**PRELIMINARY ANALYSIS**

**Hoffman v. Schneiderman**

Prepared By

SE

June 8, 2023

# SHORT SUMMARY OF CASE

Client owns the real property located at 648 South Ridgely Drive, Apartment 203, Los Angeles, CA 90036 (the "Property"), which makes her a member of the Ridgeley Vista Chateau Homeowners Association (the "HOA"). Client, who is currently serving as President of the HOA’s board of directors, has been in a dispute with HOA member, Laurel Schneiderman. Client contends that Schneiderman interfered with Client’s prior attempt to sell the Property, that Schneiderman has harassed her, and that Schneiderman has most recently engaged in false imprisonment of Client during an incident where Client was trying to take her dog to do its business and Schneiderman blocked the gate temporarily (and deliberately) preventing Client from egressing from the building.Client initially wanted to send Schneiderman a Cease and Desist demand letter, but then decided to opt for mediation instead as she believed that Schneiderman would be unlikely to comply with a Cease and Desist demand letter.Client has viable claims against Schneiderman for the following:(i) breach of the CC&Rs(ii) breach of other governing documents(iii) nuisance(iv) false imprisonment(v) civil stalking

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# Parties / Significant Figures

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| Laura Hoffman (“Client”) | Client / HOA Member |
| Laurel Schneiderman  | Neighbor |

This table may be amended from time to time as new information/evidence comes in regarding new “parties” and/or witnesses.

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# Statement of Facts / Evidentiary Support

|  |  |  |
| --- | --- | --- |
| **Date / NA** | **Fact** | **Evidence Supporting That Fact** |
| 4/19/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. Client closed escrow on the property. | Client Timeline |
| N/A | 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 that require significant revisions to Client’s pre-litigation strategy.

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# Notable Provisions of the Governing Documents

|  |  |
| --- | --- |
| **Document****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&RsSection 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. The HOA shall paint, maintain, repair and make necessary improvements to the common areas, as well as the exteriors of the garage, deck, and balcony elements of the Units, in good condition and repair. |
| Operating RulesP. 20 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.[I]n the event of any water damage, mold infestation, or related damage arising from an owner’s negligence, or arising from any pipe leak or similar failure for which this owner has the maintenance responsibility, the owner shall be responsible for all repairs and resulting damage. |
| 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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The table may or may not contain all the significant provisions of Client’s governing documents. Its sole purpose, in fact, is to help make the Firm’s analysis of Client’s pre-litigation case more convenient. 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 governing documents might strengthen (or weaken) Client’s pre-litigation case.

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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 Preliminary Analysis may, however, be amended from time to time as new information/questions arise.

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# Additional Documents Needed From Client

The Firm needs to ask Client for the following documents:

— Client indicated that she would send us a timeline of her dispute with Schneiderman as well as additional video evidence of Schneiderman’s harassment.

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

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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, or otherwise obtained access to documents supplied by a board member, 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 and 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.)

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.”

## 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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## 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.)

— Most importantly, \*\*\* 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.

— 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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## Interference with Prospective Business Advantage

Elements—Interference with Prospective Business Advantage.

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

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

Remedies—

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

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

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

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

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

Applicable Statute of Limitations—

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

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

Application—Application of the Law to Client’s Facts.

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

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

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## Declaratory Relief

Elements—Declaratory Relief.

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

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

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

Remedies—

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

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts.

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

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

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## Assault

Elements—Assault.

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

Remedies—

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

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

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts.

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

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

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## Civil Stalking

Elements—Civil Stalking.

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

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

Remedies—

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

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

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

Applicable Statute of Limitations—

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

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

Application—Application of the Law to Client’s Facts.

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

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

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

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

## False Imprisonment

Elements—False Imprisonment.

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

Remedies—

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

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts.

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

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## Invasion of Privacy

Elements—Invasion of Privacy.

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

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

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

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

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

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

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

Remedies—

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

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

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

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

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

Applicable Statute of Limitations—

— Two years (invading someone’s privacy is a personal, rather than property, matter). (Code Civ. Proc., § 335.1.)

Application—Application of the Law to Client’s Facts.

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

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

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Based upon the allegations made against Client thus far, 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.

This section of the Preliminary Analysis 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

## Applicability of Davis-Stirling Act

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

## Attorneys’ Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under the Davis-Stirling Act. In addition, the prevailing part in any such litigation will also be entitled to their attorneys’ fees and costs under \*\*\* of the CC&Rs.

## Jurisdiction and Venue

Since there is no binding arbitration provision in the CC&Rs, any litigation related to the dispute must take place in superior court of the county in which Client’s property is located.

## 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).

## Secondary Conflicts Check

No new potential or actual conflict of interest between the parties and/or significant figures came to light during the Firm’s preparation of this Preliminary Analysis.

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# Final Thoughts / Issues / Concerns / Comments

None at this time.

This section of the Preliminary Analysis 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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