**PRELIMINARY ANALYSIS**

radio\_dispute\_or\_not == "Actual Dispute"

**{{ text\_matter\_name\_dispute }}**

###

radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"

**{{ text\_matter\_name\_question }}**

###

Prepared By

{{ text\_pa\_atty }}

March 8, 2024

# SHORT SUMMARY OF CASE

radio\_dispute\_or\_not == "Actual Dispute"

{{ textarea\_short\_summary\_dispute|parse\_new\_lines }}

###

radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"

{{ textarea\_short\_summary\_question|parse\_new\_lines }}

###

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

# Parties / Significant Figures

radio\_num\_of\_parties == 1

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |

###

radio\_num\_of\_parties == 2

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |

###

radio\_num\_of\_parties == 3

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |

###

radio\_num\_of\_parties == 4

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |
| {{ text\_party\_four\_name }} | {{ text\_party\_four\_role }} |

###

radio\_num\_of\_parties == 5

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |
| {{ text\_party\_four\_name }} | {{ text\_party\_four\_role }} |
| {{ text\_party\_five\_name }} | {{ text\_party\_five\_role }} |

###

radio\_num\_of\_parties == 6

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| {{ text\_client\_full\_name }} (“Client”) | Client / HOA Member |
| {{ text\_party\_two\_name }} | {{ text\_party\_two\_role }} |
| {{ text\_party\_three\_name }} | {{ text\_party\_three\_role }} |
| {{ text\_party\_four\_name }} | {{ text\_party\_four\_role }} |
| {{ text\_party\_five\_name }} | {{ text\_party\_five\_role }} |
| {{ text\_party\_six\_name }} | {{ text\_party\_six\_role }} |

###

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

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

# 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**. | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |
| \* | \*\* | \*\* |

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.

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

# 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&Rs  Section 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 Rules  P. 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**. |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |
| \* | \*\* |

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.

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

# Additional Information/Clarification Needed From Client

yn\_need\_more\_info\_from\_client == "Yes"

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

— {{ text\_more\_info\_one }}

yn\_more\_info\_want\_second == "Yes"

— {{ text\_more\_info\_two }}

###

yn\_more\_info\_want\_third == "Yes"

— {{ text\_more\_info\_three }}

###

yn\_more\_info\_want\_fourth == "Yes"

— {{ text\_more\_info\_four }}

###

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

###

yn\_need\_more\_info\_from\_client != "Yes"

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.

###

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

yn\_cc\_doc\_demand == "Yes"

# Civil Code § 5200 Document Demand

yn\_cc\_docs\_received == "Yes"

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.

###

yn\_cc\_docs\_received != "Yes"

Although a Civil Code section 5200 demand went out, the HOA has not yet produced the documents. Once that occurs, the Firm will complete a thorough review of those documents to determine whether any that should’ve been produced are missing.

###

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

###

# Additional Documents Needed From Client

yn\_need\_more\_documents\_from\_client == "Yes"

The Firm needs to ask Client for the following documents:

— {{ text\_more\_docs\_one }}

yn\_more\_docs\_want\_second == "Yes"

— {{ text\_more\_docs\_two }}

###

yn\_more\_docs\_want\_third == "Yes"

— {{ text\_more\_docs\_three }}

###

yn\_more\_docs\_want\_fourth == "Yes"

— {{ text\_more\_docs\_four }}

###

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.

###

yn\_need\_more\_documents\_from\_client != "Yes"

None at the moment.

###

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

yn\_client\_board\_mem == "Yes" or yn\_client\_board\_mem\_question == "Yes"

# 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.

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

###

radio\_dispute\_or\_not == "Actual Dispute" and radio\_client\_plaintiff\_defendant == "Plaintiff/Petitioner"   
Potential Causes of Action and the Strengths/Weaknesses of Each**###**radio\_dispute\_or\_not == "Actual Dispute" and radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "Yes"   
Potential Cross-Claims and the Strengths/Weaknesses of Each**###**radio\_dispute\_or\_not == "Actual Dispute" and radio\_client\_plaintiff\_defendant == "Defendant/Respondent" and yn\_cross\_claims == "No"   
Potential Affirmative Defenses**###**radio\_dispute\_or\_not == "Analyze Issues/Answer Questions"   
Issues/Questions Posed by Client**###**

radio\_dispute\_or\_not == "Actual Dispute"

"Breach of CC&Rs" in checkbox\_potential\_claims or "Breach of CC&Rs" in checkbox\_potential\_cross\_claims

## 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.)

yn\_enforcement == "Yes" or yn\_cc\_enforcement == "Yes"

— Where enforcement is an issue in a breach of CC&Rs cause of action (as it is here), 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.)

###

yn\_maintain == "Yes" or yn\_cc\_maintain == "Yes"

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

###

Applicable Statute of Limitations—

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

Remedies—

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

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

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

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *breach of the CC&Rs*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip). **By the same token, however, you need to determine whether the CC&Rs actually require the HOA to enforce the CC&Rs. Some do, and some don’t.**

— \*\*\*

— \*\*\*

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

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

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

###

"Breach of Contract" in checkbox\_potential\_claims or "Breach of Contract" in checkbox\_potential\_cross\_claims

## Breach of Contract

Elements—Breach of Contract.

— To prevail on a claim for breach of contract (express or implied), the plaintiff must prove: (i) the existence of a contract; (ii) plaintiff’s performance or excuse for non-performance; (iii) defendant’s breach; and (iv) the resulting damages to plaintiff. (*Darbun Enterprises Inc. v. San Fernando Community Hosp.* (2015) 239 Cal.App.4th 399, 409; *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.)

Remedies—

— Compensatory (money) damages are available for all expected harm caused by the breach. (Civ. Code, § 3300.) In other words, damages must be reasonably foreseeable. (Civ. Code, § 3300; *Erlich v. Menezes* (1999) 21 Cal.4th 543.)

— Emotional distress damages are generally *not* available *unless* the breach caused bodily harm or a serious emotional disturbance was a particularly likely result. (*Erlich v. Menezesm, supra,* 21 Cal.4th at 558; *Plotnik v. Meihous* (2012) 208 Cal.App.4th 1950 [breach of settlement agreement by hitting dog with baseball bat].)

— Specific performance is an available remedy for breach if the non-breaching party desires to affirm the contract. (Civ. Code, § 1680; *Kassir v. Zahabi* (2008) 164 Cal.App.4th 1352.)

— Rescission (accompanied by restitution) is available in certain circumstances. (Civ. Code, § 1692.) Mutual rescission is available if all parties consent. (Civ. Code, § 1689(a).) Unilateral rescission is available by statute for mistake, fraud, duress, undue influence, failure of or void consideration, or if the contract is unlawful or against public policy. (Civ. Code, § 1689(b).)

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

Applicable Statute of Limitations—

— For breach of verbal contracts, the statute of limitations is two years. (Code Civ. Proc., § 339.)

— For breach of *most* written contracts, the statute of limitations is four years. (Code Civ. Proc., § 337.)

— For breach of *negotiable instruments* (e.g., promissory notes), the statute of limitations is six years. (Comm. Code, § 3118.)

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

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

— \*\*\*

— \*\*\*

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" in checkbox\_potential\_claims or "Breach of Other Governing Documents" in checkbox\_potential\_cross\_claims

## 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).

— \*\*\*

— \*\*\*

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

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

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

###

"Negligence" in checkbox\_potential\_claims or "Negligence" in checkbox\_potential\_cross\_claims

## 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.)

— 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.)

(yn\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims)

— 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.

###

(yn\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims) or (yn\_cc\_enforcement == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims)

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

• HOA Not Enforcing Rules.

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

• Selective Enforcement.

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

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

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

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a negligence claim.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims)

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

###

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).

— \*\*\*

— \*\*\*

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

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

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

###

"Breach of Fiduciary Duty" in checkbox\_potential\_claims or "Breach of Fiduciary Duty" in checkbox\_potential\_cross\_claims

## 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.”

yn\_architect == "Yes" or yn\_cc\_architect == "Yes"

— “A decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious.” (Civ. Code, § 4765(a)(2).) “It is a settled rule of law that homeowners’ associations must exercise their authority to approve or disapprove an individual homeowner’s construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith. (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 447; *Branwell v. Kuhle* (1960) 183 Cal.App.2d 767, 779.) As the court in Hannula stated: ‘Each of the decisions enforcing like restrictions has held that the refusal to approve plans must be a reasonable determination made in good faith.’ (*Hannula v. Hacienda Homes*, supra, 34 Cal.2d 442, 447.) The converse should likewise be true, ... ‘[T]he power to approve plans ... must not be exercised capriciously or arbitrarily.’ (*Bramwell v. Kuhle*, supra, 183 Cal.App.2d 767, 779); [Citations]” (*Cohen v. Kite Hill Community Assn*. (1983) 142 Cal.App.3d 642.)

###

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).

— \*\*\*

— \*\*\*

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

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

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

###

"Nuisance" in checkbox\_potential\_claims or "Nuisance" in checkbox\_potential\_cross\_claims

## 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.)

(yn\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Breach of CC&Rs” and “Negligence” causes of action above is also applicable in the context of a nuisance claim.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" in checkbox\_potential\_cross\_claims)

— The “failure to maintain” issue discussed in the context of the “Negligence” cause of action above is also applicable in the context of a nuisance claim.

###

(yn\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_claims and "Negligence" not in checkbox\_potential\_claims) or (yn\_cc\_maintain == "Yes" and "Breach of CC&Rs" not in checkbox\_potential\_cross\_claims and "Negligence" not in checkbox\_potential\_cross\_claims)

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

###

yn\_nuisance\_ccrs == "Yes"

— Most importantly, {{ text\_cite\_nuisance\_ccrs }} of the CC&Rs specifically states that a violation of the CC&Rs gives rise to a separate nuisance claim.

###

yn\_cc\_nuisance\_ccrs == "Yes"

— Most importantly, {{ text\_cite\_cc\_nuisance\_ccrs }} 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).

— \*\*\*

— \*\*\*

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

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

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

###

"Trespass" in checkbox\_potential\_claims or "Trespass" in checkbox\_potential\_cross\_claims

## Trespass

Elements—Trespass.

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

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

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

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

"Nuisance" not in checkbox\_potential\_claims and "Nuisance" not in checkbox\_potential\_cross\_claims

— Trespass v. Nuisance. 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. 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.

###

Remedies—

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

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

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

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

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

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

— For all forms of trespass, punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant is guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Hassholdt v. Patrick Media Group Inc.* (2000) 84 Cal.App.4th 153, 169.)

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

Applicable Statute of Limitations—

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

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

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

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

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *trespass*. 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).

— \*\*\*

— \*\*\*

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.”

###

"Interference with Prospective Business Advantage" in checkbox\_potential\_claims or "Interference with Prospective Business Advantage" in checkbox\_potential\_cross\_claims

## 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).

— \*\*\*

— \*\*\*

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.”

###

"Intentional Misrepresentation" in checkbox\_potential\_claims or "Intentional Misrepresentation" in checkbox\_potential\_cross\_claims

## Intentional Misrepresentation (Fraud)

Elements—Intentional Misrepresentation (and fraud).

— The elements of a cause of action for intentional misrepresentation are: (i) a misrepresentation; (ii) made with knowledge of its falsity; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)

• A false representation is the suggestion, as a fact, of something untrue by one who does not believe it to be true. (Civ. Code, § 1710(1).) In general, the statement must be of a past or present fact, not opinion, estimates or speculation. (*Neu-Visions Sports Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308-310.)

— The elements of an action for fraud and deceit based on a concealment are: (i) the defendant must have concealed or suppressed a material fact; (ii) the defendant must have been under a duty to disclose the fact to the plaintiff; (iii) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (iv) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; (v) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (*Marketing West Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal. App.4th 603, 612-613.)

— A promise made without intending to fulfill it—i.e., “promissory fraud”—is also actionable as fraud. In this situation, the “fact” being misrepresented is the speaker’s present intention to perform. (Civ. Code, § 1710(4); *Engalla v. Permanente Med. Group Inc.* (1997) 15 Cal.4th 951, 973 [a promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud].)

— Defendant must know the statement is false or act with reckless disregard of its truth or falsity. (*Lazar v. Sup.Ct. (Rykoff- Sexton Inc.)* (1996) 12 Cal.4th 631, 638; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 415 [scienter requirement satisfied if defendant has no belief in truth of statement and makes it recklessly, without knowing whether it is true or false].)

— Civil Code section 1709—“One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.”

• Defendant must intend to induce the other party to act in reliance on the false information. (Civ. Code, § 1709; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith Inc.* (1998) 68 Cal.App.4th 445, 481.)

• Although Civil Code section 1709 does not list “reliance” as a required element of deceit, plaintiff must plead and prove that he or she actually and justifiably relied on defendant’s misrepresentation. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1091.)

— Civil Code section 1710—Defines deceit (as used in § 1709), and includes three different types of deceit, including a promise made without any intention of performing (see above). Actual reliance is a component of “justifiable reliance.” (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 737.) A plaintiff must have been justified in believing defendant’s statements. (*Gray v. Don Miller & Assocs. Inc.* (1984) 35 Cal.3d 498, 503.) Actual reliance is shown if the misrepresentation substantially influences plaintiff’s decision to act. (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678.) A plaintiff who does not believe the representations made to him or her cannot establish actual reliance. (*Buckland v. Threshold Enterprises Ltd.* (2007) 155 Cal.App.4th 798, 806-808.)

— There are three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable person standard. (*Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 312–313*.) Second, if the matter is material, reasonableness must take into account the plaintiff’s own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)

— Forbearance can constitute reliance if plaintiff decided not to do something based on the misrepresentations. (*Small v. Frist Cos. Inc.* (2003) 30 Cal.4th 167.)

— While the standard to determine the reasonableness of the reliance is subjective (i.e., the “reasonable person” standard doesn’t typically apply, and thus being gullible is often not a bar to establishing reliance)—*Brownlee v. Vang* (1965) 235 Cal.App.2d 465—there is a limit to that subjective standard. A plaintiff cannot rely on representations that are so preposterous and “so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.” (*Blankenheim v. E.F. Hutton & Co. Inc.* (1990) 217 Cal.App.3d 1463, 1474.)

— Plaintiff must plead and prove that defendant’s fraud was the cause of plaintiff’s injury (*Service by Medallion Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818) and that his or her damages were proximately caused by defendant’s tortious conduct (Civ. Code, §§ 1709, 3333, 3343; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 65-66.)

Remedies—

— Different measures of compensatory (money) damages are available depending upon the nature of the claim. In general, for compensatory damages, defrauded plaintiffs are limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received. (*Alliance Mortgage. Co. v. Rothwell* (1995) 10 Cal.4th 1226 [damages include difference between value given and value received, plus consequential pecuniary loss caused by reliance on misrepresentation].)

— For claims involving the purchase, sale, or exchange of real property, Civil Code section 3343 governs. Essentially, the plaintiff is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he or she received, together with any additional damages arising from the particular transaction, including any of the following: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) an amount that would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud; and (iii) where the defrauded party was induced by reason of the fraud to sell or otherwise part with the property in question, an amount which would compensate him or her for profits or other gains that might reasonably have been earned by use of the property had he or she retained it.

• Additional damages are available for lost profits if the plaintiff was tricked into selling an income property. (Civ. Code, § 3343(a)(4).)

• The statute does not permit a plaintiff to recover the difference between the value of the property as represented and the actual value of the property, nor does it prevent the plaintiff to obtaining equitable remedies he or she might also be entitled to. (Civ. Code, § 3343(b).)

• In real property transactions, emotional distress damages are not recoverable. (Civ. Code, § 3343.)

— For fraud involving fiduciary relationships, a broader spectrum of damages is available, typically benefit of the bargain damages. (Civ. Code, §§ 1709, 3333.)

— Damages for emotional distress are available for some types of fraud that don’t involve real property. (*Sprague v. Frank J. Sanders Lincoln Mercury, Inc.* (1981) 120 Cal. App. 3d 412, 417 [“general damages for mental pain and suffering are recoverable in a tort action of deceit”].) For negligent misrepresentation cases, no emotional distress damages are available *unless* plaintiff suffers physical injury. (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th, 793, 798-799.)

— Punitive damages are awardable where plaintiff shows by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790; *Branch v. Homefed Bank, supra,* 6 Cal.App.4th at 799.)

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

Applicable Statute of Limitations—

— Where the essence of a claim is that defendant’s act constituted actual or constructive fraud, the claim is subject to the three-year limitations period. (Code Civ. Proc., § 338.)

— Otherwise, the statute of limitations is four years. (Code Civ. Proc., § 343; *William L. Lyon & Associates Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.)

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

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

— \*\*\*

— \*\*\*

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.”

###

"Negligent Misrepresentation" in checkbox\_potential\_claims or "Negligent Misrepresentation" in checkbox\_potential\_cross\_claims

## Negligent Misrepresentation

Elements—Negligent Misrepresentation.

— The elements of a claim for *negligent* misrepresentation are nearly identical to those required to allege intentional misrepresentation (or fraud), except that the second element requires the absence of reasonable grounds for believing the misrepresentation to be true instead of knowledge of its falsity. The elements, therefore, are: (i) a misrepresentation; (ii) made with no reasonable basis to believe the representation is true; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 231.)

Remedies—

— For compensatory (money) damages, defrauded plaintiffs are generally limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received in return, plus consequential pecuniary loss caused by reliance on misrepresentation. (*Alliance Mortg. Co. v. Rothwell* (1995) 10 Cal.4th 1226.)

— For misrepresentations involving the purchase and sale of real property, damages are governed by Civil Code section 3343. The defrauded party is entitled to recover the difference between the actual value given and the actual value of what they received, together with any additional damage arising from the particular transaction, including: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) amounts for loss of use and enjoyment of the property proximately caused by the fraud; and (iii) in the case of a party induced to sell income property, profits or other gains that might reasonably have been earned by use of the property had the person retained it. (Civ. Code, § 3343(a).) Additional damage calculations apply if the defrauded party was induced to purchase income property. (*Ibid.*) Damages are *not* calculated as the difference between what was represented and what the property is actually worth. (Civ. Code, § 3343(b).)

— Punitive damages and emotional distress damages are not available in the absence of physical injury. (*Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220, 1227; *Branch v. Homefed Bank* (1992) 6 Cal.App.793, 799-800.)

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

Applicable Statute of Limitations—

— Three years. (Code Civ. Proc., § 338(d).)

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

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

— \*\*\*

— \*\*\*

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.”

###

"IIED" in checkbox\_potential\_claims or "IIED" in checkbox\_potential\_cross\_claims

## Intentional Infliction of Emotional Distress (“IIED”)

Elements—IIED.

— The elements of IIED are: (i) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress in another person; (ii) the plaintiff’s suffering severe or extreme emotional distress; and (iii) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct. (*Davidson v. City of Westminister* [sic] (1982) 32 Cal.3d 197, 209; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) The “conduct must be intended to inflict injury or engaged in with the realization that injury will result.” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

— The conduct must be directed specifically at the plaintiff or plaintiffs, not to persons in general., or the conduct occurred in the presence of plaintiff and the defendant was aware of plaintiff. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) The requirement that the defendant’s conduct be directed primarily at the plaintiff is a factor which distinguishes intentional infliction of emotional distress from the negligent infliction of such injury. (*Id. at* 904.)

— This cause of action should only be used in extreme situations due to the high bar required for proof. Successful cases involve actions such as sexual harassment, mishandling of a corpse (*Christensen v. Superior Court* (1991) 54 Cal.3d 868), intentional dumping of toxic waste (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965), and threats of physical harm to a person’s family or pet (i.e., beating a dog with a baseball bat). (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1950.)

— IIED is only appropriate in cases where the actions of another are so extreme as to be beyond all bounds of decency. This cause of action is not available for “…mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051, citing Rest.2d Torts, § 46, com. d.)

— Actions by an HOA will very rarely meet this standard.

— Note: There is no such cause of action as *negligent infliction of emotional* distress. Courts have repeatedly held that the negligent causing of emotional distress is not an independent tort, but instead is part of the tort of negligence. The traditional elements of duty, breach of duty, causation, and damages, therefore, apply. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.)

Remedies—

— Compensatory (money) damages are available (*Fletcher v. Western Nat’l Life Ins. Co.* (1970) 10 Cal.App.3d 376), as are punitive damages. (Civ. Code, § 3294.)

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

Applicable Statute of Limitations—

— The statute of limitations for IIED is two years. (Code Civ. Proc., § 335.1.)

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

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

— \*\*\*

— \*\*\*

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" in checkbox\_potential\_claims or "Implied Covenant" in checkbox\_potential\_cross\_claims

## 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).

— \*\*\*

— \*\*\*

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.”

###

"Violation of Open Meeting Act" in checkbox\_potential\_claims or "Violation of Open Meeting Act" in checkbox\_potential\_cross\_claims

## 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).

— \*\*\*

— \*\*\*

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.”

###

"Declaratory Relief" in checkbox\_potential\_claims or "Declaratory Relief" in checkbox\_potential\_cross\_claims