Litigation Due Diligence Analysis

Jones adv. Poopy Von Trap

Case No. Z1294

By

JB

September 20, 2022

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# SUMMARY

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# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| Mack Jones (“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 |
| Poopy Von Crapp, Inc. | Infringing entity |

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

Not at the moment. This section of the LADD may, however, 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

None at the moment. This, however, may change as new information comes to light or a third party produces documents, in which case the LADD may be amended to reflect such new information/documents.

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# POTENTIAL CROSS-CLAIMS AND THE 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.

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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.”

## 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.)

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.)

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 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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## 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.)

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 with prospective business advantage*. 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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## 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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## Express Indemnity

Elements—Express Indemnity

— To prevail on a claim for express indemnity, the indemnitee (the person who is entitled to indemnity protection and is thus bringing the claim for express indemnity) must prove: (i) the existence of a contract (oral or written) containing an indemnification provision; (ii) that he or she performed under the contract; (iii) that the indemnitor (the person who promised to indemnify the indemnitee) breached the contract (e.g., by refusing to provide indemnity protection to the indemnitee); and (iv) damages. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 699-700; Civ. Code, § 2772.)

Remedies—

— Compensatory (money) damages are available for all expected harm caused by the breach. (Civ. Code, § 3300.) For an express indemnity claim, this will most often take the form of the fees and costs incurred in defending against the third party’s underlying lawsuit, as well as any judgment levied against the indemnitee.

Applicable Statute of Limitations—

— If the indemnity provision is contained in a document, a claim for express indemnity must be brought within four years. (*Valley Crest Landscape Dev., Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 481; Code Civ. Proc., § 337(a).) If the indemnity provision is not contained in a document (i.e., if it was an oral promise to indemnify), a claim for express indemnity must be brought within two years. (Code Civ. Proc., § 339(1).)

• A claim for express indemnity does not accrue until the indemnitee actually either pays the third party, or incurs expenses for his or her defense that should’ve been covered by the indemnitor. When the underlying third party’s injury occurred is irrelevant. (*Valley Crest Landscape Dev., Inc., supra,* 238 Cal.App.4th at 481.)

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 *express indemnity*. If one or more provisions of a relevant contract is/are relevant, you should cite to those provisions 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.”

## Conversion

Elements—Conversion

— To prevail on a claim for conversion, plaintiff must prove (i) his or her ownership/right to possess of the at-issue *personal property*; (ii) defendant’s wrongful exercise of control over that property; and (iii) damages. (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.)

— Conversion is a strict liability tort. (*Welco Electronics, Inc. v. Mora, supra,* 223 Cal.App.4th at 208.)

— Money can only be converted if the money that was taken is a specific sum capable of identification. (*Welco Electronics, Inc. v. Mora, supra,* 223 Cal.App.4th at p. 216.)

• For example, attorneys’ fees and costs have rightfully supported a conversion claim (*Murphy v. Am. Gen. Life Ins. Co.* (C.D. 2015) 74 F.Supp.3d 1267, 1280), as have: (i) settlement proceeds (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 616); and (ii) funds sitting in bank accounts. (*Fong v. East West Bank* (2018) 19 Cal.App.5th 224, 231-33.)

— Defendant’s good faith, motive, or lack of knowledge in converting the personal property is irrelevant. (*Los Angeles Fed. Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1388.)

— Conversion vs. trespass to chattels. Conversion arises from the complete dispossession of the *personal* *property*, while trespass to chattels deals with a lesser degree of interference. Note that neither tort is appropriate in the context of *real propert*y.

Remedies—

— Plaintiff is entitled to (i) the value of the property at the time of conversion, with interest from the date of conversion; and (ii) a fair compensation for the time and money expended pursuing the property. (*Virtanen v. O’Connell* (2006) 140 Cal.App.4th 688, 708; Civ. Code, § 3336.)

• If the property had special value to plaintiff, that value may be recovered if defendant knew the value in advance or was a willful wrongdoer. (Civ. Code, § 3355.)

— Emotional distress damages are available. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1605-07.)

— Attorneys’ fees incurred in seeking the recovery of the property are not recoverable. (*In re Martinez* (Bankr. N.D.Cal. 2019) 610 B.R. 290, 305.)

— Punitive damages may be available if the plaintiff shows that the defendant acted oppressively, fraudulently, or maliciously. (Civ. Code, § 3294.)

Applicable Statute of Limitations

— A claim for conversion must be brought within three years of the taking. (Code Civ. Proc., § 338(c).) The statute of limitations period begins running even if the owner was unaware of the conversion. (*Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 429; *Murphy v. Am. Gen. Life Ins. Co., supra,* 74 F.Supp.3d at 1280.) In other words, the “discovery” rule does not apply to conversion claims.

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 *conversion*.

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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.”

## 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.)

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.”

## Receipt of Stolen Property (Penal Code § 496)

Elements—Receipt of Stolen Property

— To prevail on a civil claim for receipt of stolen property, plaintiff must prove that (i) the property was stolen; (ii) defendant knew that the property was stolen; and (iii) defendant bought or received the property. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, disapproved on another ground in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14; Pen. Code, § 496(a).)

Remedies—

— Plaintiff is entitled to treble (triple) damages, plus his or her reasonable attorneys’ fees and costs. (Pen. Code, § 496(c).)

Applicable Statute of Limitations

— A civil claim for receipt of stolen property must be brought within three years. (Code Civ. Proc., § 338.)

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 *receipt of stolen property*.

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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.”

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# CAUSES OF ACTIONS/CLAIMS ALLEGED AGAINST CLIENT

The current action pending against Client alleges the causes of action listed below. The elements necessary to prove each of those claims will not be addressed in this LADD, but may be discussed at a later time upon Client’s request.

— (i) Breach of Contract; (ii) Negligence; (iii) Declaratory Relief; (iv) Implied Covenant; and/or (v) Trespass

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# POTENTIAL AFFIRMATIVE DEFENSES

Based upon the allegations made against Client thus far, and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the affirmative defenses discussed below appear to be applicable.

## Statute of Limitations

Affirmative Defense—Statute of Limitations

The applicability of a statute of limitations defense depends upon the nature of the claims alleged. Based upon the claims aimed at Client, the following seem relevant:

— 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)—the caveat being that the statute of limitations for breach of **negotiable instruments**, like promissory notes, is six years (Comm. Code, § 3118).

— For claims involving **breach of the implied covenant of good faith and fair dealing**, the statutes of limitations are the same as they are for breach of contract.

— 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.)

— For **fraud** and **intentional misrepresentation**, three years. (Code Civ. Proc., § 338(d).)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

## Equitable Estoppel

Affirmative Defense—Equitable Estoppel

— If a party acts or makes statements to intentionally or deliberately lead someone else to believe that a particular thing is true, and the second party acts upon that belief, the first party cannot contradict his or her prior statement or conduct. (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 782.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

## Unclean Hands

Affirmative Defense—Unclean Hands

— If the plaintiff’s bad conduct or bad faith causes/is related to his or her own underlying harm, then that plaintiff is barred from obtaining equitable relief—i.e., a plaintiff cannot take advantage of his or her own wrong. (Civ. Code, § 3517; *Lynn v. Duckel* (1956) 46 Cal.2d 845, 850.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

## Laches

Affirmative Defense—Laches

— A plaintiff’s claim is barred under the doctrine of laches if: (i) the plaintiff delayed in bringing his or her claim; (ii) the delay was unreasonable or inexcusable; and (iii) the defendant is prejudiced because of the delay. (*In re Marriage of Parker* (2017) 14 Cal.App.5th 681, 688.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

## Apportionment

Affirmative Defense—Apportionment

— In comparative fault actions for personal injury, property damage, or wrongful death, each defendant’s liability for non-economic damages are several only, not joint. (Civ. Code, § 1431.2.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

## Contract (Fraud)

Affirmative Defense—Fraud

— Consent obtained through actual or constructive fraud renders the contract voidable by the defendant. (Civ. Code, §§ 1566, 1567.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

## Failure to State a Claim

Affirmative Defense—Failure to State a Claim

— This affirmative defense applies if the plaintiff fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

## Justification

Affirmative Defense—Justification

— Because of the defendant’s legally protected interest, the defendant’s appropriate conduct was justified in protecting that interest. (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73.) How this affirmative defense is applied, however, depends upon the nature of the claims alleged. For example, in response to an invasion of privacy claim, a defendant may be justified in violating a plaintiff’s privacy interest if the reason for the invasion outweighs the plaintiff’s privacy interest. (*Lewis v. Superior Court* (2017) 3 Cal.5th 561, 573.) In an assault case, however, justification means that the defendant’s force was necessary to protect the defendant or others from wrongful injury. (Civ. Code, § 50.)

Application/Conclusion—Application of the Affirmative Defense to Client’s Facts

— REPLACE THIS TEXT by providing a brief (1-3 sentences) statement regarding why this affirmative defense *might* apply to the facts of this case.

This section of the LADD may be amended from time to time if new information/evidence comes to light that supports additional affirmative defenses.

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# STRATEGIC CONSIDERATIONS

## Statute of Limitations

To the extent that Client wants to allege all of the suggested causes of action discussed above, the claims must be filed on or before **July 15, 2024** (the *earliest* of the applicable statutes of limitations given the desired claims).

## 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, it appears that the opposing party has standing to pursue each of the claims alleged against Client.

Based upon the information/evidence that Client has provided thus far, Client has standing to pursue every cross-claim 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).)

Analysis—

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

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

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

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

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

— Acts made in furtherance of petitioning or free speech that are made during a legislative, judicial, executive, or other official proceeding are protected under category **(e)(1)** of the anti-SLAPP statute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application/Conclusion—

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

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

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

## Pre-Filing Requirements

The facts of this case do not trigger any pre-filing requirements.

## Attorneys’ Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under Section 12.5.4 of the Consulting 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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# FINAL THOUGHTS/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: \*\*\*\*\*\*