Litigation Due Diligence Analysis

Hoffman v. Ridgeley Vista Chateau Homeowners Association

By

JG

October 10, 2024

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# SUMMARY

TBD

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# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| Laura Hoffman (“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 |
| Ridgeley Vista Chateau Homeowners Association ("HOA") |  |

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 THE GOVERNING DOCUMENTS

|  |  |
| --- | --- |
| **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. |
| \* |  |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |

The table may or may not contain all the significant provisions of the document(s) at issue. It is simply a place to include one or more provisions of one or more operative agreement/document that we believe could play a role in some aspect of Client’s case (e.g., binding arbitration, attorneys’ fees, and choice of law provisions). The provisions contained in the table, therefore, should neither be viewed as an exhaustive list of key provisions/evidence, nor be used as a measure of what provisions of the operative documents might strengthen (or weaken) Client’s case.

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# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

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

— TBD

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

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# CIVIL CODE § 5200 DOCUMENT DEMAND

The HOA produced some documents in response to a Civil Code section 5200 demand. The Firm will complete its review of those documents to determine whether any that should’ve been included are in fact missing.

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# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

The Firm needs to ask Client for the following documents:

— TBD

This section of the LADD may be amended from time to time if Client locates additional documents, or if a third party produces additional documents.

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# THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

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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# **MUST NOT USE HOA’S PRIVILEGED DOCUMENTS**

If Client provides the Firm with documents that appear to be privileged (HOA’s attorney-client privilege)—e.g., communications/opinions between the HOA’s prior attorneys and the Board, etc.—such documents:

— May not be cited, or even *referenced*, at all during the pre-litigation or litigation phases of the cases.

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

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

## Can Client Waive the Privilege?

— Where the client is a corporation, it alone (through its officers and directors) is the holder of the privilege and it alone may waive the privilege. (*Titmas v. Sup.Ct. (Iavarone)* (2001) 87 Cal.App.4th 738, fn. 1.)

— The authority to waive the attorney-client privilege rests with the corporation’s officers and directors. When control of the corporation passes to new people, so too does the authority to assert or waive the privilege. (*Commodity Futures Trading Com’n v. Weintraub* (1985) 471 U.S. 343.) When control passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes, and new management may waive the attorney-client privilege with respect to communications made by former officers and directors. (*Id. at* 349.) A former director has no power to assert or waive the corporation’s privilege, and a former officer cannot assert the protection if the corporation as waived it. (*Ibid*.)

— The HOA may waive the privilege, but in cases where two or more people are joint holders of a privilege, the waiver of that privilege by one does NOT affect the rights of the other(s) to claim the privilege. (*American Mut. Liab. Ins. Co v. Superior Court* (1974) 38 Cal.App.3d 579; Ev. Code, §912b.)

## Does the CRPC Require the Firm to *Return* the Privileged Documents?

— CRPC 4.4 requires attorneys to return privileged documents that were “inadvertently sent or produced.” CRPC 4.4, however, does *not* seem to apply. Not only did Client intentionally produce the documents to the Firm, but Client had a valid right to receive the documents in the first place. Notwithstanding that fact, for now the Firm doesn’t believe it’s wise to rest on technicalities when dealing with the ethical rules.

— The official Comment to the Rule states that CRPC 4.4 does not address the “legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been inappropriately disclosed by the sending person.” The Comment then cites to *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, in which the Court of Appeal broadly held that a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged must (1) refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and (2) immediately notify the sender that he or she possesses material that appears to be privileged.

— *Keep in mind that in Clark, the court disqualified the attorney in question* (who represented an employee of a company) for excessively reviewing the employer’s (i.e., the opposing side’s) privileged materials, *despite the fact that (a) the employee intentionally transmitted the documents to the attorney, and (b) the employee had a right to receive the privileged materials during the course of his employment*. This is precisely the scenario that we’re facing.

— While there are some distinguishing facts in *Clark*—e.g., the employee was contractually obligated to return all privileged materials upon termination of his employment—the point of the case is clear: attorneys are prohibited from “excessively” reviewing certain documents covered by another party’s attorney-client privilege. This rule makes sense given the privilege’s sacred status under California law.

— The Firm has, therefore, decided to proceed with caution at the current time, at least until and unless further research calls for a different take on the issue.

## Does Providing Privileged Documents to the Firm Constitute a Fiduciary Breach by Client?

— The Firm is in the process of completing research on this issue, but it *appears* that the answer is yes—former board members cannot make unauthorized disclosures of privileged materials.

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# POTENTIAL CAUSES OF ACTION & 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.**

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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.

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## Breach of Other Governing Documents

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

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

Remedies—

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

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *breach of other governing documents*. 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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## 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.

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

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## 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.

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.)

— TBD of the CC&Rs specifically states that a violation of the CC&Rs gives rise to a separate nuisance claim.

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

Remedies—

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

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

• For *continuing* nuisances, the compensatory (money) damages are different. A plaintiff can only recover actual damages *through the date of the suit* (i.e., plaintiff cannot recover damages for diminution in value) because there is no certainty the nuisance will continue. The 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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## Violation of Open Meeting Act

Elements—Violation of Open Meeting Act

— Relevant statutes: (i) Civil Code section 4910; (ii) Civil Code section 4930; and (iii) Civil Code section 4950.

• Civil Code section 4910: The board shall not take action on any item of business outside of a board meeting, and meetings cannot be conducted “electronically” unless in an emergency, and even then only if all the directors sign a consent.

• Civil Code section 4930: Except under certain enumerated circumstances (see the statute for details), the board may not discuss or take action on any item at a non-emergency meeting unless the item was placed on the agenda included in the notice that was distributed to the members of the HOA.

• Civil Code section 4950: The minutes, including drafts/proposed minutes, and summaries of minutes at all meetings other than executive sessions, shall be available to members within 30 days of the meeting. Members are entitled to copies of such documents if they reimburse the HOA for the cost of the copies. The annual policy statement must detail the process to obtain these documents.

Remedies—

— The statute itself provides for declaratory and/or injunctive relief. The injunction would most likely set aside the Board’s action. (Civ. Code, § 4955.) A court can impose a $500 penalty on the HOA. (*Ibid*.)

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

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

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

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## Declaratory Relief

Elements—Declaratory Relief

— The essential elements of a declaratory relief cause of action are: (i) an actual controversy between the parties’ contractual or property rights; (ii) involving continuing acts/omissions or future consequences; (iii) that have sufficiently ripened to permit judicial intervention and resolution; and (iv) that have not yet blossomed into an actual cause of action. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 366–69.)

— In an action for declaratory relief, an “actual controversy” is one that “admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts; the judgment must decree, not suggest, what the parties may or may not do.” (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110.)

— Code Civ. Proc., § 1060 explicitly permits declaratory relief claims to determine the rights and duties of an HOA/homeowner.

— The “enforcement” issues discussed in the context of the “Breach of CC&Rs,” Negligence,” and “Breach of Fiduciary Duty” causes of action above are also applicable to a declaratory relief claim.

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

## Applicability of Davis-Stirling Act

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

## Jurisdiction

### Arbitration

Since there is no binding arbitration provision in the CC&Rs, any litigation related to the dispute must take place in the superior court of Los Angeles County because that is where Client’s property is located.

### Venue

Because the issues related to the current dispute involve Client’s property, which is located in Los Angeles County, that is the appropriate venue for this case.

## Standing

Based upon the information/evidence that Client has provided thus far, Client has standing to pursue every cause of action described above against each of the intended defendants (excluding DOES, of course).

## Anti-SLAPP Analysis

Anti-SLAPP Overview—

— Strategic Lawsuits Against Public Participation (“SLAPP”) are lawsuits designed to hinder or prevent parties (typically the defendant) from engaging in constitutionally protected activities (e.g., petitioning or free speech). For example, development companies have used SLAPP suits to harass environmental groups standing in the way of large development/construction projects. These companies would file lawsuits against the environmentalists for the express purpose of tying up the smaller (and not as well-funded) environmental groups’ financial resources, effectively preventing them from having their “day in court.” In response, the Legislature passed the anti-SLAPP statute, which was codified in Code of Civil Procedure section 425.16. This statute allows the defending party to file a special motion to strike (called an anti-SLAPP motion) to have the court determine whether the lawsuit can proceed or should instead be thrown out as a meritless attack on the defendant’s acts made in furtherance of his or her right “to petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (Code Civ. Proc., § 425.16(b)(1).)

— The granting of an anti-SLAPP motion can have *severe* consequences, not the least of which is the dismissal of the at-issue claim(s)—or even the entire complaint—depending on the circumstances. In addition, a defendant who prevails on an anti-SLAPP motion *must* be awarded his or her attorneys’ fees and costs, which, given the complexity of anti-SLAPP motions, is typically quite significant. (Code Civ. Proc., § 425.16(c)(1).)

Anti-SLAPP Statute’s Application in HOA-Related Cases—

— SLAPP suits can, and have, arisen in lawsuits by and against HOAs and HOA members. For example, a member might file a lawsuit against a director or committee member to pressure that person to change a critical vote regarding some issue or another. To prevent that type of abuse, and to discourage members from naming individual board members as defendants in litigation, courts have determined that the protections offered under the anti-SLAPP statute apply to various issues that arise in the HOA arena. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130-36 [tree trimming dispute between adjacent homeowners that involved covenants to all lots in the community satisfied the definition of “public interest”]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476-77 [newsletter published to 3,000 residents of an HOA was a “public forum” even if access to the newsletter was selective and limited]; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1409-10 [letters from attorney to management company and the HOA’s board regarding nuisance caused by an HOA member].)

— Obviously, however, not all HOA-related disputes are covered by the anti-SLAPP statute. (*Talega Maintenance Corp. v. Standard Pac. Corp.* (2014) 225 Cal.App.4th 722, 732 [holding that HOA proceedings must have a strong connection to governmental proceedings to qualify as “official proceedings”]; but see *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 540-46 [holding that HOAs “functioned similar to a quasi-governmental body” to constitute a “public forum”].)

Anti-SLAPP Test—

— The courts use a two-prong test to determine if a claim is protected under the anti-SLAPP statute. First, the defendant must prove that the at-issue claim arises from a constitutionally protected activity. (*Ruiz v. Harbor View Community Assn., supra,* 134 Cal.App.4th at 1466; Code Civ. Proc., § 425.16(b)(1).) If the defendant satisfies his or her burden, the burden shifts to the plaintiff to show that there is a probability that he or she will prevail on the merits of the at-issue claim. (*Ibid*.; *Equilon Enterprises v. Consumer Cause Inc.* (2002) 29 Cal.4th 53, 67; Code Civ. Proc., § 425.16(b)(1).)

— With regard to the first prong, there are four categories that the anti-SLAPP statute is intended to protect:

• Any statement (written or oral) or document generated in connection with (or as part of):

→ Any official proceedings authorized by law—e.g., legislative, executive, or judicial proceedings. (Code Civ. Proc., § 425.16(e)(1).)

→ Any issue under consideration or review by a legislative, executive, or judicial body. (Code Civ. Proc., § 425.16(e)(2).)

• Any statement (written or oral) or document made in a place open to the public (or in a public forum) and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(3).)

• Any other conduct made in furtherance of the exercise of a constitutional right of petition or free speech and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(4).)

Analysis—

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

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

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

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

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

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

— Acts made in furtherance of petitioning or free speech that are made during—or in connection with a matter under consideration by—a legislative, judicial, executive, or other official body are protected under categories **(e)(1)** and **(e)(2)** of the anti-SLAPP statute, respectively.

— “Official proceedings” are not limited to proceedings before governmental entities. They include proceedings required by law even if conducted by private parties—e.g., hospital peer review proceedings. (See *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199.)

— Even though HOAs are statutorily required to hold open membership meetings, HOA meetings are not considered “official proceedings” subject to anti-SLAPP protection unless the HOA meeting has a strong connection to governmental proceedings. (*Talega Maintenance Corp. v. Std. Pacific Corp., supra,* 225 Cal.App.4th at 732.)

— Courts have applied the protections offered by the anti-SLAPP statute to the following cases under the “legislative, judicial, executive, or other official proceeding” categories—i.e., (e)(1) and/or (e)(2):

• Statements and conduct made during a State Bar-sponsored fee arbitration may be protected by the anti-SLAPP statute because fee arbitrations are statutorily established official proceedings designed to address a particular type of dispute. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 358 [law firm’s fraud and negligent misrepresentation claims against client were subject to anti-SLAPP motion because they related to client’s seeking arbitration].)

• Statements and conduct made in connection with an arbitration of a dispute under an automobile insurance policy’s coverage for claims against uninsured motorists are protected by the anti-SLAPP statute because the arbitration of such disputes is mandated by statute (Ins. C., § 11580.2; *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531, 542 [subpoenaing mental health records for use in arbitration of uninsured motorist coverage claim dispute constituted protected activity].)

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

• Litigation based on the submission of site maps and planning documents to a city in connection with a permitting process satisfies the first prong of the anti-SLAPP statute. (*Midland Pacific Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, 272*; M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 194-95.)

• Wrongful termination and defamation claims that arose from a telephone conversation with the defendant employer about the plaintiff’s eligibility for state unemployment insurance unequivocally constituted a communication in connection with an official proceeding and was protected by the anti-SLAPP statute. (*Dible v. Haight Ashbury Free Clinics* (2009) 170 Cal.App.4th 843, 850.)

• In a civil rights action, a state university manager’s administrative review of a state employee’s grievances involved the exercise of quasi-judicial powers and constituted an official proceeding protected by the anti-SLAPP statute. (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1396-99.)

— Alternatively, courts have declined to extend the statute to any of the following cases:

• A nonjudicial foreclosure is a private, contractual alternative to a judicial foreclosure proceeding. Therefore, a wrongful foreclosure action arising from a nonjudicial foreclosure proceeding is not subject to the anti-SLAPP statute. (*Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1520.)

• A private arbitration is not an “official proceeding” under the anti-SLAPP statute. (*Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 7-8.)

• The submission of bids to obtain a public construction contract and written requests for payment did not involve petitioning activities. (*Kajima Engineering and Const., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 932.)

• A fraud claim arising from a sheriff’s ministerial sale or action that merely consisted of offers and accepting the highest bid without any determinations based on someone’s right to free speech or right to petition did not constitute an official proceeding within the protection of the anti-SLAPP statute. (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application/Conclusion—

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

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

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

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

Civil Code section 5930 requires parties to attempt alternative dispute resolution prior to filing certain types of lawsuits. While that provision of the Davis-Stirling Act *does* apply in this matter, Client complied with the statute and will be in a position to file the requisite Certificate of Compliance.

## Attorneys’ Fees and Costs

The prevailing party is entitled to attorneys’ fees and costs under the Davis-Stirling Act. The prevailing party is also entitled to their attorneys’ fees and costs under TBD of the CC&Rs.

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

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# FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS

TBD

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

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