II. SUMMARY OF ALLEGATIONS

Beginning in the summer of 2013, and into the fall of 2013, the City of Burlington filed a series of documents with the United States District Court for the Western District of Washington, and later, the Skagit County Superior Court formally accusing the Plaintiffs in the *Premier Land, et al. v. City of Burlington, et al*, litigation of exposing asbestos within the Tinas Coma plat when they were constructing single family residences in the Tinas Coma subdivision. The documents included a counterclaim, an amended counterclaim, legal briefing and a series of sworn declarations from city officials. According to such documents, such exposure and contamination by the Plaintiffs in that matter occurred between 2002 and 2012, while Plaintiffs were constructing approximately 12 single family residences in various locations through the subdivision. In those documents the City has requested damages from Plaintiffs for such exposure and contamination, and for the costs the City is responsible for in remediating and mitigating the asbestos contamination, and for contribution from the Plaintiffs to the City for cleanup and remediation of the asbestos, and for contamination of its own lands, namely the streets of the subdivision.

The first document containing City of Burlington allegations about disturbance of asbestos on Burlington Hill occurred on August 16, 2013. On that date the City filed an answer to the Plaintiffs' amended complaint including asbestos, and a Counterclaim against Plaintiffs alleging that their work in excavating and constructing the foundation on Lot 24, disturbed and released otherwise dormant asbestos fibers, and that in so doing, Plaintiffs were responsible to the City for mitigation and cleanup related to that work. Those allegations specifically included the following:

5. Naturally occurring asbestos poses no health risk when asbestos fibers remain in the soil undisturbed and do not become airborne through human disturbance.

6. Even though Plaintiffs were fully aware that naturally occurring asbestos was potentially present in the vicinity of the Tinas Coma subdivision, Plaintiffs' constructed a home on lot 24 of the Tina Coma subdivision. Plaintiffs' construction activities created a risk of disturbing naturally-occurring asbestos.

7. Plaintiffs allowed subcontractors, materials suppliers, workers, inspectors, neighbors, and others to enter lot 24 while construction was underway without warning such subcontractors, materials suppliers, workers, residents and others that Plaintiffs' believed naturally-occurring asbestos was present in the Tinas Coma subdivision.

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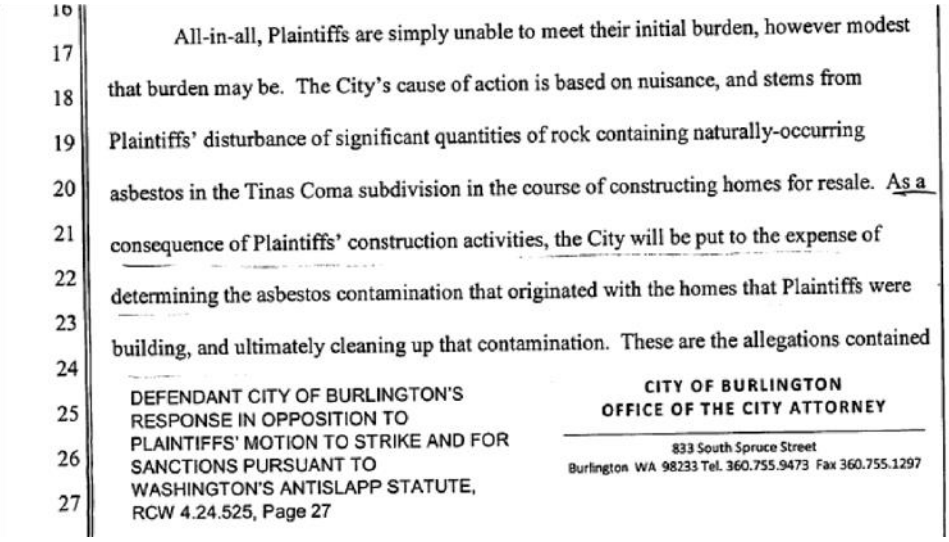
Following receipt of this document Plaintiffs filed a motion with the Court requesting that the City Counterclaim be dismissed, in part because the amount of asbestos that would be released in the activities related to Lot 24 were dwarfed by the massive amounts of earth artificially disturbed by the City and the Developer, in the original development and in the realignment. The City responded by filing an amended Counterclaim which, among other things, clarified its official position that it was *not* seeking relief from the Plaintiffs based upon the activity in the single lot – lot 24 belonging to Plaintiffs client – but to *all of the lots* Plaintiffs had worked on beginning in 2002 and extending through 2012, roughly twelve, which were randomly scattered throughout the entire subdivision. The supporting briefing of the City said that it was entitled to seek such damages for the asbestos likely to have been disturbed for all of those lots, over that entire time period:


All-in-all, Plaintiffs are simply unable to meet their initial burden, however modest that burden may be. The City's cause of action is based on nuisance, and stems from Plaintiffs' disturbance of significant quantities of rock containing naturally-occurring asbestos in the Tinas Coma subdivision in the course of constructing homes for resale. As a consequence of Plaintiffs' construction activities, the City will be put to the expense of determining the asbestos contamination that originated with the homes that Plaintiffs were building, and ultimately cleaning up that contamination. These are the allegations contained

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Had the Plaintiffs been made aware of some or all of the facts set forth herein by the City when applying for building permits to build homes within the Tinas Coma development, Plaintiffs would have suspended working within the development for fear of exposure to asbestos. Had Plaintiffs been aware of such facts before purchasing lots, Plaintiffs would not have purchased *any* lot within the Tinas Coma development.

III. AUTHORITY

A. Applicable Legal Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citations omitted). To avoid dismissal, a complaint must contain factual allegations that do more than "merely create[] a suspicion [of] a legally cognizable right of action" and must instead "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citation omitted). Furthermore, courts should accept as

true only the well pleaded factual allegations of the complaint: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678. Courts "do not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations" if those conclusions cannot be reasonably drawn from the facts alleged. *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009) (citing *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of the U.S.*, 497 F.3d 972, 975 (9th Cir. 2007)).

B. The Business Judgment Rule Bars the City of Burlington's Claims

With the benefit of hindsight and five years of review, the City of Burlington has rummaged through the Plaintiff's permit portfolio and cherry-picked <u>one</u> permit that allegedly exposed asbestos through the excavation of a building site. The City is somehow attempting to claim that information in the Plaintiff's permit file—*i.e.*, information considered by the Plaintiff's during the building process—shows that the Plaintiff's should have somehow been aware of the existence of naturally occurring asbestos throughout the Burlington Hill site, *(the Tinas Coma Plat was approved under the City of Burlington's jurisdiction in the year 1999, three years before Plaintiffs arrived and started building on Burlington Hill)* and somehow was <u>not</u> to be disturbed while excavating for foundations per the approved and permitted site and building plans. The City asks the Court to hold Plaintiffs personally liable for any losses. But this attempt to impose personal liability on company management for business decisions is barred by the business judgment rule.

1. The Business Judgment Rule

The business judgment rule is a long-recognized standard of judicial review for the conduct of officers and directors. The rule establishes a rebuttable presumption that in making a business decision, the management of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. *Interlake Porsche &*

Audi, Inc. v. Bucholz, 45 Wn. App. 502, 509, 512 (1986); *see also Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (same); *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009) (quoting *Aronson* and applying business judgment rule to derivative claims against directors and officers of financial institution for its $55 billion exposure to subprime loans).[1]

Washington courts recognize that the business judgment rule serves vital interests. Most importantly, the rule "allows the corporation to function effectively by allowing those having management responsibility the freedom to make in good faith the many necessary decisions quickly and finally, without the impairment of having to be liable for an honest error in judgment." *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 145 (1990). Delaware courts have likewise affirmed the important goals served by the business judgment rule: "[b]usiness decision-makers must operate in the real world, with imperfect information, limited resources, and an uncertain future. To impose liability on directors for making a 'wrong' business decision would cripple their ability to earn returns for investors by taking business risks." *Citigroup*, 964 A.2d at 126.[2]

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[1] This Court and Washington courts have often looked to Delaware's "well-developed" corporate law jurisprudence for guidance regarding matters of corporate governance under Washington law. *See, e.g., In re F5 Networks*, 166 Wn.2d 229, 239-40 (2009) (acknowledging persuasive status of Delaware corporate law and following Delaware law regarding demand futility standard for derivative actions); *In re Cray, Inc*., 431 F. Supp. 2D 1114, 1120 (W.D. Wash. 2006) (same); *Schwartzman v. McGavick*, No. C06-1080P, 2007 WL 1174697, at *4 (W.D. Wash. Apr. 19, 2007) (applying Delaware law to analyze fiduciary duty under Washington law).

[2] The business judgment rule is a judicial standard of review separate and apart from the standards of conduct for directors and officers set forth in the Washington Business Corporation Act. *See* RCW 23B.08.300 (directors), 23B.08.420 (officers). In adopting these statutory standards, the Washington Legislature made clear that the standards do not displace the business judgment rule and that the courts should continue to develop and apply the business judgment rule to claims against directors and officers: "The elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts in Washington and elsewhere. . . . In view of that continuing judicial development, Proposed section 8.30 does not try to codify the business judgment rule or to delineate the differences, if any, between that rule and the standards for director conduct set forth in this section. That is a task left to the courts." 2 S. Journal, 51 Leg., Reg. Sess. 3041-42 (Wash. 1989); *see also id.* at 3047 (stating that the comment to Proposed section 8.30 is "generally applicable to nondirector officers as well as to directors").

Accordingly, Washington courts "review business decisions under the business judgment rule and infrequently reverse a business decision." *Lane v. City of Seattle*, 164 Wn.2d 875, 882 (2008); *see also Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498 (1975) ("Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors."); *Fielder v. Sterling Park Homeowners Ass'n*, No. C11-1688RSM, 2012 WL 6114839, at *5 (W.D. Wash. Dec. 10, 2012) (same). Washington courts apply the business judgment rule to protect the decisions of both directors and officers. *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 395 (1987) ("In considering the actions of a corporate officer . . . the business judgment rule rather than the standard of ordinary care applies.").

The burden is on the City to rebut the presumption. *Aronson*, 473 A.2d at 812; *Citigroup*, 964 A.2d at 124. If the City fails to do so, then a court will not second guess the decision and will not impose liability on management for the decision. *See Grassmueck v. Barnett*, No. C03-122P, 2003 WL 22128263, at *3 (W.D. Wash. July 7, 2003) (under the business judgment rule, "a court will not substitute its own notions of sound business judgment for that of directors and officers unless the presumption is rebutted"); *Interlake Porsche*, 45 Wn. App. at 508 (same); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (the City bears burden to rebut the business judgment rule by demonstrating that directors breached duty of loyalty, care or good faith; otherwise, court will not second-guess business decisions).

2. The City Must Allege Well-Pleaded Facts Sufficient to Overcome the Business Judgment Rule

The business judgment rule applies to a motion to dismiss just as it does at other stages of a lawsuit. *See, e.g.*, *Fielder*, 2012 WL 6114839, at *5 (applying business judgment rule at the motion to dismiss stage); *Grassmueck*, 2003 WL 22128263, at *3 (same); *Nat'l Credit Union*

Admin. v. Siravo, No. CV 10-1597-GW (MANx), 2011 WL 8332969, at *3 (C.D. Cal. July 7, 2011) (same); *see also Krim v. ProNet, Inc.*, 744 A.2d 523, 527 (Del. Ch. 1999) (granting motion to dismiss where "the City has failed to demonstrate any reason why the business judgment rule should not be afforded the Plaintiffs directors"); *Nebenzahl v. Miller*, No. CIV. A. 13206, 1996 WL 494913, at *3 (Del. Ch. Aug. 29, 1996) (applying business judgment rule on motion to dismiss and concluding that facts pled in complaint suggest that "Director Plaintiffs acted in good faith and may avail themselves of the benefit of the business judgment rule").

Accordingly, in order to survive a motion to dismiss, the City must allege well-pleaded facts sufficient to rebut the presumptions of the business judgment rule. *See Grimes v. Donald*, 673 A.2d 1207, 1214-15 (Del. 1996) (granting motion to dismiss where the City failed to allege specific facts demonstrating that the business judgment rule did not apply), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995) ("[T]he presumption of the business judgment rule attaches *ab initio* and to survive a [motion to dismiss], the City must allege well-pleaded facts to overcome the presumption"); *Levine v. Smith*, 591 A.2d 194, 208 (Del. 1991) (affirming dismissal of complaint where complaint failed to plead particularized facts "that a majority of the [directors] acted in so uninformed a manner as to fail to exercise due care"), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

3. The City Fails to Allege Bad Faith

Numerous Washington courts, including the Washington Supreme Court, have held that Washington's business judgment rule protects any decision within the authority of management that is made in good faith:

> *Under the business judgment rule, corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within*

> *the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.*

Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 709 (2003); *see Schwarzmann v. Ass'n. of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 402 (1982); *DeHart*, 13 Wn. App. at 498. *But see Seafirst Corp. v. Jenkins*, 644 F. Supp. 1152, 1159 (W.D. Wash. 1986) (case decided before *Scott* holding that "proof of good faith alone is not sufficient to satisfy the business judgment rule"). By that standard, there can be no dispute that the Complaint should be dismissed because it alleges no bad faith by Plaintiffs.

4. The City Fails to Allege Well-Pleaded Facts Showing that Plaintiffs' Decisions Were Uninformed

The City no doubt will argue that it can overcome the business judgment rule by alleging something less than bad faith, such as a lack of due care. But even if that argument could be reconciled with the Washington case law discussed above, the Complaint is deficient. The business judgment rule cannot be rebutted by showing a simple error in judgment or ordinary negligence; a plaintiff can rebut the business judgment rule based on a lack of care (if at all) only by showing that management employed a "grossly negligent process that includes the failure to consider all material facts reasonably available." *Brehm*, 746 A.2d at 264 n.66. This inquiry focuses on the *process* employed to reach a decision and not on the *content* of the decision. *Citigroup*, 964 A.2d at 124 (business judgment analysis "properly focus[es] on the decision-making *process* rather than on a substantive evaluation of the merits of the decision"); *see Brehm*, 746 A.2d at 264 (the concept of "'substantive due care' . . . is foreign to the business judgment rule"). Provided they were not uninformed, officers and directors are protected from personal liability for business decisions, even decisions that seem egregious when reviewed with the benefit of hindsight. *DeHart*, 13 Wn. App. At 499 (the business judgment rule insulates an officer or director from liability "even though the

errors may be so gross that they may demonstrate the unfitness of the directors to manage the corporate affairs") (internal quotations and citation omitted).

a. The City Fails to Plead Facts Showing Gross Negligence

Not only does the City fail to plead facts showing that the Plaintiffs were uninformed, the facts alleged in the Complaint fail to show that Plaintiffs were so uninformed as to be grossly negligent. To the extent that the City can rebut the business judgment rule based on a lack of due care, it can do so only by showing that management followed a process so flawed as to constitute gross negligence. *Brehm*, 746 A.2d at 264 n.66 (in the absence of bad faith, disloyalty or an irrational business purpose, directors' decisions will be respected unless the directors reach their decision through "a grossly negligent process that includes the failure to consider all material facts reasonably available"); *Citigroup*, 964 A.2d at 124 ("The standard of director liability under the business judgment rule 'is predicated upon concepts of gross negligence.'") (internal quotations and citation omitted); *see also FDIC v. Jackson*, 133 F.3d 694, 700 (9th Cir. 1998) ("[U]nder Arizona law, where the business judgment rule applies to the conduct of a director, a showing of gross negligence is necessary to strip the director of the rule's protection."); *Boston Children's Heart Found., Inc. v. Nadal-Ginard*, 73 F.3d 429, 433 (1st Cir. 1996) (Under Massachusetts law, "if officers or directors act in good faith, albeit imprudently, they are not subject to personal liability absent clear and gross negligence in their conduct"). Under Washington law, "gross negligence" is defined as "negligence substantially and appreciably greater than ordinary negligence." *Nist v. Tudor*, 67 Wn.2d 322, 331 (1965) (en banc). Similarly, in Delaware, "in the duty of care context gross negligence has been defined as *reckless indifference* to or a *deliberate disregard* of the whole body of stockholders or actions which are without the bounds of reason."

McPadden v. Sidhu, 964 A.2d 1262, 1274 (Del. Ch. 2008) (emphases added) (internal quotations and citation omitted) (collecting cases).

None of the facts alleged in the City's Counterclaim pleads such gross negligence. *See McPadden*, 964 A.2d at 1274.

5. The City's Irrelevant and Inflammatory Allegations Have No Bearing on Whether Plaintiffs Breached Their Duties

Perhaps because the City's Counterclaim concedes good faith and an absence of fraud or dishonesty by Plaintiffs, the City includes in its Counterclaim irrelevant, inflammatory or misleading allegations that have no bearing on the business judgment rule. Those allegations are devoid of well-pleaded facts sufficient to rebut the business judgment rule.

C. The Plaintiff's Articles of Incorporation Bar the City's Negligence and Breach of Fiduciary Duty Claims

The City's negligence and breach of fiduciary duty claims should be dismissed on separate and independent grounds: Plaintiff's Articles contain an exculpatory provision that precludes the personal liability of Defendants for negligent conduct.[3]

The Washington Business Corporation Act allows a corporation to eliminate a director's personal liability to the corporation except for intentional or knowing misconduct, unlawful approval of distributions, or receipt of an unlawful benefit. RCW 23B.08.320. Section 10.2 of the Articles contains an exculpatory clause that matches the parameters of RCW 23B.08.320:

> No Director, Officer-Director, former Director or former Officer-Director shall be personally liable to the corporation or its shareholders for monetary damages for conduct as a Director or Officer-Director occurring after the effective date of this Article unless the Conduct is Finally Adjudged to have been Egregious Conduct.

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[3] This Court may take judicial notice of matters of public record outside the pleadings without converting this motion into a motion for summary judgment. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Specifically, under Fed. R. Evid. 201, the Court may take judicial notice of Plaintiff's Articles because they are certified public records maintained by the Secretary of State in Washington and their contents can be accurately and readily determined from a source whose accuracy cannot reasonably be questioned. *See In re Computer Sci. Corp. Deriv. Litig.*, 244 F.R.D. 580, 587 n.8 (C.D. Cal. 2007), *aff'd sub nom Labores Int'l Union of N. Am. v. Bailey*, 310 F. App'x 128 (9th Cir. 2009).

Section 10.1(a) of the Articles defines "Egregious Conduct" to mean the very conduct that cannot be shielded under RCW 23B.08.320, that is, intentional misconduct or knowing violation of law, unlawful approval of distributions, and receipt of unlawful benefits. *See id*. The provision applies to FDIC's claims here because, as a receiver, the FDIC "stands in the shoes of the corporation." *Ledo Fin. Corp. v. Summers*, 122 F.3d 825, 829 (9th Cir. 1997) (holding district court erred applying federal common law; FDIC as receiver does not pursue interests of United States); *cf. Continuing Creditors' Comm. of Star Telecomm. Inc. v. Edgecomb*, 385 F. Supp. 2d 449, 463 (D. Del. 2004) (applying Delaware law) (exculpatory clause "applies to all actions for which the Plaintiff alleges duty of care violations").

The City's Counterclaim does not allege any conduct excluded from the scope of the exculpatory clause, such as intentional misconduct, knowing violation of law, unlawful approval of distributions, or receipt of unlawful benefits. The Complaint alleges at most only ordinary negligence—a breach of an alleged duty of due care—which entails application of an ordinary negligence standard. *See* RCW 23B.08.300(1)(b), .420(1)(b), and gross negligence. Accordingly, the exculpatory provision covers the City's negligence and breach of fiduciary duty claims.

1. The Exculpatory Clause Precludes Liability for Defendants for Negligent Conduct as Officers.

The exculpatory provision by its express terms applies to the conduct of Premier's directors. Under the circumstances here, it also applies to the conduct of the Premier's officers, that is, to Welch's conduct to the extent he was acting in his capacity as an officer.

In Washington, the duties of corporate officers are identical to the duties of directors. *Compare* RCW 23B.08.420 (officer duties), *with* RCW 23B.08.300 (director duties).[4]

[4] The only difference is that directors may rely on a directors' committee in the discharge of director duties, see RCW 23B.08.300 (2)(c), whereas officers are not expressly provided such reliance, see RCW 23B.08.420(2). This difference is immaterial to the issue presented here.

Where the duties of officers and directors are identical, it would be unjust to hold that the exculpatory clause does not apply to Premiers' conduct as officers. Such a determination would hold an officer to higher standards of conduct than a director—a result that would directly conflict with Washington law. *Compare* RCW 23B.08.420, *with* RCW 23B.08.300.

In re Verestar, Inc., 343 B.R. 444, 475 (Bankr. S.D.N.Y. 2006) (applying Delaware law), illustrates the point, holding that a similar exculpatory clause shielded not only directors but also officers from liability for negligent conduct. In *Verestar*, the bankruptcy estate representative brought claims for, *inter alia*, breach of fiduciary duty against former officers and directors of debtor *Verestar.* Like RCW 23B.08.320, Delaware law permits a corporation to limit the personal liability of a director except for, in relevant part, intentional misconduct, knowing violation of the law, or receipt of an improper personal benefit. *See* Del. Code tit 8, § 102(b)(7). Accordingly, *Verestar* held that the exculpatory clause was enforceable against the bankruptcy estate representative's claims and dismissed the claims against the debtor directors for breach of the duty of care.

But *Verestar* went further. It held that the exculpatory clause, which facially applied only to director conduct shielded *officer* conduct to the same extent and dismissed the claims for breach of the duty of care against the defendant officers. *Id.* at 475. The court reasoned that, under Delaware law, officers and directors were held to the same standards of conduct, and "[n]o reason has been suggested why an officer should be held to a higher standard." *Id.* Two other cases have reached the same result. *See KDW Restructuring & Liquidation Servs. LLC v. Greenfield*, 874 F. Supp. 2d 213, 223-24 (S.D.N.Y. 2012) (director exculpatory clause requires dismissal of duty of care claims against all defendant officers and directors); *Continuing Creditors' Comm.*, 385 F. Supp. 2d at 464 (same).[5]

For the same reasons, Plaintiff 's Articles' exculpatory clause applies to conduct by Plaintiff as an officer of Premier Land Development, Inc., and Premier Consulting Group, Inc., and the exculpatory clause requires dismissal of the Premier Land Development, Inc., and Premier Consulting Group, Inc., negligence and breach of fiduciary duty claims against both. *See Verestar*, 343 B.R. at 475; *KDW Restructuring*, 874 F. Supp. 2d at 223-24; *Continuing Creditors' Comm.*, 385 F. Supp. 2d at 464.

2. The Exculpatory Clause Precludes Hanson's Liability for Negligent Conduct as a Director

In all events, Welch—as a director of Premier Land Development, Inc., and Premier Consulting Group, Inc., should receive the full benefit of the exculpatory clause. The City's Counterclaim acknowledges that Welch was both a director and an officer of the corporations throughout the relevant time period. The exculpatory clause plainly eliminates liability for directors for negligent conduct, and the negligence and breach of fiduciary duty claims against Welch should be dismissed. *Malpiede v. Townson*, 780 A.2d 1075, 1094 (Del. 2001) (affirming dismissal of duty of care claims against director Welch based on exculpatory clause). Plainly recognizing this obstacle, the City purports to assert claims against Welch solely with respect to his alleged conduct as an officer, not as a director. The City's Counterclaim, however, fails to distinguish Welch's alleged conduct as a director from his alleged conduct as an officer.

Accordingly, the entirety of Welch's conduct must be treated as director conduct. "Where the City fails to distinguish actions taken as an officer from actions taken as a director,

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[5] Although there are cases to the contrary, *e.g.*, *In re Fleming Packaging Corp.*, 351 B.R. 626, 634 (Bankr. C.D. Ill. 2006) (applying Delaware law) (director exculpatory provision does not shield officers); *In re LTV Steel Co.*, 333 B.R. 397, 413 (Bankr. N.D. Ohio 2005) (applying Delaware law) (same), these decisions rely solely on the language of the exculpatory clauses (shielding director conduct only) without further explanation. The contrary decisions do not acknowledge or address the issue expressly confronted by *Verestar*, namely, whether officers should be denied the benefit of a director-only exculpatory clause when, under applicable state law, the standard of conduct for officers and directors is identical.

defendants serving in a dual role will be shielded" by a director exculpatory clause. *Lemond v. Manzulli*, No. 05 Civ. 2222(ILG), 2009 WL 1269840, at *5 n.5 (E.D.N.Y. Feb. 9, 2009) (dismissing duty of care claims against dual role defendants based on exculpatory provision) (citing *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994)).

D. The City's Claims Should Be Dismissed for Failure to Comply with Rule 8(a)(2)

In addition to all its other deficiencies, the City's Counterclaim should also be dismissed for a Third reason: it fails to contain "a short and plain statement of the claim showing that [the City] is entitled to relief." Fed. R. Civ. P. 8(a)(2). This requirement ensures that a complaint provides each defendant with "'notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The City's Counterclaim fails this test.

Most notably, the City bases its claims entirely on <u>one</u> lot cherry-picked from Plaintiff's Tinas Coma portfolio. This one lot forms the core of the City's Counterclaim and provides the basis for all the damages sought by the City. Yet the City fails to identify even a single disturbance of asbestos by Plaintiffs.

Although the Federal Rules of Civil Procedure adopt a flexible pleading standard, a complaint must, at a minimum, "contain sufficient allegations of underlying facts to give fair notice and to *enable the opposing party to defend itself effectively*." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (emphasis added), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2101 (2012).

As it stands now, Plaintiffs Keith Welch, Premier Land Development, Inc., and Premier Consulting Group, Inc., are asked to answer and defend claims that they wrongly disturbed asbestos throughout the City's approved residential development.

Additional deficiencies in the City's Counterclaim provide separate grounds for dismissal. The Counterclaim throughout fails to distinguish between the specific conduct of the Plaintiffs Keith Welch, Premier Land Development, Inc., and Premier Consulting Group, Inc. The Counterclaim also fails to specify what each Plaintiff allegedly did with respect to each of the lots at issue, instead alleging only that, for example, "Plaintiffs Keith Welch, Premier Land Development, Inc. and Premier Consulting Group, Inc., engaged in disturbing the earth and exposing asbestos on Burlington Hill. *Id.* Similarly, the City's Counterclaim fails to identify what conduct Plaintiffs Keith Welch, Premier Land Development, Inc., and Premier Consulting Group, Inc. allegedly took as an officer and what conduct as a director.

To survive a motion to dismiss, a complaint or *(counterclaim)* must allege the specific acts of *each Plaintiff* involved in the alleged events so as to give *each defendant* notice of the claims against him or her. *See, e.g.*, *Redondo Waste Sys., Inc. v. Lopez–Freytes*, 659 F.3d 136, 140 (1st Cir. 2011) (indicating that, in order to draw plausibility inference, as required by *Iqbal*, the complaint "must allege facts linking Plaintiffs Keith Welch, Premier Land Development, Inc., and Premier Consulting Group, Inc., to the grounds on which *that particular Plaintiff* is potentially liable") (emphasis added).

The City's Counterclaim fails to satisfy the pleading requirements of Rule 8(a) and should be dismissed for this reason alone. At a minimum, the City should be ordered to re-plead its allegations in accordance with Rule 8(a).

IV. CONCLUSION

For the reasons set forth above, Plaintiffs Keith Welch, Premier Land Development, Inc., and Premier Consulting Group, Inc., respectfully request that the Court dismiss the City of Burlington's Counterclaim.