**PRELIMINARY ANALYSIS**

**Callahan/Nickerson v. Stoneybrook Villas I HOA**

Prepared By

EMS

February 8, 2023

# SHORT SUMMARY OF CASE

COMPLETE LATER - PC says hurricane Ian damaged the roof, the board said 4-6 weeks after that PC needs to have her insurance fix the roof. They told her she could pick regular tile or stone coated steel. Then the board retracted their statement and said we are going to do the work with tile. and charge you all an assessment. If your insurance pays for it you must forward the check to them.

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# Parties / Significant Figures

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| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| Kimberley Callahan (“Client”) | Client / HOA Member |
| David Nickerson ("Nickerson", "Client") | Client, neighbor |
| Stoneybrook Villas I at Gateway Association, Inc. ("HOA") | HOA |

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

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# Statement of Facts / Evidentiary Support

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| --- | --- | --- |
| **Date / NA** | **Fact** | **Evidence Supporting That Fact** |
| 4/19/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  Client closed escrow on the property. | Client Timeline |
| N/A | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  Client notified HOA of sprinkler leak into Client’s unit. | Email from Client to Mgmt. Co. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. | \*\* |
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This table may be amended from time to time as new information/evidence comes in that require significant revisions to Client’s pre-litigation strategy.

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# Notable Provisions of the Governing Documents

|  |  |
| --- | --- |
| **Document**  **Article / Section No.** | **Text of the Selected Article/Sections No.**  **(if none, put “N/A”; delete rows that you didn’t use; maintain formatting)** |
| CC&Rs  Section 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  The HOA shall paint, maintain, repair and make necessary improvements to the common areas, as well as the exteriors of the garage, deck, and balcony elements of the Units, in good condition and repair. |
| Operating Rules  P. 20 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  [I]n the event of any water damage, mold infestation, or related damage arising from an owner’s negligence, or arising from any pipe leak or similar failure for which this owner has the maintenance responsibility, the owner shall be responsible for all repairs and resulting damage. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. |
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The table may or may not contain all the significant provisions of Client’s governing documents. Its sole purpose, in fact, is to help make the Firm’s analysis of Client’s pre-litigation case more convenient. The provisions contained in the table, therefore, should neither be viewed as an exhaustive list of key provisions/evidence, nor be used as a measure of what provisions of the governing documents might strengthen (or weaken) Client’s pre-litigation case.

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# Additional Information/Clarification Needed From Client

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

— COMPLETE LATER

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

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# Additional Documents Needed From Client

The Firm needs to ask Client for the following documents:

— COMPLETE LATER

This section of the Preliminary Analysis may be amended from time to time if Client locates additional documents, or if a third party produces additional documents.

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Potential Causes of Action and the Strengths/Weaknesses of Each

## Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. Code, § 5975

Elements—Breach of CC&Rs.

— Restrictive covenants and recorded declarations are written agreements governed by contract principles. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 240.) Restrictive covenants and recorded declarations are of a contractual nature and are enforceable by statute unless unreasonable. (*Id.* at 237; and see Civ. Code, § 5975.) Because the Declaration of CC&Rs is a recorded declaration of restrictive covenants, it is enforceable provided it is not unreasonable. “[S]ettled principles of condominium law establish that an owners association, like its constituent members, must act in conformity with the terms of a recorded declaration. (See Civ. Code, § 5975, subd. (a); *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 268 [homeowner can sue association to compel enforcement of declaration's provisions];(Citations.)” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*, supra, 55 Cal.4th at p. 239.)

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

• HOA Not Enforcing Rules.

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

• Selective Enforcement.

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

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

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

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

Applicable Statute of Limitations—

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

Remedies—

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

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

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

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

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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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## Negligence

Elements—Negligence.

— To prove a claim for negligence, plaintiff must establish: (i) duty; (ii) breach of duty; (iii) proximate cause; and (iv) damages. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.)

— An HOA that fails or refuses to abide by its contractual maintenance obligations is liable to the homeowner for damages caused by such negligence. (See, e.g., *White v. Cox* (1971) 17 Cal.App.3d 824, 895.)

— The “enforcement” issue raised in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a negligence claim.

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

Remedies—

— Compensatory damages are available for all harm proximately caused by a defendant’s wrongful acts. (Civ. Code, §§ 3281, 3333-3343.7.)

— Injunctive Relief is available. Courts can fashion equitable relief to remedy negligent conditions. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.)

— Damages for emotional distress are only available in connection with bodily injury. (*Potter v. Firestone Tire & Rubber* (1993) 6 Cal.4th 965.) Such relief, when available, arises out of a claim for *negligent infliction of emotional distress*, which often involve “bystander situations”—e.g., witnessing injury to a family member. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064.) Emotional distress damages for negligence *without* injury (e.g., fear of illness such as cancer if exposed to toxic substances threatening cancer) available if defendant acted with malice, fraud, or oppression, and the fear is based on knowledge corroborated by reliable medical or scientific evidence. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000.)

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

Applicable Statute of Limitations—

— Two years for personal injuries. (Code Civ. Proc., § 335.1.)

— Three years for claims related to injury to property. (Code Civ. Proc., § 335.1.)

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

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

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

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## 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.”

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

Remedies—

— If the breach of fiduciary duty results in a breach of CC&Rs, then compensatory (money) damages and injunctive relief may be available.

— If the breach results in damage to property, available compensatory damages are the cost to remedy defects and for loss of use during the period of injury. (*Raven’s Cove Townhomes Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 802.)

— Civil Code § 3333: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

— Equitable remedies such as constructive trust, rescission, and restitution are available when the defendant has been unjustly enriched by the breach. (*Miester v. Mensinger* (2014) 230 Cal.App.4th 381.)

— Punitive damages may be available if the breach constitutes constructive fraud. (Civ. Code., § 3294; *Hobbs v. Bateman Eichler, Hill Richards Inc.* (1985) 164 Cal.App.3d 174.)

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

Applicable Statute of Limitations—

— A claim for breaching a fiduciary duty must be brought within four years of the breach. (Code Civ. Proc., § 343; *William L. Lyon & Assoc, Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.) If the breach of fiduciary duty stems from the defendant’s fraud (even if pleaded as breach of fiduciary duty), which has a statute of limitations of only three years, the claim must be brought within *three* years. (Code Civ. Proc., § 338; *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.)

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

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

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

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

Elements—IIED.

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

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

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

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

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

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

Remedies—

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

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

Applicable Statute of Limitations—

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

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

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

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

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## Violation of Election Laws (Civ. Code, § 5100 et seq.)

Elements—Violation of Election Laws.

— Preponderance of evidence is the applicable burden of proof, and thus if the plaintiff shows by a preponderance of the evidence that the election procedures set forth in the Davis-Stirling Act were not followed, a court must void any results of the election unless the association establishes, by a preponderance of the evidence, that the association’s non-compliance with the law didn’t have any affect on the results of the election. (Civ. Code, §5145(a).)

— All HOAs must have operating rules that:

• Permit all candidates access to the member’s. Specifically, an HOA’s rules must specifically address (and permit) that any candidate or member advocating a point of view is provided access to the HOA’s media, newsletters, or internet websites during a campaign provided that the reasons for such access are reasonably related to that election. Such views also include those *not* endorsed by the board. The rules must also state that the HOA may not edit or redact any content from those communications (but may include a statement specifying that the candidate or member, and not the association, is responsible for that content). (Civ. Code, § 5105(a)(1).)

• Provide members access to the common areas, at no cost, to ensure that candidates have equal access to the members. (Civ. Code, § 5105(a)(2).)

• Specify qualifications for candidates. (Civ. Code, § 5105(a)(3).)

• Specify the timing of elections and requirements regarding holding of elections. HOAs are required to hold an election for a seat on the board of directors at the expiration of a director’s term and at least once every four years. (Civ. Code, § 5100(a)(2).)

• Specify who may be a candidate for director. After January 1, 2020, HOAs have a specific list of grounds for disqualification of a candidate. The HOA cannot disqualify a candidate for any reason other than the ones referenced by law. Disqualifications come in two categories: (i) mandatory disqualifications; and (ii) permissive qualifications.

→ Mandatory: *Only* HOA members can be candidates for director (the sole exception relating to developer seats). (Civ. Code, § 5105(b).)

→ Permissive—Criminals: An HOA *may* disqualify a candidate if the association is aware or becomes aware of, a past criminal conviction that would either prevent the association from purchasing the fidelity bond coverage required by Section 5806 should the person be elected or terminate the association’s existing fidelity bond coverage as to that person should the person be elected. (Civ. Code, § 5105(c)(4).)

→ Permissive—Disqualification for Non-Payment of *Assessments*: An HOA *may* have rules that disqualify candidates if that candidate is not current on monthly assessments and special assessments. If, however, a member paid assessments under protest according to Civil Code section 5658, or if the member is under a repayment plan under Civil Code section 5665, then that member cannot be disqualified. (Civ. Code, § 5105(c)(1).) An additional requirement should an HOA adopt this disqualification is that the rule must apply to current directors as candidates. [*Note: There is no permissive disqualification for non-payment of fines. The above permissive disqualification for payment of assessments does not apply to payment of fines. An association may not disqualify a nominee for nonpayment of fines, fines renamed as assessments, collection charges, late charges, or costs levied by a third party. (Civ. Code, § 5105(d).)*]

→ Permissive—Joint Ownership: An HOA *may* have rules stating that if there are joint owners of any individual unit, only one joint interest holder may serve as a director at any given time. (Civ. Code, § 5105(c)(2).)

→ Permissive—Membership Less Than One Year: An HOA *may* have rules that require candidates to have been members of the HOA for more than one year. (Civ. Code, § 5105(c)(3).)

• Specify nomination procedures. An HOA must provide general notice of the deadline and procedure for submitting nominations for director at least 30 days prior to that deadline. Individual notice is required if a member requests individual notice. (Civ. Code, § 5115.)

• Provide proper election notice. At least 30 days prior to ballots being sent to members, the HOA must provide general notice of: (a) the date and time by which, and the physical address where, ballots are to be returned by mail or handed to the inspector or inspectors of elections; (b) the date, time, and location of the meeting at which ballots will be counted; (c) the list of all candidates’ names that will appear on the ballot; and (d) individual notice of the above paragraphs shall be delivered to all members who request individual notice. (Civ. Code, § 5115(b).)

• Provide proper instructions regarding providing ballots to members. At least 30 days before an election, the inspector of election must deliver to each member the ballot or ballots, and a copy of the election operating rules. Alternatively, the inspector may post the election operating rules online with the web address on the ballot. (Civ. Code. § 5105(g).)

• Specify who is permitted vote. An HOA cannot deny a ballot to any member for any reason other than not being a member at the time that ballots are distributed. This means that HOAs cannot revoke or suspend voting privileges as a measure of discipline or as a penalty for a member who is behind on dues. In addition, HOAs can no longer deny a ballot to a person who acts under general power of attorney for a member (and, of course, must count a ballot timely received from a person acting under a general power of attorney for a member). (Civ. Code, § 5105(g).)

• Specify a voting period. Ballots must be sent out to all members at least 30 days prior to the deadline for voting, i.e., members should have 30 days to vote (less any time that the ballots were in the mail). (Civ. Code, § 5115(c).)

• Set forth the rules regarding inspectors of election. HOAs must have an inspector of elections who is responsible for several portions of the election process, including receiving and counting ballots. *The big change for 2020 is that the inspector of elections cannot be the property manager.* The inspector must be an “independent third party,” which includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. An independent third party may be a member, but may not be a director or a candidate for director or be related to a director or to a candidate for director. (Civ. Code, § 5110.)

— Election rules cannot be changed within 90 days of an election. (Civ. Code, § 5105(h).) To be timely, each HOA will have to plan ahead if they are going to change election rules. An HOA must also comply with the required procedure for amending rules (i.e., 28 days of notice to membership for comment unless the rule change is solely to include language required by law).

— Civil Code section 5125 (dealing with inspectors of election) was amended to ensure that the inspectors of election maintained physical custody of sealed ballots, signed voter envelopes, voter lists, and candidate registration lists. That section also addresses recounts and vote tabulations.

— Civil Code section 5200 now requires HOAs to provide “Association Election Materials” in records requests. Association Election Materials include returned ballots, signed voter envelopes, the voter list of names, parcel numbers, and voters to whom ballots were to be sent, proxies, and the candidate registration list. Signed voter envelopes may be inspected, but not copied.

Remedies—

— Under Civil Code section 5145(a), the voiding of the election is mandatory unless the HOA can prove by a preponderance of the evidence that the violation had *no* effect on the results of the election.

— An HOA member who prevails on a challenge to an election in *small claims court* may recover his or her reasonable attorneys’ fees and costs incurred in consulting an attorney in connection with the small claims case. (Civ. Code, § 5145(a).)

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

Applicable Statute of Limitations—

— The statute of limitation for challenges to elections is one year from the date that the inspector(s) of election notifies the board and membership of the election results, or when the cause of action accrues, whichever is later. (Civ. Code, § 5145(a).)

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 the election laws*. 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.”

## Interference with Contract

Elements— Interference with Contract.

— The elements for a cause of action for *intentional* interference with contractual relations (aka interference with contract) are: (i) the existence of a valid contract between plaintiff and a third party; (ii) defendant’s knowledge of that contract; (iii) defendant’s *intentional* acts intended to induce the third party to breach (or acts intended to disrupt) the contract; (iv) the breach or disruption of the contract/contractual relationship; and (v) resulting damages. (*Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 55.)

— There are, however, no elements for a cause of action for negligent interference with contractual relations (aka interference with contract) because the California Supreme Court has rejected the existence of that cause of action. (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 9-10; *Fifield Manor v. Finston* (1960) 54 Cal.2d 632.)[[1]](#footnote-1)

Remedies—

— Because intentional interference with contract is a tort, tort damages apply. Compensatory (money) damages are available, including lost profits, expenses, and future profits that are reasonably certain. (Civ. Code, §3333; *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280.)

— Emotional distress damages are available only in cases where: (i) the defendant’s conduct was “extreme and outrageous”; and (ii) it was objectively reasonable that such conduct would cause serious emotional distress. (*Di Loreto v. Schumake* (1995) 38 Cal.4th 35, 38-39.)

— Punitive damages are available upon a showing of oppression, fraud, or malice by clear and convincing evidence. (Civ. Code, §3294; *Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120.)

Applicable Statute of Limitations—

— The statute of limitations for an intentional interference with contract cause of action is two years. (Code Civ. Proc., § 339(1); *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168.)

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 contract*. If one or more provisions of the CC&Rs is/are relevant (e.g., nuisance), 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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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.

This section of the Preliminary Analysis 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

## Applicability of Davis-Stirling Act

The Davis-Stirling Act does *not* apply to the facts of this dispute.

## Attorneys’ Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under Article 14 of the CC&Rs.

## Jurisdiction and Venue

Article 9, Section 9.6 of the CC&Rs contains a binding arbitration provision. Consequently, legal action related to the issues in dispute must be litigated in the manner directed by that provision of the CC&Rs.

## 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).

## Secondary Conflicts Check

No new potential or actual conflict of interest between the parties and/or significant figures came to light during the Firm’s preparation of this Preliminary Analysis.

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# Final Thoughts / Issues / Concerns / Comments

COMPLETE LATER

This section of the Preliminary Analysis 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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1. Although many think that doesn’t make sense in light of the fact that a cause of action for *negligent* interference with prospective business advantage does exist, because the California Supreme Court has yet to disprove the *Fifeld Manor* case, it remains “good” law. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 349.) [↑](#footnote-ref-1)