ins. Co., supra,* 169 Cal.App.4th at 1209.)

— As was referenced above in the discussion regarding the cause of action for breach of the implied covenant of good faith and fair dealing, in the context of a bad faith insurance claim, that “implied promise” includes a duty on the part of an insurance company to *not* unreasonably withhold or delay benefits due under a policy. (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 633.)

— In fact, courts have gone so far as to say that insurance companies must “give at least as much consideration to the welfare of its insured as it gives to its own interests.” (*Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809.)

— The “implied promise” requires the parties to a contract to “refrain from doing anything to injure the right of the other to receive the agreement's benefits.” (*Maslo v. Ameriprise Auto & Home Ins.,* *supra*, 227 Cal.App.4th at 633.) And in the context of a bad faith insurance claim, that implied promise includes a duty on the part of an insurance company to not unreasonably withhold or delay benefits due under a policy. (*Ibid.*)

— In fact, courts have gone so far as to say that insurance companies must “give at least as much consideration to the welfare of its insured as it gives to its own interests.” (*Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809.)

Remedies—

— The remedies available depend on whether plaintiff brings the bad faith insurance claim as a tort claim or a contract claim. If plaintiff proceeds in tort, plaintiff is entitled to his or her compensatory damages, including the unpaid policy benefits, emotional distress, and attorneys’ fees. (*Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 467-68, fn. 19.) If plaintiff proceeds in contract, plaintiff is only entitled to damages recoverable for a breach of contract (i.e., those damages that are reasonably foreseeable by the breach). (*Ibid*.)

— Plaintiff may be entitled to punitive damages if defendant acted fraudulently, maliciously, or oppressively. (Civ. Code, § 3294; *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1080.)

Applicable Statute of Limitations—

— The statute of limitations period differs depending on whether the bad faith insurance denial claim sounds in contract or tort. (*Casey v. Metropolitan Life Ins. Co.* (2010) 688 F.Supp.2d 1086, 1100, citing *Archdale v. American Internat. Specialty Lines Ins. Co.* (E.D. CA 2007) 154 Cal.App.4th 449, 467.)

• If the claim is based on contract law, the four-year statute of limitations applies. (Code Civ. Proc., § 337(a).) If the claim is based on tort law, the two-year statute of limitations applies. (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 *insurance bad faith*. 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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## Medical Malpractice

Elements— Medical Malpractice

— To prevail on a claim for medical malpractice, plaintiff must prove that (i) the defendant had a duty to use the same degree of skill, prudence, and diligence as other similarly situated members of defendant’s profession; (ii) the defendant breached that duty; and (iii) as a result of the breach, plaintiff suffered damages. (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.)

• Negligent conduct occurring in a medical setting is not enough to bring a claim for medical malpractice. The negligent conduct must result from a health care provider’s rendering of professional services within the scope of their license. (*Flores v. Presbyterian Intercommunity Hosp.* (2016) 63 Cal.4th 75, 83.) For example, if someone slips and falls on a wet floor in a medical office and the floor was wet due to the negligence of the healthcare provider, that would not support a medical malpractice cause action. It would support a negligence claim, however.

Remedies—

— Plaintiff is entitled to his or her compensatory and general damages up to the time of trial and for those future damages that are reasonably certain to occur. (Code Civ. Proc., § 667.7(a); Civ. Code, §§ 3281-3288, 3333.)

— Noneconomic losses (e.g., pain, suffering, inconvenience, physical impairment, disfigurement, etc.) are limited to $250,000. (Civ. Code, § 3333.2.)

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

• Plaintiff’s prayer for relief may *not* include a prayer for punitive damages *unless* plaintiff seeks and obtains leave of court to include such a prayer or defendant waives the prohibition. (Code Civ. Proc., § 425.13(a).)

Applicable Statute of Limitations—

— If plaintiff is 18 or older at the time of the injury, he or she must bring a claim for medical malpractice within the *earlier* of (i) *three* years from the injury or (ii) *one* year from when plaintiff knew or should have known of the injury. (Code Civ. Proc., § 340.5.)

— If plaintiff is 6 to 17 years old at the time of the wrongful act, he or she must bring a claim for medical malpractice within *three* years from the date of the wrongful act. (Code Civ. Proc., § 340.5.)

— If plaintiff is under 6 years old at the time of the wrongful act, he or she must bring a claim for medical malpractice within *either* (i) three years from the wrongful act or (ii) before plaintiff turns 8, whichever is *later*. (Code Civ. Proc., § 340.5.)

• That time limitation for minors (i.e., anyone under 18) is tolled for any period of time in which a parent, insurer, or health care provider has committed fraud or collusion in failing to bring an action on behalf of the minor. (Code Civ. Proc., § 340.5.)

— If the requisite notice (see the Pre-Trial Requirements section of this LADD below) is served within the 90-day notice period, then the applicable statute of limitations will be extended by 90 calendar days from the date of the notice.

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 *medical malpractice*. 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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## Legal Malpractice

Elements— Legal Malpractice

— The elements of a legal malpractice claim are (i) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise, (ii) a breach of that duty, (iii) a proximate causal connection between the breach and the resulting injury, and (iv) actual loss or damage resulting from the attorney’s negligence. (*Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1089; *Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60.)

• An attorney has the duty to exercise the same degree of skill as other similarly situated attorneys in good standing do. (*Smith v. Lewis* (1975) 13 Cal.3d 349, 355.)

• To establish causation in a legal malpractice action, the plaintiff must show that the attorney’s negligence was the actual cause of the plaintiff’s harm, which, as a general proposition, requires plaintiff to show (i) that the harm would not have occurred but for the attorney’s negligence, or (ii) that the negligence was a concurrent independent cause of the harm. (See, e.g., *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240–41; *Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 186; see CACI 601 [“but for” standard in legal malpractice cases]; *Knutson v. Foster* (2018) 25 Cal.App.5th 1075.) This ordinarily requires the plaintiff to prove that, “but for” the attorney’s negligence, he or she would have obtained a more favorable judgment or settlement in the underlying action in which the malpractice allegedly occurred. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193; *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489; *Orrick Herrington & Sutcliffe LLP v. Superior Court* (2003) 107 Cal.App.4th 1052.)

— While the facts may support this legal malpractice claim, Client needs to understand that although held to a high duty of care to their clients, attorneys do *not* warrant or guarantee success or a particular result. (*Lucas v. Hamm* (1961) 56 Cal.2d 583 [holding that the attorney is not, in the absence of express agreement, an insurer of the validity of an instrument that he or she is engaged to draft.].)

• Attorneys are *not* liable for every mistake made in their practice. (*Banerian v. O’Malley* (1974) 42 Cal.App.3d 604, 623; *Smith v. Lewis, supra,* 13 Cal.3d at 349; *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336.)

• And an attorney’s obligation to provide sound advice does *not* require the attorney to advise on “all possible alternatives no matter how remote or tenuous.” (*Davis v. Damrell* (1981) 119 Cal.App.3d 883, 889.)

• Plaintiff may be required to incorporate the case-within-a-case (or trial-within-a-trial) standard of causation, which generally requires the plaintiff to “retry” the underlying case to prove that the outcome would have been more favorable had it not been for the attorney’s error. (See *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531.)

• “[I]n order to make a defendant liable his wrongful act must be the *causa causans* [ (immediate cause) ], and not merely the *causa sine qua non* [ (necessary antecedent) ] [citation].” (*Johnson v. Union Furniture Co.* (1939) 31 Cal.App.2d 234, 237.)

— A breach of the Rules of Professional Conduct is merely evidence of a lawyer’s breach; it is not dispositive of a lawyer’s breach. (*BGJ Assocs., LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1227.)

Remedies—

— Plaintiff is entitled to his or her compensatory and general damages for the harm caused by defendant’s wrongful acts. (Civ. Code, §§ 3281-3282, 3333.)

— Plaintiff may be able to recover his or her attorneys’ fees from having to bring or defend an action against a third party under the “tort of another” doctrine. (*Orrick Herrington, supra,* 107 Cal.App.4th at 1059.)

— If defendant acted intentionally, plaintiff may recover for his or her emotional distress. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1096-97.)

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

Applicable Statute of Limitations—

— A claim for legal malpractice must be brought within either (i) one year after plaintiff knew or should have known of the wrongful act or omission; or (ii) four years from the wrongful act or omission, whichever occurs first. (Code Civ. Proc., § 340.6(a).)

Application—Application of the Law to Client’s Facts

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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

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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 **December 12, 2024** (the *earliest* of the applicable non-expired statutes of limitations deadlines given the desired causes of action).

**DELETE THIS NOTE:** If the **Medical Malpractice** claim is the triggering date listed above, and if the required 90-day notice period runs beyond that date, then **substitute** the sentence above with the following sentence:

“To the extent that Client wants to allege all of the suggested causes of action discussed above, the lawsuit must be filed on or before **[take the date above and add 90 days from the date the notice went out (or will go out)]**. This takes into account not just the statutory deadline, but the additional 90 days permitted by Code of Civil Procedure section 364(b).”

## 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).)

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)

At least 90 days before filing a claim for medical malpractice, plaintiff must send all potential defendants correspondence notifying them of plaintiff’s intent to sue. (Code Civ. Proc., § 364(a).) The correspondence must set forth the basis of plaintiff’s claim and specify the nature of plaintiff’s injuries. (Code Civ. Proc., § 364(b).)

Client has not yet complied with the pre-filing notice requirement set forth in Code of Civ. Proc., section 364(b). 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 23.4 of the Service Agreement.

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

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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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)
2. This item, and others, really relates to when the commission becomes a “completed sale.” Make sure that all contracts Client signs in the future define “completed sale” and specify such exceptions (including chargebacks, overpayments, offset, etc.). [↑](#footnote-ref-2)