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TO: Jim McNeill, Assistant City Attorney, City of San Diego
FROM: Burke, Williams & Sorensen, LLP
Brian A. Pierik Esq.
Mark J. Austin, Esq.
DATE: April 7, 2020
RE: Transaction Review: 101 Ash Street Lease-to-Own Agreement

SCOPE OF ANALYSIS

The City of San Diego ("City") has asked Burke, Williams & Sorensen, LLP ("Burke"), to review and analyze the facts and documents leading to the City's decision to enter a lease-to-own agreement (the "Lease Agreement") for the office building located at 101 Ash Street in San Diego (the "Property"), effective January 3, 2017, with 101 Ash, LLC, an entity owned and controlled by Cisterra Development, Inc. ("Cisterra"), a San Diego-based development company.

This review was requested because, after the City entered into the Lease Agreement and initiated remodeling efforts for the Property, it learned that the Property contained a greater amount of asbestos than the City had previously understood (to the extent the City understood there was asbestos on the Property at all), necessitating that the City relocate any City employees working there, and delaying the City's ability to use it as planned. The unexpected extent of asbestos at the Property led to questions regarding the adequacy of the City's due diligence on the transaction, and whether the City had made all inquiries and conducted all investigations it should have for a transaction of this nature. Burke was retained to assist the City in answering these and related questions.

In conducting its analysis, Burke relied on the records provided to it by the City, consisting of the Lease Agreement itself and the pre-transaction "due diligence" documents provided to Burke by Jim McNeill on February 18, 2020. These records did not include any post-transaction documents, such as records relating to the discovery of the asbestos, or any orders by state or county agencies regarding the City's occupancy

of the Property. The documents also did not include any correspondence or agreements between the City and its lessor/seller, Cisterra.

To the extent additional records may assist Burke in evaluating the transaction, they are referenced at the end of this Memorandum, along with a list of questions that Burke would like to explore in the next phase of its review. Although witness interviews were initially discussed as part of this review, Burke's ability to conduct those interviews has been hampered by the recent COVID-19 pandemic and the resultant "stay at home" orders in effect throughout California. Thus, at this stage, Burke's analysis has been limited to the currently available documents.

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This Memorandum contains the following sections and associated contents:

- I. **Executive Summary**: A brief summary of this office's conclusions and the primary facts and documents leading thereto, including a general discussion the adequacy of the City's due diligence.
- II. **Detailed Transaction Background**: A detailed discussion of the facts leading to the City's decision to enter into the Lease Agreement, including the City's own internal review of the transaction, based on the available documents to date, together with citations to the key records.
- III. **Analysis of Transaction History**: Commentary and analysis regarding the adequacy of the City's review of, and due diligence for, the transaction.
- IV. **Effect of Exculpatory Provisions**: Legal analysis of the likely effect of the various exculpatory provisions in the Lease Agreement, such as the "as is" clause and the release, in light of the known facts.
- V. **Questions and Documents Requested**: A list of questions and additional documents that could aid Burke in further analyzing the transaction.

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I. EXECUTIVE SUMMARY

A review of the available documents calls into question the adequacy of the City's due diligence leading to the Lease Agreement, which was likely deficient in certain key respects.

The most central of these deficiencies is its failure to follow-up on the available information concerning asbestos on the Property with a more detailed evaluation of that issue, such as a Phase II Environmental Assessment or similar evaluation, which would have shown the full extent of asbestos on the Property and the likely effect of disturbing the asbestos with improvements or remedial work.

Assuming the City received and had the opportunity to review, at the time of the transaction, the documents discussed herein discussing the presence of asbestos on the Property (including an important Phase I Environmental Assessment from 2014 and the August of 2016 appraisal obtained by Cisterra), **the City likely had sufficient information available to it to mandate further investigation of the asbestos at the Property as a matter of reasonable prudence.**

Aside from this issue, the City's overall evaluation of the transaction, and the broker-like role that Cisterra played in the City's acquisition of the Property, create a troubling picture of the adequacy of the City's investigation as a whole, and its exclusive reliance on Cisterra's reports, particularly when the Property was being sold "as is." While it is customary for a purchaser to rely on reports provided by the seller (such as appraisals and environmental reports), a contract containing strong exculpatory provisions against the seller's disclosures and nondisclosures (including, in this instance, a full release and waiver of any right to sue) increases the importance of the purchaser commissioning its own reports. **The City should have likely have done so here, rather than relying exclusively on the reports commissioned by Cisterra.**

This exclusive reliance on Cisterra's due diligence is also problematic because of Cisterra's limited history with the Property, and its role as a mere "middleman" in the transfer of the Property from the prior owner to the City. According to the City's staff reports, although it was approached by the former owner regarding a purchase of the Property in 2016, the City passed on this opportunity because the offered sale price was \$100 million, whereas the property only appraised (according to an appraisal obtained by Cisterra) for \$67.1 million. Nevertheless, Cisterra was able, in that same timeframe, to enter into a purchase agreement for the Property for \$72.5 million, which it then used to negotiate the lease-to-own agreement with the City (a transfer that was apparently in the works even as Cisterra negotiated its purchase with the prior owner).

In light of these facts, the Cisterra acted as nothing more than a conduit in a transfer of the Property from the prior owner to the City (and made a substantial profit in the process). In fact, it appears as though Cisterra was negotiating a purchase with the prior owner for the sole purpose of then transferring the Property to the City. **Considering these facts, it is unclear why the City didn't simply negotiate its own purchase of the Property directly from the prior owner.** Although the City's staff reports state that the parties explored a transfer of Cisterra's purchase rights for the Property to the City, this option was abandoned because Cisterra's purchase agreement with the former owner allegedly prohibited such a transfer. However, because Cisterra's purchase agreement is not in the City's due diligence files, this office is unable to confirm this interpretation.

More problematic, Cisterra's position as a mere middleman in the transfer of the Property **also acts as a potential shield for both Cisterra and the prior owner against any liability to the City for nondisclosures**, in that (1) it strengthens Cisterra's likely argument that it was ignorant of any conditions of the Property, since it never used or occupied the Property, (2) **it disincentivized Cisterra from conducting a thorough due diligence for its own purchase (and its ignorance of the property's condition would only help it in an "as is" transfer to the City)**, and (3) it prohibited the City from contracting with, and obtaining disclosures from, the prior owner, and thus precludes the City from pursuing any legal action against that owner for issues relating to the Property.

In addition to the general problems of relying too heavily on Cisterra's due diligence, and unnecessarily allowing Cisterra to act as a mere conduit in a transfer from the prior owner, it is also unclear which of the many reports regarding the condition of the Property were reviewed by City staff in advance of the transaction, and when and from whom the City received those reports. According to the available documents, Cisterra provided only two such reports to the City that Cisterra itself commissioned—(1) a Property Condition Report, dated March 10, 2016, and (2) a Phase I Environmental Assessment, dated March 4, 2016. However, **neither of these documents discusses the presence of asbestos on the Property.** In fact, the Phase I report expressly disclaims any attempt to do so.

Granted, in addition to these property-condition records, the above-referenced appraisal obtained by Cisterra (appraising the Property at \$67.1 million), dated August 12, 2016, **does** state that the Property has a history of asbestos. However, that appraisal also states that the asbestos has largely been abated or "encapsulated," and that that such encapsulation is "typically adequate if construction or maintenance work is not likely to disturb it." (Appraisal, p. 40.)

In contrast to the Cisterra reports from 2016, there are multiple older reports in the City's files that clearly reveal the Property's lengthy history with asbestos, including (1) a Property Condition Report and a separate Phase I Environmental Assessment obtained in 2014 in conjunction with a mortgage loan on the Property, (2) a Phase I Environmental Assessment from 2004 that was attached to the Phase I assessment from 2014, and (3) a multitude of technical documents from 1993 to 2015 relating to Semptra's efforts to remediate asbestos on every floor of the Property.

Most likely, the presence of these older reports in the City's files, together with the August 2016 appraisal, would provide adequate notice to the City of the condition of the Property, and adequate disclosure by Cisterra on the presence of asbestos (assuming these documents were received from Cisterra), necessitating the City's further investigation. However, it is unclear from the available documents when or how the City came into possession of the pre-2016 Property records or the appraisal, what was said about them at the time they were provided, or whether the City reviewed them prior to the transaction. The answers to the above questions could impact the effect of these records on the City's constructive notice.

Alternatively, the specific nature of Cisterra's communications, and the manner in which the above documents were provided to the City, **could reveal an effort by Cisterra to conceal the presence of asbestos on the Property, in part by convincing the City to rely exclusively on Cisterra's less-informative 2016 property-condition records.** To fully evaluate these issues, this office would need to interview the City personnel who communicated with Cisterra regarding the transaction, and review any written communications with Cisterra on the subject. In addition, it would also be helpful to know if and when Cisterra was ever in possession of the pre-2016 reports, and whether Cisterra provided them to the City.

With respect to the Lease Agreement itself, it contains a number of exculpatory provisions, including an "as is" clause, a release (together with a Civil Code section 1542 waiver), and specific disclaimers regarding "Hazardous Materials," which is defined to include asbestos (amongst other materials), and the City's responsibility for determining the presence of such materials on the Property. **These provisions could be fatal to the City's ability to proceed against Cisterra based on the presence of asbestos.** However, under the law, **exculpatory provisions such as "as is" clauses generally do not relieve a seller from liability for its failure to disclose known material facts about a property, or for any misrepresentations regarding the property.** Thus, to fully evaluate the impact of these provisions, more facts are needed concerning Cisterra's specific communications with the City, and how and when the City came into possession of the various reports in its "due diligence" files.

In Section IIIC of this Memorandum we list the instances where the City did not follow best practices in regard to due diligence for the subject transaction based upon our review of the documents provided to Burke by the City.

II. DETAILED TRANSACTION BACKGROUND

A. The City's Internal Staff Reports

The Lease Agreement was entered into by the City with 101 Ash, LLC (owned by Cisterra), effective January 3, 2017. Based on the available documents, it is unclear when the City Council specifically approved the Lease Agreement, as no resolution to that effect has been provided. However, the documents provided by the City include two internal reports: (1) a "Report to the City Council" (attached to a "Request for Council Action" and a "Council Action Executive Summary Sheet"), dated September 9, 2016 (the "Staff Report"), and (2) an "Office of the Independent Budget Analyst Report," dated October 12, 2016 (with a "City Council Docket Date" of October 17, 2016) (the "OIB Report"). These documents, and the Lease Agreement dated January 3, 2017 (and signed in the "Approved as to Form" line on December 19, 2016), indicate that the agreement was likely approved by the City Council between mid-October of 2016 and late December of 2016.

The Staff Report (September 9, 2016) and the OIB Report (October 12, 2016) are the only internal City documents analyzing the transaction that have been provided. According to these documents, in or about 2016, the City began to search for additional office space for its employees. This search was driven by multiple factors, including that (1) the City had reached capacity at one of its primary owned locations, the City Operations Building ("COB"), and it would cost the City approximately \$94 million to complete required maintenance on that building, (2) although the City was leasing-to-own additional office space at its Civic Center Plaza ("CCP") location, this property would be undergoing asbestos-abatement work over the next five years that would require the temporary relocation of any employees during that period, and (3) market trends showed that office-lease rates were high, and could increase by up to 50% in the next five to eight years, such that a purchase or lease-to-own arrangement for any additional space would likely result in cost savings for the City. (OIB Report, pp. 2-3; Staff Report, pp. 1-3¹.)

¹ Page citations to the "Staff Report" are to the Memorandum entitled "Report to the City Council," designated as Report No. 160-70.

Against this backdrop, in or about 2016, the Property's former owner, which is not identified in the documents,² offered to sell the Property to the City for \$100 million. However, the City passed on this offer because the Property only appraised for \$67.1 million. (OIB Report, pp. 1-2.) This \$67.1 million value was stated in an appraisal obtained by Cisterra, dated August 12, 2016, and conducted by F. Davis Real Estate, Inc. (the "Appraisal"). Although this Appraisal is included in the City's due diligence files, it is unclear when the City received it. In addition, it stated that the Property had the following history with asbestos:

The building contains asbestos fireproofing. Reportedly, it has been removed in all accessible areas on floors 1 and 17 through 19. On the remaining floors the asbestos below the floor decking has been removed; on the underside of the floor decking the asbestos has been encapsulated. An operations and maintenance program has been in place since the 1990s. **This is typically adequate if construction or maintenance work is not likely to disturb it.**

(Appraisal, p. 40 [emphasis added].)

After the City's rejection of the \$100 million sale price, Cisterra entered into an agreement to purchase the Property from the prior owner for \$72.5 million. (OIB Report, p. 2.) According to the OIB Report, "[d]uring Cisterra's negotiations to purchase the building," the City and Cisterra entered into a separate "non-binding agreement"³, which would allow the City to either (1) buy the Property directly from the prior owner via an assignment of Cisterra's purchase rights (for a total financing cost of \$110.6 million over 20 years), or (2) lease-to-own the Property over 20 years (for a total cost of \$127.8 million over that period). (*Ibid.* [emphasis added].) In other words, **before Cisterra had even secured the right to purchase the Property, the City and Cisterra had a plan for Cisterra to simply turn around and transfer the Property to the City in some fashion** (raising the question why the City did not simply engage in further negotiations with the owner of the Property directly).

In support of Cisterra's ultimate purchase value of \$72.5, amongst the City's due diligence documents is a "Broker Opinion of Value" ("BOV"), commissioned by Cisterra, and prepared by Jones Lang LaSalle, valuing the Property between \$83.1 million and \$85.7 million. Interestingly, however, this BOV is dated September 12, 2016, which is

² The Property was occupied by San Diego Gas & Electric from 1968 through 1998, and by Sempra Energy from 1998 through 2015. However, these entities did not own the Property.

³ This "non-binding agreement" with Cisterra is not in the City's due diligence files.

after the date of the Staff Report (September 9, 2016)—a report that had already recommended the transaction to the City Council, and that included a draft of the Lease Agreement as an attachment. Thus, this BOV was apparently obtained after Cisterra had already secured the Property for \$72.5 million and was negotiating a transfer of the Property to the City.

Ultimately, despite the fact that the lease-to-own option would cost approximately \$17 million more than the purchase option, the City opted not to pursue the purchase option because language in Cisterra's agreement with the former owner purportedly disallowed a transfer of Cisterra's purchase rights. (OIB Report, p. 2.) Notably, Cisterra's purchase agreement was **not** amongst the documents provided to Burke. Thus, this claim of Cisterra's inability to transfer its purchase rights could not be verified by this office.⁴

Despite the greater cost of the lease-to-own option, according to the City's analysis, even this option would potentially save the City approximately \$44 million over 20 years compared to the simple leasing of additional office space, due to the estimated trends in office rental rates in the City, referenced above. (OIB Report, p. 1.) As stated in the OIB Report: "Entering into this 20-year lease-to-own agreement will insulate the City from the risks of rising rental costs for leased office space. It should be noted that projected savings associated with the agreement – estimated by READ [Real Estate Assets Department] at \$44.4 million over the 20-year term – rely on an estimated market rate for renting similar office space downtown." (*Ibid.*)

In terms of the condition of the Property, we are informed by the City Attorney's Office that City staff understood, before the Lease Agreement was approved, that there was at least some asbestos on the Property, but that it was unaware of the extent. **Nevertheless, neither the Staff Report nor the OIB Report mention that the Property contains asbestos.** Moreover, to the extent the City's staff reports discuss the condition of the Property at all, the only report cited is the 2016 Property Condition Report commissioned by Cisterra, which is summarized as follows in the September 9, 2016 Staff Report:

On March 10, 2016, a Property Condition Report (PCR) for 101 West Ash Street was completed by Advantage Environmental Consultants, LLC, which stated that "The Site was observed to be in good condition.

⁴ There are multiple incongruities in this factual history, as discussed later in this Memorandum. For instance, if Cisterra knew it was contemplating a transfer of its purchase rights to the City when it was negotiating with the former owner, why did it agree to a restriction on such a transfer?

Evidence of on-going maintenance was observed." **The previous occupant, Sempra Energy, was meticulous in their maintenance and care of the property over their several decades of occupancy.** In fact, the PCR estimates that 'this Site's estimated remaining useful life (ERUL) should be at least an additional 40 years barring any natural disasters.' The PTR summarized that **"AEC did not identify any obvious items of deferred routine maintenance that warrant mention" and their only recommendation for immediate repair was an amount of \$10,000 to clean, caulk and pressure wash the exterior of the building.**

(Staff Report, p. 4 [emphasis added].)

No other reports concerning the condition of the property are cited, and no other comments on that subject are made, in either the Staff Report or the OIB Report, calling into question the extent to which any other such reports were reviewed by City staff, such as the ones from 2014 (discussed below). Moreover, as demonstrated by the Staff Report, City staff's chief takeaway from the 2016 Property Condition Report was merely that the prior occupant, Sempra Energy, was "meticulous in [its] maintenance and care of the property," and that the consultant "did not identify any obvious items of deferred routine maintenance that warrant mention."

Against this backdrop, both the Staff Report and the OIB Report recommended approval of the Lease Agreement, concluding that it would ultimately save the City millions of dollars in the leasing of office space, as set forth above. (Staff Report, p. 1; OIB Report, pp. 4-5.) Based on this recommendation, the City approved the agreement, which became effective January 3, 2017. According to the City's staff reports, the City planned to do some tenant improvements to the Property after it took possession. (Staff Report, pp. 1, 4; OIB Report, p. 3.)

B. The Available Due Diligence Documents

In contrast to the limited documents and facts referenced in the Staff Report and the OIB Report, the due diligence files provided by the City reveal a voluminous number of additional records that are now, and likely were at the time of the transaction, in the City's possession. Depending upon when and how these records were provided to the City, and by whom, they could constitute adequate constructive notice for the facts stated therein, and/or adequate disclosures by Cisterra regarding, among other things, the condition of the Property.

The vast majority of the records in the City's due diligence files are not relevant to the issues addressed in this Memorandum.⁵ Those that may be of relevance, and their pertinent contents, are discussed in the following sub-sections of this Memorandum.

The 2014 Reports

In 2014, a series of reports on the Property were issued for the purpose of securing a mortgage loan on the Property, which reports are in the City's due diligence files. At the present time, it is unclear when and from whom the City received these reports, and whether they were reviewed by City staff prior to the Lease Agreement.⁶ The 2014 reports included the following documents relating to the condition of the property, among others⁷:

1. **A Property Condition Assessment Report**, dated November 25, 2014, by AEI Consultants Environmental & Engineering Services, for Washington Capital Management, Inc.

According to this report, "[t]he purpose of the assessment was to provide an objective, independent, professional opinion of **the potential repair and deferred maintenance costs associated with the subject property**, as well as estimate the minimum ongoing capital reserves necessary to maintain the property for its current usage." (Page 1 [emphasis added].)

⁵ These records include (1) the original architectural drawings for the Property (50 documents, undated); (2) the original Certificate of Occupancy for the Property, dated July 8, 1968; (3) an apparent proposal for a conversion of the Property to a hotel condominium project, dated January of 2013; (4) property tax bills for the Property from 2013-2016; (5) electrical and water bills for the Property from 2014-2015; (6) an ALTA Survey by San Diego Land Surveying and Engineering, Inc., dated November 21, 2014; (7) a "Preliminary Report," dated April 15, 2015, by Stevenson Systems, Inc., concerning building area calculations; (8) a series of undated CAD and PDF files relating to office furniture at the site; (9) approximately 650 undated photographs of the exterior and interior of the Property; and (10) a marketing video for the sale of the Property (undated), entitled "2nd cut reshoot."

⁶ Included in the City's due diligence documents are notes in Microsoft Word format purporting to relate to "Due Diligence Docs" that may shed some light on these facts, as discussed later in this Memorandum.

⁷ In addition to those listed below, the Property reports from 2014 also included (1) a "Scenario Expected Loss Assessment," dated November 25, 2014, by AEI Consultants Environmental & Engineering Services, for Washington Capital Management, Inc. (evaluating the Property for risk from seismic events); and (2) a Zoning and Site Requirements Summary, dated November 26, 2014, by the Planning & Zoning Corporation, for Washington Capital Management, Inc. (evaluating the Property's conformance with zoning and land-use requirements).

The report broke the building down into approximately 24 different components, and evaluated each component's need for ongoing maintenance or repairs. The vast majority of these sections ended with the phrase: "No items of deferred maintenance were observed. Routine maintenance of the [component in question] will be required over the evaluation period."

The report also contained an **express disclaimer for asbestos**, stating that "This Report **does not confirm or deny** the presence or absence of items such as mold, **asbestos**, environmental conditions or hazardous substances on this property." (App. F [emphasis added].) It also listed asbestos as an "Out of Scope Item." (Table Section 11.1.11.)

2. **A Phase I Environmental Site Assessment**, dated November 26, 2014, by AEI Consultants Environmental & Engineering Services, for Washington Capital Management, Inc.

Although this report excluded asbestos from the scope of its analysis, it nevertheless contained the following statements on that subject, including a statement that **"a thorough asbestos survey is required . . . prior to demolition or renovation activities"**:

"Due to the age of the subject property building, **there is a potential that ACMs [asbestos-containing materials] are present**. According to a prior report, **an asbestos survey completed at the subject property in May 1989 identified on-site friable spray-on fireproofing, acoustical popcorn ceiling finishes and pipe elbows as asbestos containing**. Based on the presence of ACMs, AEI recommends the property owner develop and implement an Operations and Maintenance (O&M) Plan for the subject property which stipulates the identification, assessment, repair and maintenance of building materials to protect the health and safety of the building occupants, visitors to the site, and the environment. Observed suspect ACMs were in good condition and are not expected to pose a health and safety concern to the occupants of the subject property at this time. **In the event that building renovation or demolition activities are planned, a thorough asbestos survey is required in accordance with the EPA NESHAP 40 CFR Part 61 prior to demolition or renovation activities that may disturb ACMs.**" (Pages iii-iv, and 30-31 [emphasis added].)

In addition to these comments, this report from also contained, in its Appendix E, a separate Phase I Environmental Site Assessment, dated July 14, 2004, by IVI International, Inc., commissioned by Morgan Stanley. This 2004 report contained the following additional statement regarding asbestos:

"Friable asbestos containing spray-on fireproofing and pipe elbows are known to exist at the Subject. According to an interview with Mr. Sheldon Gladly, the Facilities Manager, Floors 17-19 were renovated and all asbestos containing material including friable ACM from these floors have been abated. In addition, non-friable wallboard assemblies, built-up roofing system components and cooling tower fill may contain asbestos. These friable and non-friable materials were identified in good condition. IVI recommends that these materials be maintained in good condition under the existing Asbestos Operations and Maintenance (O&M) Program and keeping the current O&M in place at the Subject." (App. E, 2004 Phase I, p. 1 [emphasis added]; see also *id.* at pp. 26-28.)

The 2016 Reports⁸

In addition to the 2014 documents, the City's due diligence files also contain the reports commissioned by Cisterra in 2016. These reports are important because they are the most direct embodiment of the representations made by Cisterra to the City regarding the Property, they are the closest in time to the transaction in comparison to any of the other due diligence materials in the City's files, and, to the extent the City merely relied on the due diligence conducted by Cisterra, they in effect constitute the City's own due diligence efforts.

The 2016 reports include the above-described Appraisal (August 12, 2016) and the BOV (September 12, 2016), as well as the following additional reports⁸:

1. **A Phase I Environmental Site Assessment**, dated March 4, 2016, by Advantage Environmental Consultants, LLC, for Cisterra.⁹

This report states that its purpose is to "provide a professional opinion on the presence of recognized environmental conditions and other suspect

⁸ In addition, the 2016 reports also include a Preliminary Title Report, dated August 3, 2016, by Chicago Title Company.

⁹ Although the available version of this report and the following "Property Condition Report" are both marked "DRAFT," the City's staff reports refer to final such reports of the same dates.

environmental conditions in connection with the Site, as they existed on the date of the site inspection, and to recommend whether further investigation is required," in accordance with standard "ASTM" practice for such assessments. (Page 1.) Consistent with these standards, the report contains an **express exclusion for asbestos** (Page 4), and concludes as follows:

"This Phase I ESA has revealed **no evidence of current recognized environmental conditions in connection with the Site. Additional environmental assessment at the Site is not considered to be warranted at this time.** The apparent historical presence of a gas and oil facility and automotive repair facilities on portions of the Site are considered to be potential historical environmental concerns in connection with the Site that do not warrant further investigation. AEC has identified no information in regulatory records or other information sources that would lead us to believe that the above referenced historical uses of the Site have adversely impacted the Site. Such potential concerns are considered to be mitigated by the construction of the existing improvements at the Site including the subterranean parking garage" (Page 22 [emphasis added]).¹⁰

2. **A Property Condition Report**, dated March 10, 2016, by Advantage Environmental Consultants, LLC, for Cisterra.

This report states that its purpose is to "evaluate the general condition of the buildings, Site, and other improvements at the referenced location" and to "identify those areas that will **require remedial repair work** and . . . assign them an associated estimated remedial cost." (Page 5 [emphasis added].)

The report breaks the building down into approximately 30 different components, and evaluates each component's need for ongoing maintenance or repairs. The vast majority of these sections end with determination that the component is in good condition and requires few or no improvements or repairs. Meanwhile, **the report contains no substantive mention of asbestos.**

¹⁰ Notwithstanding this conclusion and the asbestos exclusion, this report does provide some hints that there is asbestos on the property, including (1) a statement that the site is identified on a "HAZNET" database as containing hazardous materials, which *could* include "PCBs, asbestos and oil containing waste," and (2) a site photograph (Site Photograph # 44 (page 38)) of a pipe with an asbestos warning label, and sub-heading for the photograph stating: "View of asbestos warning label on insulated pipe." However, it is unlikely that these hints alone would constitute constructive notice of the extensive presence of asbestos on the Property.

The Historical Asbestos-Abatement Records from Sempra Energy

In addition to the records and reports from 2014 and 2016, the City's due diligence files also contain a plethora of historical documents relating to Sempra's efforts to remediate the Property of asbestos. These documents span from 1993 to 2015, and consist primarily of technical notes for the abatement work (many of which are written by hand), such as "Daily Logs" and "Air Analyses." Generally, each set of documents relates to abatement efforts on a different set of floors, undertaken at different times, with some floors undergoing multiple remediation projects over the years. For many of the documents, however, it is only possible to determine the floors and time periods that they relate to by looking at the titles of the electronic PDFs provided by the City, for the documents themselves often consist largely of disjointed notes that are difficult to decipher.

For someone trying to determine whether asbestos has been completely abated from the Property, or from the floors to which a given set of documents relates, these records are of little use. To the extent the records can be deciphered, they generally contain no summary of the required abatement activities or conclusive statements regarding the condition of the Property at the conclusion of the work. At most, the reports occasionally state that the abatement efforts were completed within the "scope of work" (which is generally unidentified or inconclusive), and/or that results of any air analyses are within acceptable standards.

That said, someone in possession of these documents should at least be able to glean that the Property has a lengthy history of asbestos, and that abatement efforts have been undertaken multiple times on multiple floors of the Property for over 20 years, such that an investigation as to the current status of abatement on the Property would be in order. In fact, removing any doubt regarding the significance of the records, included with them is a certification by San Diego Gas & Electric, dated July 27, 2015, sent to Sempra Energy, and entitled "Asbestos Records – Sempra Energy Headquarters." This certification states that the records enclosed therewith constitute "the current asbestos inventory and records of asbestos surveys and abatement at the Sempra Energy Headquarters Building (HQ)."¹¹

¹¹ This certification is, in turn, attached to a letter, dated July 30, 2015, from Sempra Energy to an individual at "Shapery Enterprises," stating: "Attached are the asbestos inventory records for the former Sempra Energy Headquarters Building located 101 Ash St., per your request."

The City's "Due Diligence Docs" Notes

Finally, included with the City's due diligence files are three informal notes, in Microsoft Word format, that appear to list the various due diligence documents that the City had in its files at different times. These notes are summarized as follows:

1. The first note is entitled "101 Ash Street (as of 07.19.16) Due Diligence Docs Provided to Cisterra." It lists all of the documents listed in Footnote 5 of this Memorandum, above, as well as all of the documents discussed above under the heading "2014 Reports." Based on this note, the City appeared to have these documents by at least July 19, 2016.
2. The second note is entitled "101 Ash Street (as of 09/12/16) Due Diligence Docs." It lists the documents from the first note, and adds the Property Condition Report and the Phase I Environmental Assessment commissioned by Cisterra in March of 2016 (although it identifies each of them as a "DRAFT"). Based on this note, the City appeared to have these documents by at least September 12, 2016 (which, notably, is after the September 9, 2016 Staff Report recommending the transaction).
3. The "third" note (unlike the other two, this one is undated) is entitled "101 Ash Street Due Diligence Documents Provided by Cisterra to City of San Diego." It lists all of the documents from the first note, and adds (a) the Property Condition Report and the Phase I Environmental Assessment commissioned by Cisterra in March of 2016 (which are no longer identified as "DRAFTs"), (b) the Appraisal, (c) the BOV, and (d) the historical asbestos-abatement records from Sempra Energy.

Assuming this office's interpretation of these notes is correct, they provide a rough timeline of when the City received the various due diligence documents referenced in this Memorandum. However, because the third note is undated, it is unclear as to when the documents added in that note were received by the City. In addition, the circumstances of how any of the documents were provided to the City, including who provided them and the associated representations of the providing entity, remain open questions.

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III. ANALYSIS OF TRANSACTION HISTORY

A. Standard Due Diligence Items

One of the issues the City asked Burke to address is the extent to which the City, in entering into the Lease Agreement, used due care under standard due diligence practices for a commercial real-estate transaction. Here, most of the standard due diligence items that a purchaser would be expected to review for a commercial purchase or lease-to-own transaction were located in the City's due diligence files. Certainly, there more potential documents that are sometimes seen in transactions that were not present here, but any such documents do not seem to be pertinent to this transaction or a concern for the City here.

A standard list of due diligence documents that a purchaser would be expected to review in a transaction of this nature (including what the City did and did not have here) is set forth below. As discussed as part of that list, the primary deficiencies in the City's compilation of due diligence documents appears to be (1) the City's failure to consider commissioning its own environmental assessments in light of the strong exculpatory provisions in the Lease Agreement and Cisterra's unique role in the transaction (discussed more in the next section of this Memorandum), and (2) **the City's failure to follow-up on the available information concerning asbestos with a more detailed evaluation of that issue, such as a Phase II Environmental Assessment or similar evaluation**, which would have shown the full extent of asbestos on the Property and the likely effect of disturbing the Property with improvements.

With that in mind, the typical list of due diligence documents a property purchaser obtains is as follows:

- An up-to-date title policy (Preliminary Title Report, dated August 3, 2016, by Chicago Title Company).
- The legal description of the property (included).
- The applicable certificate of occupancy (Certificate of Occupancy, dated July 8, 1968).
- Copies of any zoning or land-use approvals, and any available reports concerning zoning compliance (Zoning and Site Requirements Summary, dated

November 26, 2014, by the Planning & Zoning Corporation, for Washington Capital Management, Inc.).

- The most recent ALTA survey (ALTA Survey by San Diego Land Surveying and Engineering, Inc., dated November 21, 2014).
- The available plans and drawings for the building, including architectural plans, engineering plans, construction blueprints, etc. (These appear to largely be present here, to the extent available, as part of the "architectural plans" in the City's due diligence files.)
- Property tax bills for the prior three years (included).
- The legal description of the property (included).
- Seller's third-party appraisals (including (a) the Appraisal, dated August 12, 2016, conducted by F. Davis Real Estate, for Cisterra, and (b) BOV, dated September 12, 2016, prepared by Jones Lang LaSalle, for Cisterra).
- **Seller's third-party property reports, including property-condition reports, environmental reports** (Phase I and Phase II assessments, mold or asbestos-abatement reports and tests), soils tests, engineering reports, termite studies, and similar records.

These reports are present in the City's files to the extent discussed above, and include (a) the Property Condition Reports and Phase I assessments from 2016 (commissioned by Cisterra), (b) the similar reports from 2014 (commissioned by the prior owner for a mortgage loan), (c) another Phase I assessment from 2004 (as an attachment to the 2014 Phase I assessment), and (d) the historical asbestos-abatement records from Sempra. It is unknown whether there are other reports regarding the Property that were in Cisterra's possession but were not provided to the City.

Although obtaining these reports from the seller/lessor was consistent with standard due diligence practices, **the City likely should have commissioned its own property-condition reports in light of the strong exculpatory provisions in the Lease Agreement** (including the release, the "as is" clause, and the provisions putting the responsibility on the City to determine the extent of "Hazardous Materials"), and the nature of the sale and Cisterra's role as a mere "middleman" in the transaction.

Moreover, the City deviated from acceptable standards by failing to conduct further analysis, commissioned on its own, to further explore the presence of asbestos on the Property. Assuming City staff received and had the opportunity to review the reports from 2014 and the Semptra abatement records (and the Appraisal, which also mentioned the historical presence of asbestos on the Property) prior to the Lease Agreement, **City staff had sufficient information to mandate conducting a "Phase II Environmental Assessment" or other appropriate analysis to review the Property for the full extent of asbestos, for a prudent investigation of the transaction.** This is particularly true in light of the Phase I assessment from 2014 that stated as follows with respect to the evaluating the effect of potential renovation activities on the Property, which Burke is informed the City planned here:

"Due to the age of the subject property building, **there is a potential that ACMs [asbestos-containing materials] are present.** According to a prior report, an asbestos survey completed at the subject property in May 1989 identified on-site friable spray-on fireproofing, acoustical popcorn ceiling finishes and pipe elbows as asbestos containing. Based on the presence of ACMs, AEI recommends the property owner develop and implement an Operations and Maintenance (O&M) Plan for the subject property which stipulates the identification, assessment, repair and maintenance of building materials to protect the health and safety of the building occupants, visitors to the site, and the environment. **Observed suspect ACMs were in good condition and are not expected to pose a health and safety concern to the occupants of the subject property at this time. In the event that building renovation or demolition activities are planned, a thorough asbestos survey is required in accordance with the EPA NESHAP 40 CFR Part 61 prior to demolition or renovation activities that may disturb ACMs.**" (Phase I Environmental Site Assessment, dated November 26, 2014, by AEI Consultants Environmental & Engineering Services, for Washington Capital Management, Inc., pp. iii-iv, and 30-31 [emphasis added].)

- Any third-party agreements applicable to the property, including any leases or service contracts, and an accounting of any owed amounts under those contracts, either to or from the property owner, and/or a certification that there are no leases and no amounts owed. (This does not appear to have been obtained here, at least according to the City's due diligence files.)

- A copy of any pending claims relating to the property. (It is unknown whether any such claims exist, but none appear to have been provided.)

B. Analysis of City's Overall Transaction Review

Separate from whether the City compiled the standard due diligence documents and/or conducted the all prudent investigations, the history of the transaction gives rise to larger issues concerning the propriety of the City's overall review of the transaction, and whether the City operated sufficiently independent of its lessor/seller, Cisterra. Some of these issues cannot be fully addressed until additional documents and/or information are obtained from the City.

First, there is the question of why the City chose a lease-to-own option over the purchase option, which would have saved the City at least \$17 million. The rationale provided by City staff in the available staff reports is incongruous and raises questions on its own. For instance, if the former owner offered the Property to the City for \$100 million, how did Cisterra so easily obtain a purchase price, in that same time period, of \$72.5 million? And in light of those competing offers, why didn't the City simply explore out-bidding Cisterra? These unanswered questions make the necessity of Cisterra's involvement in the transaction (which appears to have been similar to the role of a broker) appear to be doubtful at best.

Moreover, according to the OIB Report, Cisterra had a non-binding agreement with the City to transfer the Property to the City **before** Cisterra had finalized its purchase agreement with the former owner. If that ~~was~~ the case, it seems particularly plausible that the City could have negotiated directly with the owner of the Property, and makes the necessity of Cisterra's role in the transaction even more doubtful, as Cisterra ultimately merely negotiated to purchase the Property on the City's behalf. Furthermore, if Cisterra knew it was contemplating a transfer of its purchase rights to the City when it was negotiating with the former owner, **why did Cisterra then agree to a restriction on such a transfer, which is the only reason cited by the City for not ultimately proceeding with the purchase option?**¹² One answer to that question is that Cisterra did so purposefully to ensure the City was saddled with the more costly option of leasing-to-own the Property.

¹² As noted above, Cisterra's purchase agreement has not been provided, which ~~disables~~ this office from confirming that restriction. In general, however, a restriction on the transferability of property or purchase rights is rare, and is considered against public policy, which favors the transferability or real property.

Overall, these facts give rise to the impression that Cisterra was being offered, or orchestrated events to ensure it received, a better-than-market deal, and/or that the City simply relied to its detriment on the representations of Cisterra, without confirming them. Indeed, despite the City's potential ability to simply purchase the Property directly from the owner, and the apparent lack of necessity of Cisterra's involvement in the transaction, the end result was that the City is leased-to-own the Property from Cisterra, for which Cisterra made a substantia profit merely for acting as a conduit. Moreover, it did so only after Cisterra effectively agreed to purchase terms that precluded the City from acquiring Cisterra's purchase rights.

This impression is further underscored by the "due diligence" documents obtained and reviewed by the City for the transaction itself. As noted above, all of the contemporaneous (*i.e.*, 2016) reports in the City's files were commissioned by Cisterra, presumably as part of its own due diligence to purchase the Property from the prior owner. In contrast, the City appeared to commission none of its own reports, and instead relied exclusively on those of Cisterra, which could have been deficient—and, in fact, were, at least in its failure to review the Property, for asbestos.

Although it is customary for a purchaser to rely on reports provided by the seller, a contract containing strong exculpatory provisions against the seller's nondisclosures (such as the Lease Agreement here) generally necessitates that the purchaser commission its own reports for confirmation. **The City should have likely have done so here, rather than relying exclusively on the reports commissioned by Cisterra.**

Moreover, this exclusive reliance on Cisterra, and the use of Cisterra as a "middleman" to obtain the Property from the prior owner, creates an additional problem—it acts a potential liability shield for both Cisterra and the prior property owner, for which Cisterra acts as an effective "buffer." For instance, if Cisterra claimed that it was ignorant of the presence of asbestos on the Property (which would likely shield Cisterra from liability for nondisclosure), there would be little the City could do to disprove that ignorance, because Cisterra never occupied the Property and may have paid little attention to the due diligence documents given its plan to simply transfer the Property "as is" to the City. Indeed, **Cisterra's limited role as a temporary transferee, together with the strong exculpatory provisions in the Lease Agreement, would have specifically disincentivized Cisterra from conducting a proper due diligence,** so it could remain "deliberately ignorant" of the Property's condition.

In contrast, had the City purchased the Property directly from the prior owner, the City could have known, based on the prior owner's long ownership history, that the City could obtain a full and complete picture of the Property's condition. Moreover, the City

could file a lawsuit against that prior owner if any of the disclosures were inadequate or the Property was otherwise defective. In contrast, with Cisterra as a "buffer," the City has no option to seek any information or remedies from the former owner.

Finally, the lack of mention of asbestos in Cisterra's 2016 reports, in contrast to the substantial mention of it in the above-referenced 2014 and other "historical" reports, raises questions regarding (1) whether Cisterra's disclosures to the City regarding the Property were legally adequate, (2) whether Cisterra **intentionally** made inadequate disclosures to the City regarding the presence of asbestos on the property, and (3) whether the City, for its part, appropriately reviewed all available documents in its possession.

Most likely, the presence of the 2014 reports in the City's files, together with the August 2016 appraisal, would be seen as adequate notice to the City of the condition of the Property, and adequate disclosure by Cisterra on the presence of asbestos (assuming these documents were received from Cisterra), irrespective of whether the 2016 reports, standing alone, were inadequate. However, if it can be shown that the City reasonably relied exclusively on Cisterra's reports, while disregarding the prior reports (e.g., based on representations and/or characterizations by Cisterra), and/or that the City was not, in fact, given the historical reports in sufficient time to review them prior to the Lease Agreement, then the City may have arguments that Cisterra's representations were insufficient, **and/or that Cisterra deliberately concealed material information regarding the existence of asbestos on the Property.**

Obtaining answers to the above questions would require that Burke be provided access to the documents referenced above, and be given the opportunity to speak directly to the City staff involved in the transaction—particularly, the staff who interacted with and received the representations of Cisterra prior to the Lease Agreement.

C. **Summary of Instances in Which the City Failed to Follow Best Practices for Due Diligence**

As a summary of the above, this office has determined, based on the documents provided to us for review, that the City did not follow best practices in regard to the due diligence performed for the Lease Agreement transaction, in the following respects:

1. The City does not appear to have followed up on the available information concerning the presence of asbestos on the Property with a more detailed evaluation of that issue, such as a Phase II Environmental Assessment or similar evaluation of the full extent of that hazardous material.

2. As an example of the preceding point, it appears that the City did not follow the recommendation of at least one report in its possession regarding asbestos, which specifically recommended a "thorough asbestos survey" prior to any "demolition of renovation activities."

The report in question is the Phase I Environmental Site Assessment, dated November 26, 2014, commissioned in relation to a 2014 mortgage loan on the Property. Although it is unclear who provided this report to the City, the City's "Due Diligence Docs" notes show that it was likely in the City's possession as of July 19, 2016. The report stated that, "[i]n the event that building renovation or demolition activities are planned, a thorough asbestos survey is required . . . prior to demolition or renovation activities that may disturb ACMs [asbestos-containing materials]." (Pages iii-iv, and 30-31 [emphasis added].)

The Staff Report and the OIB Report indicate that the City planned to make tenant improvements to the Property after acquisition—in fact, that these improvements would be paid for in part by Cisterra. (Staff Report, pp. 1, 4; OIB Report, p. 3.) Thus, the City came directly within the recommendation of the 2014 Phase I assessment, and the City should therefore have conducted the detailed asbestos survey that it suggested. The City did not do so, and, in our understanding, it was in the course of the City's remodel work that the extent of asbestos was discovered.

3. The City did not commission its own property-condition reports and environmental assessments, and instead relied exclusively on Cisterra's due diligence documents and reports, despite the strong exculpatory provisions in the Lease Agreement (including the release, the "as is" clause, and the provisions placing the responsibility for determining the extent of Hazardous Materials on the Property on the City) and Cisterra's role in the transaction as a mere "middleman," which disincentivized Cisterra from conducting a thorough due diligence review.
4. We are unable to confirm whether City staff reviewed all available reports in the City's due diligence files prior to recommending to the City Council that it approve, and prior to the City Council approving, the Lease Agreement.
5. We are unable to confirm whether City staff requested the full available due diligence documents (such as the available property-condition and

environmental reports) sufficiently in advance of the City's consideration of the Lease Agreement. (For instance, the "Due Diligence Docs" notes, referenced above, show that many important documents may not have been obtained until after staff's recommendation for approval had been made.)

6. Unless there are facts to suggest otherwise, it appears that the City could have explored a less-expensive purchase option directly from the former owner, and considered how its "non-binding agreement" with Cisterra incentivized Cisterra to agree to terms with the former owner that prohibited Cisterra from transferring its purchase rights to the City.

IV. EFFECT OF EXCULPATORY PROVISIONS

As noted above, the Lease Agreement contains a number of exculpatory provisions, including an "as is" clause¹³, a release (together with a Civil Code section 1542 waiver)¹⁴, and specific disclaimers regarding "Hazardous Materials"¹⁵ (which is

¹³ The "as is" clause is contained in Section 1(b), which states:

TENANT EXPRESSLY AGREES TO LEASE THE PREMISES AND EACH PART THEREOF "AS IS" AND "WHERE IS". LANDLORD SHALL NOT BE DEEMED TO HAVE MADE AS OF THE EFFECTIVE DATE, AND LANDLORD HEREBY DISCLAIMS, ANY WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED OR OTHERWISE, WITH RESPECT TO THE SAME OR THE LOCATION, USE, DESCRIPTION, DESIGN, MERCHANTABILITY, FITNESS FOR USE FOR ANY PARTICULAR PURPOSES, CONDITION OR DURABILITY THEREOF, OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP THEREIN, OR AS TO LANDLORD'S TITLE THERETO OR OWNERSHIP THEREOF OR OTHERWISE, IT BEING AGREED THAT ALL RISKS INCIDENT THERETO, EXCEPT AS OTHERWISE SET FORTH HEREIN, ARE TO BE BORNE BY TENANT. IN THE EVENT OF ANY DEFECT OR DEFICIENCY OF ANY NATURE IN THE PREMISES OR ANY PROPERTY OR FIXTURE OR OTHER ITEM CONSTITUTING A PORTION THEREOF, WHETHER PATENT OR LATENT, EXCEPT AS OTHERWISE STATED HEREIN, LANDLORD SHALL HAVE NO RESPONSIBILITY OR LIABILITY WITH RESPECT THERETO. THE PROVISIONS OF THIS SECTION 1(b) HAVE BEEN NEGOTIATED AND ARE INTENDED TO BE A COMPLETE EXCLUSION AND NEGATION OF ANY WARRANTIES BY LANDLORD, EXPRESS OR IMPLIED, WITH RESPECT TO THE PREMISES OR ANY PROPERTY OR FIXTURE OR OTHER ITEM CONSTITUTING A PORTION THEREOF, WHETHER ARISING PURSUANT TO THE UNIFORM COMMERCIAL CODE OR ANOTHER LAW NOW OR HEREAFTER IN EFFECT OR OTHERWISE.

¹⁴ The release in Section 1(c) states:

As of the Commencement Date, the Tenant, and its agents, members, partners, employees, representatives, officers, directors, agents, related and affiliated entities, successors and assigns (collectively, the "Tenant Parties"), hereby **fully and irrevocably release Landlord and each person or entity acting by or on behalf of Landlord, and any member, partner, officer, director, employee, agent, affiliate, successor or assign of Landlord** (collectively, the

defined to include asbestos) and the City's responsibility for determining the presence of such materials on the Property.

Despite such provisions, a seller has a common law obligation to disclose any facts within the seller's knowledge that materially affect the value or desirability of the property, if the seller also is aware that those facts are not known to the buyer or within reach of the buyer's "diligent attention and observation." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735.) This duty applies in commercial as well as residential real estate transactions. (See *Stevenson v. Baum* (1998) 65 Cal.App.4th 159, 165.)

Under this rule, an as-is provision in a purchase agreement will generally only immunize a seller from defects to real property **that are visible to or observable by the buyer.** (*Lingsch, supra*, (1963) 213 Cal.App.2d at p. 742.) In contrast, however, an as-is provision does **not** immunize a seller who, through fraud or misrepresentation, intentionally conceals material defects not otherwise visible or observable to the buyer. (*Shapiro v. Hu* (1986) 188 Cal.App.3d 324, 333-334.) Similarly, "where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer." (*Lingsch, supra*, (1963) 213 Cal.App.2d at p. 735.)

With respect to the release, "[a]s a general rule, a release, indemnity, or other exculpatory provision is binding on the parties and enforceable as long as it is clear, explicit, and comprehensible in the essential details. The provision, when read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement, and be clear, explicit, and comprehensible in each [of their] essential

"Landlord Parties") . . . for any cost, loss, liability, damage, expense, demand, action or cause of action ("Claims") arising from or related to any matter of any nature relating to, and condition of, the Premises, including any latent or patent construction defects, errors or omissions, compliance with law matters, Hazardous Materials and other environmental matters within, under or upon, or in the vicinity of the Premises, (Emphasis added.)

¹⁵ Section 1(a) states:

The Premises are leased to Tenant in their present condition without representation or warranty by Landlord and subject to the rights of parties in possession, to the existing state of title and to all applicable legal requirements now or hereafter in effect. Tenant acknowledges that it is sufficiently familiar with and knowledgeable about the physical condition of the Premises, including any elements of deferred maintenance or the presence of any Hazardous Materials and is not relying on any representation or warranty by Landlord with regard to the condition of the Premises, and Tenant finds all of the same satisfactory for all purposes. (Emphasis added.)

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details.” (Contractual provision against fraud liability—Exculpatory clauses generally, 1 Cal. Real Est. § 1:172 (4th ed.).)

However, a principal who utters a false statement is not relieved of liability merely because the contract contains an integration or exculpatory clause. “All contracts which have for their objective, directly or indirectly, to except anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” (Civ. Code § 1668.) In this regard, Civil Code section 1668 only “negates a contractual clause exempting a party from responsibility for fraud or a statutory violation only when all or some of the elements of the tort are **concurrent** or future events at the time the contract is signed. Contrariwise, we hold that section 1668 does not negate such a clause when all the elements are past events.” (*SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Cal.App.5th 146, 148 [emphasis added].)

Therefore, since negligent misrepresentation is a species of fraud, a party who has induced the other party to enter into the contract based on either an intentional or negligent misrepresentation cannot be relieved of liability by any integration or exculpatory clause, or other clause waiving liability, **contained in the contract**. (Contractual provision against fraud liability—Exculpatory clauses generally, 1 Cal. Real Est. § 1:172 (4th ed.).)

In light of this law, although the terms of the various exculpatory provisions in the Lease Agreement are quite strong—indeed, they are as strong as such provisions can be in a purchase contract, particularly with the inclusion of the release—it is definitive that these provisions would preclude a finding of liability on the part of Cisterra. Undoubtedly, the cards are stacked against the City in this regard, in that the available documents suggest that, at the time the Lease Agreement was approved, the City had in its possession all of the available due diligence documents, which were likely provided to it by Cisterra, and that these documents sufficiently informed the City of the status of asbestos on the Property such as to put the City on notice that additional investigations should be performed in due prudence.

However, under the right set of facts, which could be revealed through further review of the communications between the City and Cisterra, including the timing and context of Cisterra's provision of the key documents to the City, and whether Cisterra had more knowledge of the presence of asbestos on the Property than was revealed by Cisterra's March 2016 property reports, it could be the case that Cisterra's disclosures are deemed insufficient and/or intentionally concealing, thereby giving rise to liability for Cisterra and a potential right for the City to rescind the transaction.

V. QUESTIONS AND DOCUMENTS REQUESTED

Set forth below is a list of questions that this office would like to have addressed in the next phase of its investigation and review, and a list of documents Burke would like to obtain to better understand the transaction.

A. Questions

1. Was the City ever given a copy of Cisterra's purchase agreement with the prior owner? Did it truly prevent a transfer of Cisterra's purchase rights to the City as stated in the City's staff reports? If so, why did Cisterra agree to that if it knew it may seek to transfer its purchase rights to the City?
2. Do we have a copy of the "non-binding agreement" between Cisterra and the City referenced in the OIB Report? (OIB Report, p. 2.) What are its terms?
3. What was the precise timing in which (a) the prior owner offered to sell the Property to the City for \$100 million, (b) the City declined, (c) the City and Cisterra entered into the above-referenced "non-binding agreement," and (d) Cisterra entered into a purchase agreement with the former owner of the Property for \$72.5 million?
4. Why was acquiring the property through Cisterra (via either (a) a transfer of Cisterra's purchase rights, or (b) leasing-to-own from Cisterra) the only options considered by the City? (OIB Report, p. 2.) Why did the City not consider simply purchasing the property from Cisterra after it closed, or negotiating directly with the former owner for a higher price?
5. If Cisterra had moved forward with its own purchase, what was its intended use for the site? Was it similar or dissimilar from the City's intended use, or did it only ever intend to act as a "middleman" in a transfer to the City?
6. Was any due diligence performed or contracted for by the City independent of what it received from Cisterra?
7. Who at the City was involved in interfacing with Cisterra and/or evaluating the information provided by Cisterra?

8. To what extent did City staff review or evaluate the various due diligence documents it now has in its files. When and from whom did it receive those documents, and what communications accompanied them (either oral or written)?
9. More specifically, the notes on "Due Diligence Docs" in the City's files imply that (a) the City may not have received Cisterra's March 2016 Property Condition Report and Phase I Environmental Assessment until potentially as late as September of 2016, and (b) it may not have received the historical asbestos abatement documents until as even later. All of these dates are after, at least, the September 9, 2016 Staff Report in which City staff were recommending that the transaction be approved, and after a draft of the Lease Agreement had already been prepared. In light of that timing, to what extent did these new documents change or inform the City's decision to enter into the transaction, or were considered by City staff?

B. Documents Requested

1. The City Council resolution approving the Lease Agreement.
2. Any additional staff reports regarding the Lease Agreement, including any follow-up reports for meetings after the initial Staff Report of September 9, 2016.
3. The meeting minutes for all meetings at which the Lease Agreement was agendaized for consideration by the City Council.
4. Cisterra's purchase agreement with the former owner of the Property.
5. The "non-binding agreement" between Cisterra and the City referenced in the OIB Report. (OIB Report, p. 2.)
6. All written communications between City staff and Cisterra relating to the Property or the transaction, including all correspondence and emails by which Cisterra transferred any and all due diligence and Property-related documents to the City.
7. All written communications between the City and the prior owner of the Property relating to the Property or the transaction.

8. All internal written communications at the City relating to the Property or the transaction.
9. All written communications between Cisterra and the prior owner of the Property, to the extent the City has them.
10. Post-transaction documents relating to the discovery of asbestos on the Property, such as orders or investigations by state or county agencies regarding the City's occupancy of the Property.
11. Any environmental or asbestos-specific assessments for the Property that have been conducted since the Lease Agreement was entered into.

* * * *

We look forward to receiving from you the answers to these questions, and the documents we have requested, so that we can provide you with additional analysis of this transaction.

Thank you