Litigation Due Diligence Analysis

Daily Planet v. Jimmy Olsen

By

JT

October 14, 2022

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# SUMMARY

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# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| The Daily Planet, Inc. (“Client”)DELETE THIS NOTE: If we represent more than one individual/entity, then list all our Clients here—one on each line. Then, make sure to alter the defined “Client” to say: **“(collectively, ‘Client’”)**. The point is to keep “Client” *singular* no matter how many people/entities we represent. If there’s a need to refer to different Clients in the “Statement of Facts/Evidentiary Support” section below, you can put a shortcut (“\*\*\*”) after each individual Client, but still collectively define all of them as “Client.” | N/A |
| Jimmy Olsen ("Olsen")  | Infringing party |

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.

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

# NOTABLE PROVISIONS OF \*\*\*\*\*\*

|  |  |
| --- | --- |
| **Document Article / Section No.** | **Relevant Text of the Selected Article / Section No.** |
| \*\*\* | \*\*\* |
| \*\*\* | \*\*\* |

This table may be amended from time to time if and when new applicable documents come to light. To the extent that such new document(s) necessitate(s) 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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# 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 loaned debtor $875,000, secured by a deed of trust (Orange Country Recorder No. 2019234563) (“Deed of Trust”). | Client Timeline |
| 6/10/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.Client notified debtor of breach. | Email from Client to debtor |
| 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

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

— Cum sociis natoque penatibus et magnis dis parturient. Ac feugiat sed lectus vestibulum mattis. Lacus vel facilisis volutpat est velit.

— Ligula ullamcorper malesuada proin libero nunc.

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

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# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

None at the moment. This section of the LADD, however, may be amended from time to time if Client locates additional documents.

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# THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

Client believes that one or more third parties has possession, custody, control, and/or knowledge of the following documents/information.

|  |  |  |
| --- | --- | --- |
| **Document/Information** | **Significance of the Document/Information** | **Identity of Third Party in Possession of the Documents**[[1]](#footnote-1) |
| Minutes from the Board meeting dated 3/5/20 where Client objected to the action taken by the Board. | These minutes, which are supposed to be available to directors, will show that the Board acted arbitrarily and capriciously, and that Client objected to the action being taken. Client was then wrongfully locked out of management of the company. | ABC Corp.’s Attorney |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |
| \* | \*\* | \* |

The table above may be amended from time to time as new information comes to light.

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# POTENTIAL CAUSES OF ACTION ANDTHE STRENGTHS/WEAKNESSES OF EACH

## Breach of Contract

Elements—Breach of Contract

— “The essential elements of a claim of breach of contract, whether express or implied, are the contract, plaintiff’s performance or excuse for non-performance, defendant’s breach, and 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).)

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 a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

— \*\*\*

— \*\*\*

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

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

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

## Breach of Fiduciary Duty

Elements—Breach of Fiduciary Duty

— The elements of a claim for breach of fiduciary duty are: (i) the existence of a fiduciary relationship; (ii) its breach; and (iii) damage proximately caused by that breach. (*Tribeca Companies, LLC v. First American Title, Ins.* (2015) 239 Cal.App.4th 1088.)

— Officers and directors of a corporation are fiduciaries and are thus required to exercise due care and undivided loyalty for the interests of the corporation. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 179.) Likewise with respect to members of an LLC in member-managed LLCs, or managing members in manager-managed LLCs. (Corporations Code § 17704.09; *Feresi v. The Livery, LLC* (2015) 232 Cal.App.4th 419, 425.)

— Among its acts, directors may not make decisions for the association that benefit their own interests at the expense of the association. (*Raven’s Cove Townhomes, Inc. v. Kruppe Development Co.* (1981) 114 Cal.App.3d 783, 799.) This is typically referred to as “self-dealing.”

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.)

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 a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

— \*\*\*

— \*\*\*

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 (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 the term “deceit” (as its 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.)

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 a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

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

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

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

## Declaratory Relief

Elements—Declaratory Relief

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

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

Remedies—

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

Applicable Statute of Limitations—

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

Application—Application of the Law to Client’s Facts

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *declaratory relief*. If one or more provisions of a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

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

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## Unfair Business Practices (Bus. & Prof. Code, § 17200 et seq.)

Elements—Unfair Business Practices aka Unfair Competition

— A claim brought under Bus. & Prof. Code, § 17200 et seq. is really an unfair competition claim, and the statute is sometimes referred to as the “Unfair Competition Law.” (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558.) It is *not* the same thing as a common law unfair competition claim, the essence of which is the “the inequitable pirating of the fruits of another’s labor and then either ‘palming off’ those fruits as one’s own (deception) or simply gaining from them an unearned commercial benefit.” (*KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 850; *Bank of the West v. Sup.Ct.* (1992) 2 Cal.4th 1254, 1263.)

— This statute is specifically intended to remedy anti-competitive activities (e.g., monopolies) and unfair (e.g., dishonest, deceptive, fraudulent, or discriminatory) business practices. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 179.)

— The passage of Prop. 64, however, greatly narrowed the use (i.e., abuse) of this cause of action. Prior to the passage of Prop 64 (i.e., November of 2004), standing to bring a claim under 17200 did *not* depend upon a showing of damages. (*Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 228.) After the passage of that proposition—which imposed a number of limitations on a private party’s standing to bring such a claim—a private party was required to (i) establish a loss or deprivation of money or property sufficient to qualify as injury in fact (i.e., an economic injury), and (ii) show that the economic injury resulted from an unfair business practice or false advertising. (*Kwikset Corp. v. Sup.Ct.* (2011) 51 Cal.4th 310, 322.)

— Today, a plaintiff wishing to make a claim for unfair business practices must prove that the defendant: (i) engaged in an unlawful, unfair, or fraudulent business practice/act; or (ii) used unfair, deceptive, untrue, or misleading advertising; or (iii) violated an act prohibited under Business and Professions Code section 17500 et seq. (See Bus. & Prof. Code, § 17200 et seq.; see also *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1146.) Plaintiff must not only also establish damages, but plaintiff must also prove that those damages were caused by the unfair competition at issue. (*Kwikset Corp. v. Sup. Ct., supra,* 51 Cal.4th at 322.)

• If plaintiff is arguing that defendant engaged in an “unlawful” business act or practice, plaintiff must (i) specify the unlawful conduct (which may be based on federal, state, or local law); (ii) show that defendant committed the unlawful business practice/conduct; and (iii) show that defendant unjustly received ill-gotten gains, including plaintiff’s money or property, as a result of the business practice/act. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 676.)

• “Fraud” under Business and Professions Code section 17200 et seq. means conduct that is likely to deceive the public. (*Prata v. Superior Court, supra,* 91 Cal.App.4th at 1146.)

• Within the context of a 17200 claim, unfair, deceptive, untrue, or misleading advertising means any advertising that is communicated to plaintiff that is likely to deceive the public. (*Prata v. Superior Court, supra,* 91 Cal.App.4th at 1136.)

• Whether to include an additional cause of action for false advertising under Business and Professions Code section 17500 is still up for discussion. Because the False Advertising Act and the Unfair Competition Act (i.e., 17200) are so similar, it may not be worth while to include it as a separate claim. This is especially true given the fact that the statute of limitations is only three years, as opposed to the four year statute under 17200 (discussed below). The big difference between a claim under 17200 and one brought under 17500 is that with respect to the latter, one of the elements is that the defendant needed to have intended to dispose a consumer of the consumer’s real or personal property (or get a consumer to perform a service). (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950; Bus. & Prof. Code, § § 17500.)

Remedies—

— Plaintiff may obtain injunctive relief to prevent the unfair competition and/or to order defendant to return any money or property that may have been unlawfully acquired. (Bus. & Prof. Code, §§ 17200, 17203.)

— Plaintiff is not, however, entitled to compensatory, actual, or punitive damages. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.)

Applicable Statute of Limitations

— A claim for unfair business practices/competition must be brought within four years. (Bus. & Prof. Code, § 17208.)

• Any cause of action brought under 17200 is entitled to the benefit of this four-year statute of limitation. *Thus, an unfair competition claim can revive claims that are otherwise time-barred by shorter statute periods* (e.g., failing to pay wages is an unfair business practice so the four-year statute of limitations applies, not the three-year limitations). (*Cortez v. Purolator Air Filtration Production Co.* (2000) 23 Cal.4th 163, 178.)

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 *unfair business practices*.

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

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

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

## Medical Malpractice

Elements— Medical Malpractice

— To prevail on a claim for medical malpractice, plaintiff must prove that (i) the defendant had a duty to use the same degree of skill, prudence, and diligence as other similarly situated members of defendant’s profession; (ii) the defendant breached that duty; and (iii) as a result of the breach, plaintiff suffered damages. (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.)

• Negligent conduct occurring in a medical setting is not enough to bring a claim for medical malpractice. The negligent conduct must result from a health care provider’s rendering of professional services within the scope of their license. (*Flores v. Presbyterian Intercommunity Hosp.* (2016) 63 Cal.4th 75, 83.) For example, if someone slips and falls on a wet floor in a medical office and the floor was wet due to the negligence of the healthcare provider, that would not support a medical malpractice cause action. It would support a negligence claim, however.

Remedies—

— Plaintiff is entitled to his or her compensatory and general damages up to the time of trial and for those future damages that are reasonably certain to occur. (Code Civ. Proc., § 667.7(a); Civ. Code, §§ 3281-3288, 3333.)

— Noneconomic losses (e.g., pain, suffering, inconvenience, physical impairment, disfigurement, etc.) are limited to $250,000. (Civ. Code, § 3333.2.)

— Plaintiff may be entitled to punitive damages if defendant acted intentionally and fraudulently, maliciously, or oppressively. (Civ. Code, § 3294.)

• Plaintiff’s prayer for relief may *not* include a prayer for punitive damages *unless* plaintiff seeks and obtains leave of court to include such a prayer or defendant waives the prohibition. (Code Civ. Proc., § 425.13(a).)

Applicable Statute of Limitations—

— If plaintiff is 18 or older at the time of the injury, he or she must bring a claim for medical malpractice within the *earlier* of (i) *three* years from the injury or (ii) *one* year from when plaintiff knew or should have known of the injury. (Code Civ. Proc., § 340.5.)

— If plaintiff is 6 to 17 years old at the time of the wrongful act, he or she must bring a claim for medical malpractice within *three* years from the date of the wrongful act. (Code Civ. Proc., § 340.5.)

— If plaintiff is under 6 years old at the time of the wrongful act, he or she must bring a claim for medical malpractice within *either* (i) three years from the wrongful act or (ii) before plaintiff turns 8, whichever is *later*. (Code Civ. Proc., § 340.5.)

• That time limitation for minors (i.e., anyone under 18) is tolled for any period of time in which a parent, insurer, or health care provider has committed fraud or collusion in failing to bring an action on behalf of the minor. (Code Civ. Proc., § 340.5.)

— If the requisite notice (see the Pre-Trial Requirements section of this LADD below) is served within the 90-day notice period, then the applicable statute of limitations will be extended by 90 calendar days from the date of the notice.

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 *medical malpractice*. If one or more provisions of a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

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

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

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## Violation of Statute (Bus. & Prof. Code section 444555)

Elements—Violation of Statute (Bus. & Prof. Code section 444555)

— Provide the elements AND statutory/case law of this cause of action.

— If you want, add snippets from other cases (see the examples above for ideas). Make sure to maintain the proper formatting and margins established in this document.

— If you have more than one cause of action to add, then cut and paste this one FIRST (before replacing the green highlights) as many times as there are causes of action to add. That way, you’ll be sure to keep everything consistent and standardized.

Remedies—

— What are the available remedies.

Applicable Statute of Limitations—

— What is the statute of limitations for this claim?

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 of statute (bus. & prof. code section 444555)*. If one or more provisions of a contract is relevant, you should cite to such provision(s) here. *No need to quote or provide a snip from any other document.* Referring to the page/section/paragraph of the contract is sufficient.

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# STRATEGIC CONSIDERATIONS

## Jurisdiction

### Arbitration

None of the documents reviewed require Client to submit the current dispute to binding arbitration. Client may, therefore, *choose* whether to agree to arbitration. Whether that is a good idea or not depends upon a variety of factors that Client and the Firm can discuss at a later time.

### Personal Jurisdiction

It is likely that given the facts and parties relevant to this dispute, the superior court in Orange County may exercise personal jurisdiction over the parties.

### Subject Matter Jurisdiction

Subject matter jurisdiction is a requirement for suits filed in federal court. There are no federal court issues of subject matter jurisdiction in connection with this dispute.

## Standing

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

## Anti-SLAPP Analysis

Anti-SLAPP Overview—

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

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

Anti-SLAPP 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).)

Application/Analysis/Conclusion—

— Based upon the applicable facts and claims, an anti-SLAPP motion is unlikely because none of the conduct complained of arises from constitutionally protected activities.

## Pre-Filing Requirements

At least 90 days before filing a claim for medical malpractice, plaintiff must send all potential defendants correspondence notifying them of plaintiff’s intent to sue. (Code Civ. Proc., § 364(a).) The correspondence must set forth the basis of plaintiff’s claim and specify the nature of plaintiff’s injuries. (Code Civ. Proc., § 364(b).)

Client has not yet complied with the pre-filing notice requirement set forth in Code of Civ. Proc., section 364(b). That will need to be done prior to filing the action.

## Attorneys’ Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under Section 23.5 of the Distribution Agreement.

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

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# FINALTHOUGHTS/ISSUES/CONCERNS/COMMENTS

None at this time.

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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Reviewed and Approved by: \*\*\*\*\*\*

1. Any third party listed here should also be listed in the “Parties/Significant Figures” section above. [↑](#footnote-ref-1)