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9 *Capital Credit Lease-Backed Pass-Through*
Trust, Series 2017 CTL-1

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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF SAN DIEGO CENTRAL DIVISION**

13 JOHN A. GORDON, an individual,

14 Plaintiff,

15 v.

16 101 ASH, LLC, a Delaware limited liability
company; WILMINGTON TRUST,
17 NATIONAL ASSOCIATION, as trustee for the
registered certificate holders of the CGA Capital
18 Credit Lease-Backed Pass-Through Trust, Series
2017-CTL-1; CITY OF SAN DIEGO, a
19 municipal corporation; ROLANDO CHARVAL,
sued in his official capacity as City of San
20 Diego's Chief Financial Officer; and DOES 1 to
100, INCLUSIVE,

21 Defendants.
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CASE NO. 37-2020-00028837-CU-FR-CTL

**DEFENDANT WILMINGTON TRUST,
NATIONAL ASSOCIATE'S NOTICE OF
EX PARTE APPLICATION AND EX
PARTE APPLICATION FOR ORDER
APPOINTING DISCOVERY REFEREE**

IMAGED FILE

Date: February 15, 2022
Time: 8:30 a.m.
Dept.: C-73
Judge: Hon. Joel R. Wohlfeil

Complaint Filed: August 17, 2020
Trial Date: January 20, 2023

1 TO THE ABOVE-ENTITLED COURT AND PLAINTIFF

2 PLEASE TAKE NOTICE that Defendant Wilmington Trust, National Association, as
3 trustee for the registered certificate holders of the CGA Capital Credit Lease-Backed Pass-Through
4 Trust, Series 2017-CTL-1's ("Lender") will appear *ex parte* before the Honorable Joel R. Wohlfeil
5 in Department 73 of the Superior Court, 330 West Broadway, San Diego, CA 92101 to request an
6 order appointing a discovery referee to monitor depositions and determine any disputes arising
7 therein. While this Court has the discretion to appoint a discovery referee to handle all discovery
8 disputes, Lender seeks a discovery referee solely for the limited purpose of monitoring depositions
9 and adjudicating any objections at ongoing depositions in order to streamline and make the process
10 more efficient. The other defendants in this case have welcomed this solution but, unfortunately,
11 Plaintiff, after meet and confer efforts, will not consent. As a result, Lender has been compelled to
12 bring this request to the Court rather than by consent of all parties.

13 Lender's Application is made pursuant to California Rule of Court 3.1200 et seq. and the
14 California Civil Discovery Act. The Application will be based on the below Memorandum of Points
15 and Authorities, the Declaration of Craig Solomon Ganz, and any other evidence that may be
16 developed at the hearing. Notice of this *Ex Parte* Application is given by email to all counsel in this
17 case concurrently with the filing of the Application.

18 DATED this 9th day of February, 2022.

19 **BALLARD SPAHR LLP**

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By: /s/ Michael S. Myers

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Craig Solomon Ganz

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Michael S. Myers

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Attorney for Defendant Wilmington Trust,

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National Association, as Trustee of CGA Capital

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Credit Lease-Backed Pass-Through Trust, Series

2017 CTL-1

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 To say that this case has been contentious would be an understatement. The Court has
4 already entertained multiple discovery disputes with nearly a year left remaining until trial and
5 numerous witnesses yet to be deposed—including most of the party witnesses. Unfortunately, this
6 acrimony has only snowballed and resulted in unnecessarily lengthy and unproductive depositions.
7 Indeed, the recent deposition of Chris Wahl—a non-party—consumed two full days. However, the
8 vast majority of the deposition consisted of legal argument of counsel and not witness testimony.
9 Based on this and other precedent in this case, there is a serious likelihood that disputes will only
10 continue to build such that depositions—particularly of party witnesses that will involve more issues
11 of privilege—will become increasingly contentious and engender many more discovery disputes.
12 Rather than continue to occupy this Court with *all* of those disputes, Lender requests that the Court
13 appoint a discovery referee for the limited purpose of monitoring depositions and determining
14 disputes that arise therein.

15 **II. STATEMENT OF FACTS**

16 **A. Plaintiff’s Complaint**

17 On August 17, 2020, Plaintiff filed the now-inoperative Complaint (the “Original
18 Complaint”) alleging claims of fraudulent misrepresentation, negligent misrepresentation, and
19 waste of public funds and resources. (Original Complaint at ¶¶ 52–74). Plaintiff’s Original
20 Complaint did not assert claims against Lender but, rather, 101 Ash, LLC (“Landlord”), 101 Ash
21 Member Partners, LLC, Cisterra Development, LLC, Shapery Developers Gas & Electric Property,
22 LP, Shapery Developers Gas & Electric Corp., Gas & Electric Headquarters Building – San Diego
23 L.P, the City of San Diego (“City”), and Rolando Charvel. (Original Complaint at 1). Plaintiff
24 sought to rescind the subject Lease and an order enjoining the City from using the so-called 101 Ash
25 Building (Original Complaint at 16). Plaintiff never served that Original Complaint.

26 On October 9, 2020, the City filed suit against Landlord and Lender seeking declaratory
27 relief that it is not required to pay rent under the subject Lease while it is unable to occupy the 101
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1 Ash Building or, alternatively, reformation of the Lease permitting such abatement of rent to avoid
2 what it alleged would be an unconstitutional lease. *See* Complaint, *City of San Diego v. 101 Ash,*
3 *LLC*, No. 37-2020-00036247-CU-CO-CTL. The City’s Complaint survived demurrer and the City
4 subsequently filed an amended complaint in which it added additional claims and parties.

5 Two weeks after this Court overruled the demurrer to the City’s Complaint, Plaintiff filed
6 its First Amended Complaint (“FAC”), which thereby became the operative complaint in this action.
7 The FAC struck many of the allegations contained in the Original Complaint, including by omitting
8 claims and references to fraud and negligent misrepresentation. Instead, the FAC mirrors the City’s
9 original complaint at issue in the related action, naming the same two defendants and alleging that
10 the subject Lease is unconstitutional because of the scope of the abatement clause and the City’s
11 purported inability to occupy the 101 Ash Building. (FAC ¶ 25.)

12 **B. The Depositions Conducted Thus Far Have Been Contentious and Inefficient**

13 The parties have engaged in substantial discovery, including several depositions. The
14 depositions in particular have been extremely contentious, culminating in the suspension of the
15 recent deposition of Chris Wahl. Declaration of Craig Ganz (“Ganz Decl.”), ¶ 2. As this Court is
16 well aware, there were multiple discovery disputes leading up to the Wahl deposition. Those
17 tensions boiled over to the deposition itself, which lasted two full days despite the fact Mr. Wahl is
18 not even a party to this case. Ganz Decl., ¶ 3. The reason Mr. Wahl’s deposition consumed so many
19 hours was largely due to the constant argument between counsel rather than the substance of Mr.
20 Wahl’s testimony. Ganz Decl., ¶ 4. The arguments between the parties went far beyond zealous
21 advocacy, and ventured into the area of unnecessarily aggressive behavior and shocking examples
22 of complete unprofessionalism. Ganz Decl., ¶ 5. This has resulted in undue expense to the parties,
23 not to mention non-parties (including non-parties to this case that are parties to the related 101 Ash
24 case brought by the City). Ganz Decl., ¶ 6.

25 Plaintiff has scheduled numerous depositions in the upcoming weeks and months, including
26 Lender’s representative Kyle Gore, and several current and former representatives of the City. Ganz
27 Decl., ¶ 7. It is expected that these depositions of party representatives may be even more
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1 contentious and involve a significant number of privilege objections. Ganz Decl., ¶ 8. Lender’s
2 counsel welcomes all parties to depose its representatives to reinforce that Lender is an innocent
3 party that should not even be a defendant in this matter. That being said, Lender’s counsel, cannot
4 in good conscious, allow his client representative(s) to be subjected to high levels of consistent
5 abuse and prolonged harassment within the confines of a deposition. Lender’s counsel has waited
6 as long as possible to formally seek the requested relief, in the hope that certain behavior of the
7 parties was only fleeting, or a “one-off”.¹ Unfortunately, the various acts of abuse, harassment, and
8 complete unprofessionalism have only increased as the depositions have moved closer to party
9 participation. Ganz Decl., ¶ 5. While the other defendants in this case have consented to the
10 appointment of a discovery referee through Lender’s meet and confer efforts, Plaintiff has refused.
11 Ganz Decl., ¶ 9.

12 **III. The Court Should Appoint a Discovery Referee to Attend Depositions**

13 Under Cal. Code Civ. Proc. § 639, a court may appoint a discovery referee “to hear and
14 determine any and all discovery motions and disputes relevant to discovery in the action and to
15 report findings and make a recommendation thereon.” (Code Civ. Proc., § 639(a)(5)). The order
16 appointing a discovery referee must indicate whether the referee is being appointed for all discovery
17 purposes in the action. (Code Civ. Proc., § 639(c)). The order must further provide the following:

- 18 - the exceptional circumstances requiring the reference, which must be specific to the
19 circumstances of the particular case;
20 - The subject matter or matters included in the reference;
21 - The name, business address, and telephone number of the referee;
22 - The maximum hourly rate the referee may charge and, at the request of any party, the
23 maximum number of hours for which the referee may charge;

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26 ¹ As the Court may recall, at the hearing on Plaintiff’s *Ex Parte* Application to Compel Chris
27 Wahl to Appear for Deposition, Lender’s counsel stated on the record that he was concerned that
28 the case had become so acrimonious, and the behavior of the parties so egregious that a discovery
referee should be appointed.

1 - Either a finding that no party has established an economic inability to pay a pro rata share
2 of the referee’s fee or a finding that one or more parties has established an economic
3 inability to pay a pro rata share of the referee’s fees and that another party has agreed
4 voluntarily to pay that additional share of the referee’s fee.

5 (Code Civ. Proc., § 639(d)(2-6)). A court may appoint a discovery referee with respect to all
6 discovery motions where a majority of the following factors are present:

- 7 1) there are multiple issues to be resolved;
- 8 2) there are multiple motions to be heard simultaneously;
- 9 3) the present motion is only one in a continuum of many;
- 10 4) the number of documents to be reviewed (especially in issues based on assertions of
11 privilege) make the inquiry inordinately time-consuming.

12 (*Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 105.) “Where one or more of the above
13 factors unduly impact the court's time and/or limited resources, the court is clearly within its
14 discretion to make an appropriate reference.” *Id.* at 106.

15 Here, all of the factors are present such that the Court would be within its rights to appoint
16 a discovery referee to handle all discovery disputes: (1) multiple discovery issues have already
17 arisen and will likely continue to arise; (2) multiple discovery motions have been filed; (3) the
18 present request is only one in a continuum of those discovery motions; and (4) the voluminous
19 document production in this case would make any inquiry inordinately time-consuming for this
20 Court. Nonetheless, Lender does not request the appointment of a discovery referee to hear and
21 determine **all** discovery matters. Instead, Lender seeks a discovery referee for the limited purpose
22 of monitoring depositions and ruling on objections that arise during the course of depositions. The
23 exceptional circumstances of this case—particularly the increasing acrimony and aggressive
24 behavior of certain parties—warrants the appointment of a referee. A discovery referee would
25 greatly streamline the depositions by making these rulings in real time at the depositions rather than
26 parties having to suspend depositions in order to file motions for protective orders. The referee
27 could also help limit the amount of legal argument that has consumed the depositions thus far,
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1 thereby maximizing the witness testimony and making the depositions more cost efficient for all
2 parties involved. Lender would suggest the appointment of Judge Jeff Barton, Judge Leo Papas, or
3 Judge Linda Quinn as discovery referee.

4 **IV. Defendants Have Complied with the Rules Governing *Ex Parte* Applications**

5 *Ex parte* applications are governed generally by Cal. Rules of Ct., Rule 3.1200 *et seq.* An
6 *ex parte* application must be in writing and must include the following: (1) An application containing
7 the case caption and stating the relief requested; (2) a declaration in support of the application; (3)
8 a declaration, competent and based on personal knowledge, regarding the notice provided to other
9 parties pursuant to Cal. Rules of Ct., Rule 3.1204; (4) a memorandum; and (5) a proposed order.

10 Here, Defendant has filed the required *ex parte* application documents. Under Cal. Rules of
11 Ct., Rule 3.1203, the party seeking an *ex parte* order must notify all parties no later than 10:00 a.m.
12 the court day before the *ex parte* appearance, absent a showing of exceptional circumstances that
13 justify a shorter time for notice. Defendant notified counsel for Plaintiff of this *Ex Parte* Application
14 concurrent with the filing of the Application.

15 **V. Conclusion**

16 Based on the foregoing, Defendant respectfully requests that this Court grant Defendant's
17 request for an order appointing a discovery referee to monitor depositions and determine disputes
18 arising therein.

19 DATED this 9th day of February, 2022.

20 **BALLARD SPAHR LLP**

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2017 CTL-1*

1 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

2 **COUNTY OF SAN DIEGO**

3 GORDON v. 101 ASH, LLC, ET AL
4 CASE NO. 37-2020-00028837-CU-FR-CTL

5 **PROOF OF SERVICE**

6 On February 9, 2022, I caused the following document to be served:

7 **DEFENDANT WILMINGTON TRUST NATIONAL ASSOCIATION, AS TRUSTEE**
8 **FOR THE REGISTERED CERTIFICATE HOLDERS OF THE CGA CAPITAL CREDIT**
9 **LEASE-BACKED PASS-THROUGH TRUST, SERIES 2017 CTL-1'S EX PARTE**
10 **APPLICATION FOR APPOINTMENT OF DISCOVERY REFEREE**

11 On the interested parties as set forth below:

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(X) **BY MAIL.** I am familiar with this firm's practice of collection and processing correspondence for mailing with the United States Postal Service, and that the sealed correspondence was deposited with the United States Postal Service on the same day in the ordinary course of business pursuant to Code of Civil Procedure §1013a.

() **BY FACSIMILE.** In addition to service by mail as set forth above, a copy of said document(s) was also delivered by facsimile transmission to the addressee(s) pursuant to Code of Civil Procedure §1013(e).

() **BY PERSONAL SERVICE.** I caused a true copy of said document(s) to be hand-delivered to addressee(s).

() **BY EXPRESS MAIL.** I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier providing overnight/2 business day delivery pursuant to Code of Civil Procedure §1013(c).

() **BY ELECTRONIC MAIL.** The above document was served electronically in the ordinary course of business following ordinary business practices simultaneously with filing via One Legal to the electronic mail address(es) set forth above pursuant to Code of Civil Procedure §1010.6(a), (e).

(X) **BY ELECTRONIC SERVICE** through One Legal at the time of filing.

(X) **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

I declare under penalty of perjury that this Declaration was executed February 9, 2022.

/s/ Monica Baca
Monica Baca