Litigation Due Diligence Analysis

Olson v. White

23-4584848

By

MBK

October 6, 2023

Table of Contents

[1. SUMMARY 11](#_Toc147469381)

[2. PARTIES/SIGNIFICANT FIGURES 11](#_Toc147469382)

[3. STATEMENT OF FACTS / EVIDENTIARY SUPPORT 14](#_Toc147469383)

[4. yn\_notable\_provisions\_govdocs\_table == "Yes" NOTABLE PROVISIONS OF THE GOVERNING DOCUMENTS###yn\_notable\_provisions\_agreement\_table == "Yes" NOTABLE PROVISIONS OF ONE OR MORE OPERATIVE AGREEMENTS###yn\_notable\_provisions\_govdocs\_table == "No" or yn\_notable\_provisions\_agreement\_table == "No"RESERVED### 16](#_Toc147469384)

[5. ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT 17](#_Toc147469385)

[6. CIVIL CODE § 5200 DOCUMENT DEMAND 18](#_Toc147469386)

[7. ADDITIONAL DOCUMENTS NEEDED FROM CLIENT 19](#_Toc147469387)

[8. THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST 20](#_Toc147469388)

[9. MUST NOT USE HOA’S PRIVILEGED DOCUMENTS 22](#_Toc147469389)

[9.1. Can Client Waive the Privilege? 22](#_Toc147469390)

[9.2. Does the CRPC Require the Firm to *Return* the Privileged Documents? 22](#_Toc147469391)

[9.3. Does Providing Privileged Documents to the Firm Constitute a Fiduciary Breach by Client? 23](#_Toc147469392)

[10. radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner" or radio\_client\_plaintiff\_defendant == "Plaintiff & Cross-Defendant" CURRENT CAUSES OF ACTION ALLEGED IN THE COMPLAINT & THE STRENGTHS/WEAKNESSES OF EACH###radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_client\_filed\_cross\_complaint == "Yes" CURRENT CAUSES OF ACTION ALLEGED IN THE CROSS-COMPLAINT & THE STRENGTHS/WEAKNESSES OF EACH### radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_client\_filed\_cross\_complaint == "No" and yn\_cross\_claims == "Yes" POTENTIAL CAUSES OF ACTION TO INCLUDE IN A CROSS-COMPLAINT & THE STRENGTHS/WEAKNESSES OF EACH###radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_client\_filed\_cross\_complaint == "No" and yn\_cross\_claims != "Yes" RESERVED### 24](#_Toc147469393)

[10.1. Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. Code, § 5975 24](#_Toc147469394)

[10.2. Breach of Contract 27](#_Toc147469395)

[10.3. Implied Covenant of Good Faith and Fair Dealing 29](#_Toc147469396)

[10.4. Breach of Other Governing Documents 31](#_Toc147469397)

[10.5. Negligence 32](#_Toc147469398)

[10.6. Breach of Fiduciary Duty 36](#_Toc147469399)

[10.7. Nuisance 41](#_Toc147469400)

[10.8. Trespass 47](#_Toc147469401)

[10.9. Interference with Prospective Business Advantage 51](#_Toc147469402)

[10.10. Interference with Contract 52](#_Toc147469403)

[10.11. Intentional Misrepresentation (Fraud) 54](#_Toc147469404)

[10.12. Negligent Misrepresentation 58](#_Toc147469405)

[10.13. Intentional Infliction of Emotional Distress (“IIED”) 59](#_Toc147469406)

[10.14. Violation of Open Meeting Act 61](#_Toc147469407)

[10.15. Declaratory Relief 63](#_Toc147469408)

[10.16. Violation of Election Laws (Civ. Code, § 5100 et seq.) 75](#_Toc147469409)

[10.17. Assault 78](#_Toc147469410)

[10.18. Battery 80](#_Toc147469411)

[10.19. Defamation 82](#_Toc147469412)

[10.20. Civil Stalking 84](#_Toc147469413)

[10.21. Violation of Statute (Dog Bite) 86](#_Toc147469414)

[10.22. False Imprisonment 87](#_Toc147469415)

[10.23. Invasion of Privacy 89](#_Toc147469416)

[10.24. Express Indemnity 91](#_Toc147469417)

[10.25. Equitable Indemnity 92](#_Toc147469418)

[10.26. Failure to Permit Inspection of Records 94](#_Toc147469419)

[10.27. Quiet Title 95](#_Toc147469420)

[10.28. Slander of Title 97](#_Toc147469421)

[10.29. Cancellation of Instrument 98](#_Toc147469422)

[10.30. Reformation of Instrument 99](#_Toc147469423)

[10.31. Partition 100](#_Toc147469424)

[10.32. Conversion 102](#_Toc147469425)

[10.33. Trespass to Chattels 104](#_Toc147469426)

[10.34. Open Book Account 106](#_Toc147469427)

[10.35. Money Had and Received 107](#_Toc147469428)

[10.36. Account Stated 108](#_Toc147469429)

[10.37. Goods and Services Rendered 109](#_Toc147469430)

[10.38. Unjust Enrichment 110](#_Toc147469431)

[10.39. Rescission 111](#_Toc147469432)

[10.40. Financial Elder Abuse (Welf. & Inst. Code, § 15610.30) 112](#_Toc147469433)

[10.41. Negligent Hiring 114](#_Toc147469434)

[10.42. Negligent Supervision 116](#_Toc147469435)

[10.43. Unfair Business Practices (Bus. & Prof. Code, § 17200 et seq.) 119](#_Toc147469436)

[10.44. Receipt of Stolen Property (Penal Code § 496) 122](#_Toc147469437)

[10.45. Misrepresentation in Connection with Sale of Security (Corp. Code, § 25401) 123](#_Toc147469438)

[10.46. Recovery Against Contractor’s Bond 125](#_Toc147469439)

[10.47. Breach of Independent Wholesale Representatives Act (Civ. Code, § 1738.10 et seq) 126](#_Toc147469440)

[10.48. Violation of California Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.) 130](#_Toc147469441)

[10.49. Malicious Prosecution 131](#_Toc147469442)

[10.50. Abuse of Process 133](#_Toc147469443)

[10.51. Insurance Bad Faith 135](#_Toc147469444)

[10.52. Medical Malpractice 137](#_Toc147469445)

[10.53. Legal Malpractice 139](#_Toc147469446)

[10.54. Fraudulent Transfer (Uniform Fraudulent Transfer Act—Civil Code, § 3439 et seq.) 143](#_Toc147469447)

[11. (radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner" or radio\_client\_plaintiff\_defendant == "Plaintiff & Cross-Defendant") and yn\_add\_new\_coa\_complaint == "Yes" POTENTIAL CAUSES OF ACTION TO BE ADDED TO THE COMPLAINT & THE STRENGTHS/WEAKNESSES OF EACH###radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_add\_new\_coa\_cross\_complaint == "Yes" POTENTIAL CAUSES OF ACTION TO BE ADDED TO THE CROSS-COMPLAINT & THE STRENGTHS/WEAKNESSES OF EACH###radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and (yn\_add\_new\_coa\_cross\_complaint == "No" or yn\_cross\_claims == "No") RESERVED### 146](#_Toc147469448)

[11.1. Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. Code, § 5975 146](#_Toc147469449)

[11.2. Breach of Contract 149](#_Toc147469450)

[11.3. Implied Covenant of Good Faith and Fair Dealing 151](#_Toc147469451)

[11.4. Breach of Other Governing Documents 153](#_Toc147469452)

[11.5. Negligence 154](#_Toc147469453)

[11.6. Breach of Fiduciary Duty 158](#_Toc147469454)

[11.7. Nuisance 163](#_Toc147469455)

[11.8. Trespass 169](#_Toc147469456)

[11.9. Interference with Prospective Business Advantage 172](#_Toc147469457)

[11.10. Interference with Contract 174](#_Toc147469458)

[11.11. Intentional Misrepresentation (Fraud) 175](#_Toc147469459)

[11.12. Negligent Misrepresentation 179](#_Toc147469460)

[11.13. Intentional Infliction of Emotional Distress (“IIED”) 181](#_Toc147469461)

[11.14. Violation of Open Meeting Act 183](#_Toc147469462)

[11.15. Declaratory Relief 184](#_Toc147469463)

[11.16. Violation of Election Laws (Civ. Code, § 5100 et seq.) 195](#_Toc147469464)

[11.17. Assault 199](#_Toc147469465)

[11.18. Battery 200](#_Toc147469466)

[11.19. Defamation 202](#_Toc147469467)

[11.20. Civil Stalking 204](#_Toc147469468)

[11.21. Violation of Statute (Dog Bite) 206](#_Toc147469469)

[11.22. False Imprisonment 207](#_Toc147469470)

[11.23. Invasion of Privacy 209](#_Toc147469471)

[11.24. Express Indemnity 211](#_Toc147469472)

[11.25. Equitable Indemnity 212](#_Toc147469473)

[11.26. Failure to Permit Inspection of Records 214](#_Toc147469474)

[11.27. Quiet Title 215](#_Toc147469475)

[11.28. Slander of Title 217](#_Toc147469476)

[11.29. Cancellation of Instrument 218](#_Toc147469477)

[11.30. Reformation of Instrument 219](#_Toc147469478)

[11.31. Partition 220](#_Toc147469479)

[11.32. Conversion 222](#_Toc147469480)

[11.33. Trespass to Chattels 224](#_Toc147469481)

[11.34. Open Book Account 226](#_Toc147469482)

[11.35. Money Had and Received 227](#_Toc147469483)

[11.36. Account Stated 228](#_Toc147469484)

[11.37. Goods and Services Rendered 229](#_Toc147469485)

[11.38. Unjust Enrichment 230](#_Toc147469486)

[11.39. Rescission 231](#_Toc147469487)

[11.40. Financial Elder Abuse (Welf. & Inst. Code, § 15610.30) 232](#_Toc147469488)

[11.41. Negligent Hiring 234](#_Toc147469489)

[11.42. Negligent Supervision 236](#_Toc147469490)

[11.43. Unfair Business Practices (Bus. & Prof. Code, § 17200 et seq.) 239](#_Toc147469491)

[11.44. Receipt of Stolen Property (Penal Code § 496) 241](#_Toc147469492)

[11.45. Misrepresentation in Connection with Sale of Security (Corp. Code, § 25401) 242](#_Toc147469493)

[11.46. Recovery Against Contractor’s Bond 245](#_Toc147469494)

[11.47. Breach of Independent Wholesale Representatives Act (Civ. Code, § 1738.10 et seq) 246](#_Toc147469495)

[11.48. Violation of California Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.) 249](#_Toc147469496)

[11.49. Malicious Prosecution 251](#_Toc147469497)

[11.50. Abuse of Process 253](#_Toc147469498)

[11.51. Insurance Bad Faith 254](#_Toc147469499)

[11.52. Medical Malpractice 257](#_Toc147469500)

[11.53. Legal Malpractice 259](#_Toc147469501)

[11.54. Fraudulent Transfer (Uniform Fraudulent Transfer Act—Civil Code, § 3439 et seq.) 262](#_Toc147469502)

[radio\_client\_plaintiff\_defendant == "Defendant/Respondent" or radio\_client\_plaintiff\_defendant == "Plaintiff & Cross-Defendant" 265](#_Toc147469503)

[12. POTENTIAL AFFIRMATIVE DEFENSES 265](#_Toc147469504)

[12.1. BJR (Lamden) 266](#_Toc147469505)

[12.2. Statute of Limitations 268](#_Toc147469506)

[12.3. Equitable Estoppel 273](#_Toc147469507)

[12.4. Unclean Hands 273](#_Toc147469508)

[12.5. Laches 274](#_Toc147469509)

[12.6. Negligence (Comparative Fault) 274](#_Toc147469510)

[12.7. Apportionment 275](#_Toc147469511)

[12.8. Negligence (Sudden Emergency) 275](#_Toc147469512)

[12.9. Assumption of Risk 276](#_Toc147469513)

[12.10. Contract (Force Majeure) 276](#_Toc147469514)

[12.11. Contract (Duress) 277](#_Toc147469515)

[12.12. Contract (Fraud) 277](#_Toc147469516)

[12.13. Contract (Frustration of Purpose) 278](#_Toc147469517)

[12.14. Contract (Lack of Consideration) 278](#_Toc147469518)

[12.15. Contract (Failure of Consideration) 279](#_Toc147469519)

[12.16. Contract (Illegality) 279](#_Toc147469520)

[12.17. Contract (Impossibility) 279](#_Toc147469521)

[12.18. Contract (Impracticability) 280](#_Toc147469522)

[12.19. Contract (Mistake of Law) 280](#_Toc147469523)

[12.20. Contract (Mistake of Fact) 281](#_Toc147469524)

[12.21. Contract (Novation) 281](#_Toc147469525)

[12.22. Contract (Statute of Frauds) 282](#_Toc147469526)

[12.23. Contract (Unconscionability) 283](#_Toc147469527)

[12.24. Contract (Undue Influence) 284](#_Toc147469528)

[12.25. Contract (Accord and Satisfaction) 284](#_Toc147469529)

[12.26. Waiver 284](#_Toc147469530)

[12.27. Failure to Mitigate 285](#_Toc147469531)

[12.28. Lack of Damages 285](#_Toc147469532)

[12.29. Failure to State a Claim 286](#_Toc147469533)

[12.30. No Causation 286](#_Toc147469534)

[12.31. Justification 287](#_Toc147469535)

[12.32. Ratification 287](#_Toc147469536)

[12.33. Litigation Privilege (Civ. Code, § 47) 288](#_Toc147469537)

[12.34. Consent 288](#_Toc147469538)

[12.35. Necessity 289](#_Toc147469539)

[12.36. Private Necessity 289](#_Toc147469540)

[12.37. Equitable Easement 290](#_Toc147469541)

[13. STRATEGIC CONSIDERATIONS 291](#_Toc147469542)

[13.1. Statute of Limitations 291](#_Toc147469543)

[13.2. Applicability of Davis-Stirling Act 292](#_Toc147469544)

[13.3. Jurisdiction 292](#_Toc147469545)

[13.3.1. Arbitration 292](#_Toc147469546)

[13.3.2. Venue 294](#_Toc147469547)

[13.4. Standing 295](#_Toc147469548)

[13.5. Anti-SLAPP Analysis 296](#_Toc147469549)

[13.6. Damage to Client’s Credit as an Element of Client’s Damages 305](#_Toc147469550)

[13.7. Pre-Filing Requirements (e.g., Notice or Mediation Requirements) 306](#_Toc147469551)

[13.8. Attorneys’ Fees and Costs 309](#_Toc147469552)

[14. FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS 313](#_Toc147469553)

# SUMMARY

To be added later.

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

# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| Jimmy Olson (“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 |
| Perry White  | Wrongdoer |

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

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

# STATEMENT OF FACTS / EVIDENTIARY SUPPORT

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

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# RESERVED

RESERVED.

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# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

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

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

# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

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

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

# 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.

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

# CURRENT CAUSES OF ACTION ALLEGED IN THE CROSS-COMPLAINT &THE STRENGTHS/WEAKNESSES OF EACH

## Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. Code, § 5975

Elements—Breach of CC&Rs

— Restrictive covenants and recorded declarations are written agreements governed by contract principles. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 240.) Restrictive covenants and recorded declarations are of a contractual nature and are enforceable by statute unless unreasonable. (*Id. at* 237; and see Civ. Code, § 5975.) Because the Declaration of CC&Rs is a recorded declaration of restrictive covenants, it is enforceable provided it is not unreasonable. “[S]ettled principles of condominium law establish that an owners association, like its constituent members, must act in conformity with the terms of a recorded declaration. (See Civ. Code, § 5975, subd. (a); *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 268 [homeowner can sue association to compel enforcement of declaration's provisions];(Citations.)” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*, supra, 55 Cal.4th at p. 239.)

— Where enforcement is an issue in a breach of CC&R cause of action, it tends to arise in two ways: (i) HOA not enforcing rules at all; or (ii) HOA applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn., supra,* 21 Cal.4th at 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* *(US) LLC, supra,* 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

Applicable Statute of Limitations—

— The statute of limitations to enforce a restriction, which includes CC&Rs, is five years. (Code Civ. Proc., § 336(b).) Consequently, an action for a violation of a restriction must be commenced within five years after the party enforcing the restriction discovers, or through the exercise of reasonable diligence, should have discovered, the violation. [*As used here, a “restriction” means a limitation on, or a provision affecting the use of, real property in a deed, Declaration, or other instrument in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.*] (Civ. Code, § 784.)

Remedies—

— While typically injunctive in nature, courts may fashion remedies to enjoin an ongoing breaches. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.) Additionally, compensatory damages are available if plaintiff incurred monetary damages. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1385; Civ. Code, §§ 3281, 3300.)

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *breach of the CC&Rs*. 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). **By the same token, however, you need to determine whether the CC&Rs actually require the HOA to enforce the CC&Rs. Some do, and some don’t.**

— \*\*\*

— \*\*\*

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.)

— The “enforcement” issue raised in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a negligence claim.

— When enforcement is an issue in a negligence cause of action, it tends to arise in two ways: (i) an HOA is not enforcing rules at all; or (ii) an HOA is applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn* (1999) 21 Cal.4th 249, 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

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.”

— The “enforcement” issues discussed in the context of the “Breach of CC&Rs” and “Negligence” causes of action above are also applicable to a breach of fiduciary duty claim.

— When enforcement is an issue in a breach of fiduciary duty cause of action, it tends to arise in two ways: (i) an HOA is not enforcing rules at all; or (ii) an HOA is applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn* (1999) 21 Cal.4th 249, 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

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

— 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.”

## 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

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *Nuisance*. 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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# POTENTIAL CAUSES OF ACTION TO BE ADDED TO THE CROSS-COMPLAINT &THE STRENGTHS/WEAKNESSES OF EACH

## 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.

— When enforcement is an issue in a declaratory relief cause of action, it tends to arise in two ways: (i) an HOA is not enforcing rules at all; or (ii) an HOA is applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn* (1999) 21 Cal.4th 249, 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

Remedies—

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

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

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

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

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# POTENTIAL AFFIRMATIVE DEFENSES

Based upon the allegations made against Client in the operative pleadings, and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the affirmative defenses discussed below appear to be applicable.

**The Firm needs to determine whether or not Client’s existing Answer needs to be amended or not to include any of the following (that aren’t already there) or remove any that don’t apply.**

This section of the LADD may be amended from time to time if new information/evidence comes to light that supports additional affirmative defenses.

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# STRATEGIC CONSIDERATIONS

## Statute of Limitations

## Applicability of Davis-Stirling Act

The Davis-Stirling Act applies to the facts of this dispute.

## Jurisdiction

### Arbitration

### Venue

## Standing

Based upon the information/evidence that Client has provided thus far, it appears that the opposing party *lacks* standing to pursue a claim against Client for \*\*\*. [*State the reasons for lack of standing. If there is more than one cause of action at issue, adjust the language accordingly.*] The Firm will take a closer look at the standing issue and follow up with Client in the near future.

Client may lack standing to bring a cross-claim for \*\*\*. [*State the reasons for lack of standing. If there is more than one cause of action at issue, adjust the language accordingly.*] The Firm will take a closer look at the standing issue and follow up with Client in the near future.

## Anti-SLAPP Analysis

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

Given the facts of this dispute, the Davis-Stirling Act does *not* require pre-lawsuit ADR.

## Attorneys’ Fees and Costs

The prevailing party is entitled to attorneys’ fees and costs under the Davis-Stirling Act.

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

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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