Litigation Due Diligence Analysis

Lane adv. Murdock

2023-CV-232312

By

MBK

April 3, 2023

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# SUMMARY

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# PARTIES/SIGNIFICANT FIGURES

|  |  |
| --- | --- |
| **Name of Party / Significant Figure** | **Significance to Underlying Matter/Dispute** |
| Lois Lane (“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 |
| Matthew Murdock  | Plaintiff |

The table above may be amended from time to time to reflect revisions to Client’s narrative and/or new information that may become available in the future.

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# STATEMENT OF FACTS / EVIDENTIARY SUPPORT

|  |  |  |
| --- | --- | --- |
| **Date / NA** | **Fact** | **Evidence Supporting That Fact** |
| \* | This section should contain a comprehensive and objective statement of the relevant facts of the case, as well as any relevant dates. When possible, cite to evidence already in our possession that support the facts referenced. | \* |
| 4/19/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.Client closed escrow on the property. | Client Timeline |
| 6/10/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.Client notified HOA of sprinkler leak into Client’s unit. | Email from Client to Mgmt. Co. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. | \*\* |
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This table may be amended from time to time as new information/evidence comes in. To the extent that such new information necessitates any significant revisions to Client’s litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

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# NOTABLE PROVISIONS OF ONE OR MORE OPERATIVE AGREEMENTS

|  |  |
| --- | --- |
| **Document Name****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&RsArticle IX, Section 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  |
| Purchase AgreementSection 8.4 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE. IF YOU DON’T KNOW HOW TO DO THAT, ASK MBK.  |
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The table may or may not contain all the significant provisions of the document(s) at issue. It is simply a place to include one or more provisions of one or more operative agreement/document that we believe could play a role in some aspect of Client’s case (e.g., binding arbitration, attorneys’ fees, and choice of law provisions). 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 operative documents might strengthen (or weaken) Client’s case.

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# ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

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

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# ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

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

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# THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

At this time, Client is unaware of any documents or information that can only be obtained from a third party. This, however, may change as new information comes to light, in which case the LADD may be amended to reflect such new information.

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# POTENTIAL CROSS-CLAIMS &THE STRENGTHS/WEAKNESSES OF EACH

## 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.”

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).

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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.”

## 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.)

— Nuisance v. Trespass. Nuisance is based on a property’s owner’s use of his or her own property in a way that adversely affects other property owners. Typical examples of a nuisance include things like excessive noise, vibration, odors, etc. Trespass refers to a physical invasion of property, either by persons entering the property, or a substance that is dumped, has drained onto, or under the property (e.g., drainage, toxic spills, etc.), or the encroachment of a physical object, such as a structure built over a property line.

Remedies—

— Remedies are different, depending upon whether the nuisance is *permanent* or *continuing*.

• For *permanent* nuisances, compensatory (money) damages are available. The usual measure of such damages is the diminution in fair market value of the affected property. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 292 [jury decides fair market value before and after creation of nuisance].) A plaintiff may also recover the present value of losses or expenses he or she may, with reasonable certainty, incur in the future because of the nuisance. (*Id. at* 295.) A plaintiff must recover all past, present, and future damages in one suit. (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271-272.)

• For *continuing* nuisances, the compensatory (money) damages are different. A plaintiff can only recover actual damages *through the date of the suit* (i.e., plaintiff cannot recover damages for diminution in value) because there is no certainty the nuisance will continue. The rational for that is apparently that if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that the nuisance will continue. (*Gehr v. Baker Hughes Oil Field Operations Inc.* (2008) 165 Cal.App.4th 660, 668.) Which leads to the most common remedy for ongoing nuisances—abatement. A continuing nuisance is ongoing and can be abated at any time via injunction. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868-871.)

— Emotional distress damages are also a possibility. (See *Kornoff v. Kingsburg Cotton Oil Co.*, *supra*, 45 Cal.2d at 272; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 986, fn.10; *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 287-288; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464 [damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort].) Mental distress is an element of loss of enjoyment. (*Sturges v. Charles L. Harney Inc.* (1958) 165 Cal.App.2d 306, 323.)

— Punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Hassoldt v. Patrick Media Group Inc.* (2000) 84 Cal.App.4th 153, 169-170.)

— Declaratory relief may be available in nuisance cases. (Code Civ. Proc., § 1060; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984.)

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

Applicable Statute of Limitations—

— Three years for property damage resulting from a nuisance. (Code Civ. Proc., § 338(b); *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 743-745.)

— Two years for personal injuries resulting from a nuisance. (Code Civ. Proc., § 335.1.)

— Commencement of running of the statute can be an issue.

• For private *continuing* nuisances, each repetition of a continuing nuisance is considered a separate wrong that commences a new period in which to bring an action based on the new injury. (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996), 44 Cal.App.4th 1160.)

• For a *permanent* nuisance (e.g., a building, fence, buried sewer, or structure located on the property of another), the three year statute of limitations begins to run *when the nuisance first occurred*.

Application—Application of the Law to Client’s Facts

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

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

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

— 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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# 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:

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.

## Contract (Mistake of Fact)

Affirmative Defense—Mistake of Fact

— If the parties to a contract are mistaken as to a fact, a party may defend a claim for breach of contract if the mistake was not caused by the mistaken party’s neglect, and if the mistake consists of: (i) an unconscious ignorance or forgetfulness of a material past or present fact; or (ii) a belief in the present existence of a thing material to the contract that does not exist (or in the past existence of such a thing, which has not existed). (Civ. Code, § 1577.)

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 (Novation)

Affirmative Defense—Novation

— A novation occurs when parties to a contract enter into an entirely new contract, or otherwise substitute old obligations for new ones. (Civ. Code, § 1530.)

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.

## Waiver

Affirmative Defense—Waiver

— As an affirmative defense, waiver is a type of estoppel. It prevents a plaintiff from relying on a right (typically contractual) that the plaintiff would otherwise have no problem being able to enforce. Often, such a waiver exists because the plaintiff did or said something that made the defendant believe that the provision in question was no longer in effect, and defendant relied upon that action/statement. (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78.)

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 Mitigate

Affirmative Defense—Failure to Mitigate

— A plaintiff has a duty to take steps to mitigate damages and is therefore not entitled to damages that could have been avoided had the plaintiff taken those steps. (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111.)

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.

## Lack of Damages

Affirmative Defense—Lack of Damages

— Damages is a necessary element in most causes of action. Consequently, if the plaintiff hasn’t been damaged, it’s almost certain that the plaintiff cannot prevail.

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.

## No Causation

Affirmative Defense—No Causation

— The defendant is not liable for the plaintiff’s damages if another’s conduct was the cause of the harm. (*Martinez v. Vintage Petroleum, Inc.* (1998) 68 Cal.App.4th 695, 700 [“intervening negligence cuts off liability (i.e., it becomes a superseding cause) if the intervening cause, and its results, are not reasonably foreseeable].)

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.

## Ratification

Affirmative Defense—Ratification

— The defendant is not liable for the plaintiff’s harm because the plaintiff ratified the defendant’s conduct after the conduct occurred. (Civ. Code, §§ 1588, 2307, 2310, 2311; *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168; *C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1111, [“[T]he ratification relates back to the time the tortious act occurred.”].)

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.

## Litigation Privilege (Civ. Code, § 47)

Affirmative Defense—Litigation Privilege

— The litigation privilege found at Civil Code section 47 is an *absolute* privilege, and it bars all tort causes of action except a claim of malicious prosecution. (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953; Civ. Code, §47.)

— In the context of litigation, the privilege applies to *all* statements/writings made (even those made maliciously): (i) in a judicial or quasi-judicial proceeding; (ii) by litigants or other participants authorized by law; and (iii) to achieve the objects of the litigation (whether taken before, during, or after such proceedings. (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1300.)

— In the context of HOA disputes, the litigation privilege applies to comments by the HOA’s attorney made about one or more homeowners (in a letter to the homeowners), even if such comments are defamatory. (*Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1.)

— The privilege also applies in various other “official” proceedings, such as those related to: (i) city counsel proceedings (*Cayley v. Nunn* (1987) 190 Cal.App.3d 300); (ii) school boards (*Frisk v. Marrihew* (1974) 42 Cal.App.3d 319); (iii) police investigations (*Cox v. Griffin* (2019) 34 Cal.App.5th 440); (iv) regulatory complaints (*Carver v. Bonds* (2005) 135 Cal.App.4th 328); and (v) executive (governmental) functions (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424.)

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

This section is *not* intended to address whether or not the statute of limitations has run on a particular cross-claim that might have otherwise been relevant under the facts. Those specifics can be found in reference to each of the potential cross-claims discussed above.

Rather, this section of the LADD is intended only to highlight the earliest statute of limitations relevant to one of the available above-referenced cross-claims. If, therefore, Client wants to file a cross-complaint containing the applicable the causes of action discussed above, the action must be filed on or before **November 30, 2023**.

## Jurisdiction

### Arbitration

Section 23.4(a) of the Non-Disclosure Agreement contains a binding arbitration provision that appears to apply to all the issues and players relevant to the dispute. Consequently, legal action related to the issues in dispute must be litigated in the manner directed by that provision and may be compelled or confirmed in the superior court (most likely in San Diego County).

### Venue

As was discussed above, at least as it applies to our Client, the parties to the Non-Disclosure Agreement agreed to submit all disputes to binding arbitration in San Diego County, so that is the correct venue.

## Standing

Based upon the information/evidence that Client has provided thus far, it appears that the opposing party *lacks* standing to pursue a claim against Client for \*\*\*. [*State the reasons for lack of standing. If there is more than one cause of action at issue, adjust the language accordingly.*] The Firm will take a closer look at the standing issue and follow up with Client in the near future.

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 Statute’s Application in HOA-Related Cases—

— SLAPP suits can, and have, arisen in lawsuits by and against HOAs and HOA members. For example, a member might file a lawsuit against a director or committee member to pressure that person to change a critical vote regarding some issue or another. To prevent that type of abuse, and to discourage members from naming individual board members as defendants in litigation, courts have determined that the protections offered under the anti-SLAPP statute apply to various issues that arise in the HOA arena. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130-36 [tree trimming dispute between adjacent homeowners that involved covenants to all lots in the community satisfied the definition of “public interest”]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476-77 [newsletter published to 3,000 residents of an HOA was a “public forum” even if access to the newsletter was selective and limited]; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1409-10 [letters from attorney to management company and the HOA’s board regarding nuisance caused by an HOA member].)

— Obviously, however, not all HOA-related disputes are covered by the anti-SLAPP statute. (*Talega Maintenance Corp. v. Standard Pac. Corp.* (2014) 225 Cal.App.4th 722, 732 [holding that HOA proceedings must have a strong connection to governmental proceedings to qualify as “official proceedings”]; but see *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 540-46 [holding that HOAs “functioned similar to a quasi-governmental body” to constitute a “public forum”].)

Anti-SLAPP Test—

— The courts use a two-prong test to determine if a claim is protected under the anti-SLAPP statute. First, the defendant must prove that the at-issue claim arises from a constitutionally protected activity. (*Ruiz v. Harbor View Community Assn., supra,* 134 Cal.App.4th at 1466; Code Civ. Proc., § 425.16(b)(1).) If the defendant satisfies his or her burden, the burden shifts to the plaintiff to show that there is a probability that he or she will prevail on the merits of the at-issue claim. (*Ibid*.; *Equilon Enterprises v. Consumer Cause Inc.* (2002) 29 Cal.4th 53, 67; Code Civ. Proc., § 425.16(b)(1).)

— With regard to the first prong, there are four categories that the anti-SLAPP statute is intended to protect:

• Any statement (written or oral) or document generated in connection with (or as part of):

→ Any official proceedings authorized by law—e.g., legislative, executive, or judicial proceedings. (Code Civ. Proc., § 425.16(e)(1).)

→ Any issue under consideration or review by a legislative, executive, or judicial body. (Code Civ. Proc., § 425.16(e)(2).)

• Any statement (written or oral) or document made in a place open to the public (or in a public forum) and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(3).)

• Any other conduct made in furtherance of the exercise of a constitutional right of petition or free speech and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(4).)

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(e.g., Notice or Mediation Requirements)

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

## Attorneys’ Fees and Costs

The prevailing party is entitled to attorneys’ fees and costs under Civil Code section 1111.

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

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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