Litigation Due Diligence Analysis

By

June 4, 2024

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# SUMMARY

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# PARTIES/SIGNIFICANT FIGURES

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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# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

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

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# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

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

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# THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

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# STRATEGIC CONSIDERATIONS

## Statute of Limitations

## Jurisdiction

### Arbitration

### Venue

## Standing

## 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 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)

## Attorneys’ Fees and Costs

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

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# FINAL THOUGHTS / ISSUES / CONCERNS / COMMENTS

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

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