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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JOHN A. GORDON, an individual,

Plaintiff,

v.

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

Defendants.

Case No. 37-2020-00028837-CU-FR-CTL  
Assigned for all purposes to  
Honorable Joel R. Wohlfeil

**FIRST AMENDED COMPLAINT FOR  
WASTE OF PUBLIC FUNDS AND TO  
RECOVER FUNDS**

Complaint filed: August 17, 2020

Trial Date: None set

**IMAGED FILE**

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1 **INTRODUCTION**

2 1. This action is brought on behalf of San Diego City citizen taxpayer Plaintiff JOHN  
3 A. GORDON (hereinafter sometimes referred to as “GORDON”) under California Code of Civil  
4 Procedure Section 526a to obtain an Order setting aside an agreement known as the Lease  
5 Purchase Agreement (hereinafter sometimes referred to as “LPA”) between Defendant CITY OF  
6 SAN DIEGO (hereinafter sometimes referred to as “CITY”) and 101 ASH, LLC, a Delaware  
7 limited liability company (hereinafter sometimes referred to as “101 ASH LLC”) because the  
8 LPA violates Section 18 of Article 16 of the California State Constitution (hereinafter referred to  
9 as “Section 18”). The LPA provided for CITY to lease-purchase a 21-story downtown San Diego  
10 office building known as The Sempra Building, located at 101 Ash Street, San Diego, California.  
11 The transaction violated Section 18 because City of San Diego officials agreed to incur liability  
12 and indebtedness in one-year that exceeded the City’s same year income and revenue.

13 2. In addition to setting aside the LPA, Plaintiff GORDON also seeks to disgorge a  
14 minimum of \$23,527,966 of public funds paid by CITY to date pursuant to the LPA to Defendant  
15 WILMINGTON TRUST, NATIONAL ASSOCIATION, as Trustee for the registered certificate  
16 holders of the CGA Capital Credit Lease-Backed Pass-Through Trust, Series 2017-CTL-1  
17 (hereinafter sometimes referred to as “WILMINGTON TRUST”).

18 3. Further to the \$23,527,966 disgorgement of public funds from WILMINGTON  
19 TRUST, Plaintiff GORDON also seeks to disgorge a minimum of \$6,059,298.95 of additional  
20 public funds paid by CITY to, or for the benefit of, 101 ASH, LLC, in violation of Section 18 of  
21 Article 16 of the California State Constitution.

22 4. The 101 Ash Street Office Building is a 21-story concrete and steel high-rise  
23 building situated on a one-acre parcel in central Downtown San Diego located at 101 Ash Street,  
24 San Diego, California. The structure, known and often referred to in the public as The Sempra  
25 Building, was built in 1967 and served as the headquarters for San Diego Gas & Electric for fifty  
26 years. As of October 2016, when the LPA was being negotiated with CITY, the building was at  
27 0% tenant occupancy.

28 ///



1 92101.

2 13. Defendant CITY OF SAN DIEGO, a municipal corporation of the State of  
3 California, is required to comply with the applicable provisions of the laws of its Charter and the  
4 Constitution of the State of California. The City of San Diego is named as a necessary defendant  
5 for purposes of the relief sought herein.

6 14. Defendant ROLANDO CHARVEL is sued in his official capacity as the Chief  
7 Financial Officer of the City of San Diego and as a necessary defendant for purposes of the relief  
8 sought. Defendant CHARVEL is in charge of debt management and responsible for expending  
9 public funds for rent, operating expenses, and anything else required under the City’s lease-to-  
10 own agreement for the building located at 101 Ash Street, San Diego California. Specifically,  
11 Defendant CHARVEL has been authorized to transfer public funds from the Real Estate Assets  
12 Operating Department Budget to the Citywide Program Expenditures Department and expend  
13 those funds for rent, operating expenses, improvements, and other requirements under the City-  
14 leasehold. Defendant CHARVEL is also authorized to establish a restricted Capital Improvement  
15 Program “CIP” fund for capital improvements relating specifically to 101 Ash Street, San Diego,  
16 California.

17 15. Sempra Energy is a utility holding company; its principal asset is San Diego Gas  
18 & Electric Co. (hereinafter “Sempra” and/or “SDG&E”). Sempra and SDG&E operated out of the  
19 101 Ash Street Building from 1968 through 2015 when both companies moved to a new high-rise  
20 building located at 488 Eighth Ave in East Village San Diego. The 101 Ash Street, San Diego,  
21 California, building that is the subject of the LPA hereinafter will be sometimes referred to as  
22 “The Sempra Building,” as it is commonly referred to by the public.

23 16. DOE DEFENDANTS 1-20, acting together on behalf of the non-City of San Diego  
24 Defendants, received funds under the illegal LPA (“Public Fund Recipients”) in violation of the  
25 debt limit laws within the California Constitution and the City Charter.

26 17. DOE DEFENDANTS 1-30 possessed an interest in the non-City Defendants and  
27 used their status to obtain funds from the City to ultimately benefit them.

28 ///

1 18. DOE DEFENDANTS 31-50 are charged with responsibilities concerning the City  
2 of San Diego 101 Ash Street lease and payments by the City of San Diego and are sued as parties  
3 necessary to the requested relief.

4 19. Plaintiff is informed and believes, and thereupon alleges, that at all times relevant  
5 and mentioned herein, Defendants and DOES 1 through 100, inclusive, and each of them, were  
6 the agents, servants, employees, independent contractors, co-conspirators, management  
7 companies, subsidiaries and/or joint ventures of the remaining Defendants, and each of them, and  
8 were at all times material hereto acting within the authorized course, scope and purpose of said  
9 agency and employment, and/or that all of said acts were subsequently performed with the  
10 knowledge, acquiescence, ratification and consent of the respective principals, and the benefits  
11 thereof accepted by said principals.

12 20. The true names and/or capacities, whether individual, corporate, governmental,  
13 associate, or otherwise, of Defendant DOES 1 through 100, inclusive, and each of them, are  
14 unknown to Plaintiff, who therefore sue said Defendants by such fictitious names. Plaintiff is  
15 informed and believes, and thereon alleges, that each Defendant fictitiously named herein as a  
16 DOE is legally responsible as alleged herein, for the events and damages hereinafter referred to,  
17 and which legally caused the injuries and damages to Plaintiff as hereinafter alleged. Plaintiff will  
18 seek leave of Court to amend this complaint to insert the true names and/or capacities of such  
19 fictitiously named Defendants when the same have been ascertained.

#### 20 **GENERAL ALLEGATIONS**

21 21. This taxpayer action is brought under CCP § 526a because San Diego City  
22 officials have failed to fully vindicate the rights of Plaintiff and other San Diego taxpayers to stop  
23 the waste of funds and to recover funds already wasted relating to the 101 Ash Street building. In  
24 a related action filed in this Court entitled, *City of San Diego v. 101 Ash, LLC, et al*, Case No. 37-  
25 2020-00036247-CU-CO-CTL, CITY incorrectly asserts it was unable to occupy The Sempra  
26 Building since beginning January, 2020, to the present, when in fact CITY was unable to occupy  
27 The Sempra Building since beginning January, 2017, to the present. CITY officials have thus  
28 seemingly abandoned CITY'S right to recover from both WILMINGTON TRUST and other

1 Defendant recipients an additional unlawfully transferred amount of \$19,250,154 paid by CITY  
2 from January 2017 to December 2019, as follows:

3

Year	Amount
2017	\$6,416,718.00
2018	\$6,416,718.00
2019	\$6,416,718.00

4  
5

6 22. CITY officials also breached their fiduciary duty to protect public funds by  
7 entering into the \$200 million LPA in violation of Art XVI, Section 18, and by making in excess  
8 of \$23 million total through in monthly payments from January 2017 to date pursuant to the LPA  
9 payable to Defendant WILMINGTON TRUST, Defendant 101 ASH, LLC, and/or to other DOE  
10 Defendants in violation of Section 18.

11 23. CITY officials also breached their fiduciary duty to protect public funds by  
12 entering into the \$200 million LPA in violation of Art XVI, Section 18, and by paying over  
13 \$6,059,298.95 to date pursuant to the LPA payable to Defendant 101 ASH, LLC and other DOE  
14 Defendants in violation of Section 18.

15 24. CITY officials further violated their fiduciary duty to taxpayers by failing to  
16 properly identify which entities and/or individuals received the approximately \$23 million and \$6  
17 million paid by CITY pursuant to the LPA. Those unidentified parties who in fact received the  
18 unlawfully-paid \$29 million are sued herein for disgorgement and such other remedies as CITY  
19 may be entitled as DOE Defendants.

20 25. CITY officials and Defendant 101 ASH LLC have made false and or publicly  
21 misleading representations that they and each of them entered into an LPA that was in compliance  
22 with all applicable laws, including Article 16, Section 18(a) of the California Constitution. The  
23 LPA falsely states, “[T]he obligation of the Lessee (City of San Diego) to pay Rent does not  
24 constitute an indebtedness of the [City of San Diego].” The true facts known to CITY and 101  
25 ASH LLC were that the LPA created an unlawful obligation upon CITY for the unlawful benefit  
26 of Defendants because: a) CITY was incurring an obligation to pay Defendants \$200 million for  
27 The Sempra Building which CITY would not be able to occupy; and b) because the LPA did not  
28 provide for an abatement-of-rent owing Defendants in the event CITY is unable to occupy the

1 building.

2 **A. Lease Purchase Agreement**

3 26. On November 15, 2016, the San Diego City Council authorized the City of San  
4 Diego to enter into the LPA with 101 Ash, LLC, which provided for the City to incur over \$200  
5 million to lease purchase from 101 Ash, LLC The Sempra Building. The indebtedness and  
6 liability the City incurred in agreeing to the LPA exceeded the income and revenue provided for  
7 such year, without the assent of two-thirds of the voters of the public entity voting at an election  
8 to be held for that purpose,

9 **B. Further Representations Made to Taxpayers About The Sempra Building**

10 27. San Diego taxpayers were told that the City should authorize the LPA because  
11 The Sempra Building would (1) increase accessibility and ease flow for the public; (2) provide  
12 the City an estimated savings in occupancy expenses of over \$44 million in a 20-year period and  
13 allow the City to control its expenses at a time of record-breaking rent increases for the  
14 Downtown market; (3) allow City operations to be centralized in one building vs. spread out into  
15 several buildings, thus providing for less wasted travel time between buildings for employees as  
16 well as improved service to the public; and (4) substantially improve working conditions for all  
17 affected City employees. The LPA accomplished none of those four things; all of these  
18 representations were in fact false, and Defendant 101 ASH LLC, knew them to be false at the  
19 time the LPA was entered into with CITY.

20 28. 101 ASH LLC represented to CITY that a 2016 Property Condition Report (PCR)  
21 for The Sempra Building provided to CITY fairly and accurately represented the true condition of  
22 The Sempra Building, as follows: (1)"[T]he Site was observed to be in good condition. Evidence  
23 of on-going maintenance was observed;" (2) the previous occupant, Sempra Energy, was  
24 meticulous in their maintenance and care of the property over their several decades of occupancy;  
25 (3) The Sempra Building's estimated remaining useful life "should be at least an additional 40  
26 years barring any natural disasters"; (4) there were no obvious items of deferred routine  
27 maintenance that warrant mention; and (5) The Sempra Building only needed \$10,000 to clean,  
28 caulk and pressure wash the exterior of the building.



1           **C.     The City Could Not Occupy the Ash Street Building**

2           29.     CITY was unable to safely occupy The Sempra Building under the LPA and did  
3 not have a useful life for CITY’s use and in consideration for payments. The true condition of  
4 The Sempra Building was not accurately or fairly represented by 101 ASH LLC as stated in the  
5 2016 Property Condition Report. In fact: a) a lack of proper maintenance and/or deferred  
6 maintenance affecting safe occupancy was known to sellers and/or observable upon reasonable  
7 diligence; b) the previous tenant was aware of deferred maintenance issues and conditions  
8 affecting safe long term occupancy and made its decision to relocate based in large part on those  
9 safety concerns; c) The Sempra Building had negligible years useful life remaining without  
10 extensive remediation and repair; d) there were many items of deferred maintenance which were  
11 known to Defendants and were observable to real estate condition experts retained by Defendants  
12 but not disclosed to CITY; and e) the representation that the building only needed caulking and  
13 \$10,000 power washing was a knowing and false misrepresentation proffered by Defendants with  
14 the intent to mislead the CITY and the public as to the true condition of the building, requiring  
15 tens of millions of dollars in repairs and years of work before it could be safely occupied. As a  
16 result of these misrepresentations, the City of San Diego was in fact unable to safely occupy The  
17 Sempra Building under the LPA.

18                   **1.     Useful Life**

19           30.     101 Ash, LLC agents falsely represented to CITY officials The Sempra Building  
20 had an estimated remaining economic life of 40 years as an inducement to enter into the LPA.

21           31.     In fact, major components of The Sempra Building necessary for lawful and safe  
22 occupancy not only did not have the represented 40 years of remaining useful life, they were in  
23 many examples decades beyond their remaining useful life and in such a state of disrepair as to be  
24 inoperable and unrepairable. City employees could **not** in fact safely occupy The Sempra  
25 Building because substantial parts of the building’s systems and materials were in need of repair,  
26 replacement and/or removal to allow for safe occupation of the building by the City. As an  
27 example, the HVAC system was not operational and because of a lack of ongoing maintenance  
28 and its age it was no longer capable of being used or repaired. Consequently, the entire HVAC

1 system, including all ducting, blowers, and electronic control systems needs to be replaced at  
2 substantial expense in terms of construction costs and time during which time the building cannot  
3 not be occupied. To illustrate this point, the following actual conditions were observed by  
4 construction experts retained by CITY in 2020 relative to the HVAC system: a) the Variable Air  
5 Volume boxes in The Sempra Building (part of the air flow and air conditioning systems) had a  
6 *negative* 25-year remaining useful life (the systems had exceeded their original estimated useful  
7 life by 25 years); b) the Hydronic Constant Volume Air Handlers (part of the heating, ventilating,  
8 and air-conditioning system) had a negative 5-year useful life; c) the fan coil units (another part  
9 of the HVAC) system had a negative 33-year useful life; d) the Constant Air Volume and  
10 Variable Air Volume Boxes (another part of the heating, ventilating, and/or air-conditioning  
11 systems) had a negative 33-year useful life; e) the metal ductwork, dampers, and fire dampers all  
12 had negative useful lives of between 23- and 33-years. None of these conditions were fairly or  
13 accurately disclosed in the building condition assessment or remaining useful life statements  
14 made by Defendants at the time the CITY was induced to enter into the LPA.

15 32. Furthermore, because of obsolescence and poor upkeep, most of The Sempra  
16 Building's heating, ventilation and air conditioning systems (HVAC) ran ineffectively needed to  
17 be replaced. When the CITY tried unsuccessfully to occupy the building in December 2019,  
18 there was 0% heating and 50% cooling available to the workers, which is not only grossly out of  
19 sync with the exceptionally excellent building condition representations made by Defendants, it  
20 made the building literally uninhabitable. To make the building functional, let alone capable of a  
21 remaining useful life of 40 years as represented by Defendants, the entire HVAC system needs to  
22 be replaced including the ducting on all floors.

23 33. The functional obsolescence of The Sempra Building includes a need for asbestos  
24 abatement. To "remove the existing asbestos and rebuild the impacted space at the Ash Street  
25 Building was estimated to cost \$16 to \$25 million."

26 34. In addition to the HVAC system, the fire systems of the building are not  
27 operational due to obsolescence and lack of maintenance making the building unsafe for  
28 occupancy. Like all office high rises, to ensure the safety of the City workers who will reside

1 there and the public who will be invited in to do business with the City daily, The Sempra  
2 Building required appropriate fire-smoke dampers, smoke evacuation, stairway pressurization  
3 system, and ductwork system be installed as well as all the electronics necessary to recognize a  
4 fire, notify the first responders, then close fire doors, clear the air in the fire escape, and control  
5 the HVAC system so as not to feed oxygen into the burning floors while delivering fresh air to  
6 the people trapped on adjacent floors. None of these systems are operational. The metal ducting  
7 is in such poor condition of decay that the fire dampers either do not open and close or they are  
8 physically propped open so as to maximize heating and air conditioning since the HVAC system  
9 is so poor. The electronic control systems are out of date and inoperable such that the fire control  
10 system cannot communicate with the fire damper control system and even if a signal is received  
11 the damper control system can't communicate with the damper control motor. Then in the event  
12 a signal is sent to the damper control motor, so many of the fire dampers are rusted out or locked  
13 open there is in fact no air flow control in the event of fire.

14 35. Layered into this HVAC and Fire Safety obsolescence is the asbestos condition  
15 which is exacerbated by the ducting because asbestos dust and debris inevitably makes its way  
16 into the old systems and decayed ducting in use at The Sempra Building. Due to asbestos safety  
17 requirements and age/decay of the primary ductwork, the air distribution system has to be  
18 replaced in its entirety. A new ducted system including smoke evacuation, had to be integrated  
19 with the fire alarm and Building Automation System along with new motorized fire smoke  
20 dampers to comply with National Fire Protection Association (NFPA) standards and appropriate  
21 City standard high-rise building codes. None of this was disclosed by Defendants at the time the  
22 CITY was induced to enter into the LPA and in fact these conditions are directly contradictory to  
23 the false representations made by Defendants that the building was capable of immediate and safe  
24 occupancy.

25 36. Subsequent to these adverse building conditions leaking out into the public, the  
26 Defendants have falsely alleged that The Sempra Building, and all of its critical systems were in  
27 perfect working order and had a remaining 40 year useful life, needing only a \$10,000 power  
28 washing and caulking, when title transferred to CITY in 2017 but somehow these systems became

1 obsolete and suddenly aged decades beyond their remaining useful life in the ensuing three years  
2 after the sale. In 2020, the CITY's expert team determined that The Sempra Building's original  
3 fire protection did not contain current Code-compliant fire-smoke dampers, smoke evacuation,  
4 and stairway smoke pressurization due to out-of-date fire protection standards. Moreover, directly  
5 contradicting Defendants, the original fire system did not appear to have been disturbed during  
6 the various tenant improvements made to the building.

7 37. As the CITY's expert team concluded in 2020, the original fire dampers in the Ash  
8 Street Building are still in place per the original drawings. Moreover, in the poor condition the  
9 fire safety system is in, if a fire were to occur within the building, the current fusible link fire  
10 dampers located in the ductwork would only prevent supply air from feeding the fire. To be safely  
11 occupied and for the building to have a remaining useful life of 40 years as represented by  
12 Defendants at the time of inducement, the current fire dampers need an upgrade to a smoke-rated  
13 damper integrated with the fire protection system in order to prevent smoke from entering in the  
14 HVAC return air system and distributing the smoke throughout the building.

15 38. The CITY experts have also concluded there is a need to replace existing access  
16 doors to the HVAC main duct shaft to an appropriate fire-rated maintenance access. The fire  
17 sprinkler system is not integrated with the fire alarm system and is lacking areas of coverage in  
18 certain rooms in the building. The fire sprinkler system needs to be integrated with the fire alarm  
19 system and additional fire sprinkler coverage needs to be added in areas lacking the required fire  
20 sprinkler coverage.

21 39. In addition to a lack of a working HVAC system and a working fire safety system,  
22 the CITY's expert team has concluded the electrical system is also failing, which also contradicts  
23 the 40 year remaining useful life representations made by Defendants to induce the CITY to enter  
24 into the LPA. It is fundamentally unreasonable if not a fraudulent misrepresentation of the  
25 building condition to state to the CITY that the electrical system at 101 Ash, which hadn't been  
26 upgraded or materially modified since it was built in 1967, would serve the CITY presently let  
27 along into the 2050s. Specifically, to be capable of a 40 year remaining useful life, The Sempra  
28 Building needs a modernization project to replace the electrical system, which relies on the

1 original 1967 equipment and the 12 KV feeders.

2 40. Even in the narrow categories where electrical upgrades occurred, they were so out  
3 of date in 2017, that they not only didn't have 40 years remaining useful life, they too have  
4 already exceeded their expected useful life and need to be replaced. According to the CITY's  
5 experts in 2020, the electrical panelboards installed in 1993 need replacement because they are  
6 nearing the end of their rated life. The older fluorescent light fixtures needed to be replaced.  
7 The Sempra Building electrical infrastructure consisting of the 12.5 KV switchgear, medium  
8 voltage distribution, transformers, switchboards, and motor control centers remain as installed in  
9 1967. This equipment was beyond its rated life (the amount of time that a piece of equipment is  
10 expected to last) and is no longer manufactured. Surplus replacement parts will be increasingly  
11 difficult to procure. Several components of the Ash Street Building electrical equipment have  
12 reached or passed their useful life including Draw-Out 600V Switchboards, Medium Voltage  
13 Switches, Motor Control Center, Lighting, and Receptacles Light Switches. The Sempra Building  
14 contains (2) 250KVA solar gas turbine emergency generators on the 21st floor. The generators  
15 are original to the 1967 construction and are well beyond their expected 25-year rated life. The  
16 building's electric emergency system needs an upgrade with a new generator or generators with  
17 separate and independent wiring for emergency and standby equipment per modern code.

18 41. The estimated costs for the repairs needed to make the Ash Street Building capable  
19 for safe employee occupancy was estimated by the CITY'S outside experts in 2020 to exceed  
20 \$115 million, including \$22 million for the HVAC components, \$13.85 million for electrical  
21 improvements, \$68.4 million in construction costs, and \$8 million for lighting and Branch  
22 Wiring. In addition, it was estimated that it would take 4 years of additional non-occupancy for  
23 contractors to complete the job.

24 42. These items articulated herein are alleged by way of examples. There are  
25 additional life safety issues in the category of plumbing, glazing, and other critical systems that  
26 are in states of gross disrepair or functional obsolescence due to extreme age.

27 43. As a direct and proximate result of these conditions, CITY has been since 2017  
28 and remains to this day unable to occupy The Sempra Building. None of these building

1 conditions were disclosed to CITY at the time of the LPA negotiation and in fact the disclosures  
2 that were made by Defendants are contradicted by these extensive findings of obsolescence  
3 throughout all major systems. It is the intersection of the extensively poor buildings conditions  
4 present, combined with the unconstitutional obligations of the LPA entered into on the basis of  
5 extensive non-disclosures and misrepresentations by Defendants which Plaintiff contends renders  
6 the LPA unlawful and unenforceable, thus entitling CITY to return of all monies wrongfully paid  
7 and received.

8 **2. Asbestos**

9 44. In addition to the obsolescence and disrepair of nearly all major systems in The  
10 Sempra Building, overlaying the replacement of these systems to make the building capable of  
11 safe occupancy is the fact that the asbestos conditions are in a similar state of old age and lack of  
12 maintenance. The Sempra Building, as is common for structures built in the 1960s, contains  
13 asbestos. As exists with regard to the electrical, plumbing, HVAC, and fire systems, the previous  
14 owners did very little by way of maintenance and misrepresented the condition of the asbestos  
15 containment as being capable of another 40 year remaining useful life. In fact, the asbestos  
16 coating, which is applied to prevent asbestos fiber from flaking and falling off thus entering the  
17 ducting where it is blown into the workspace by the HVAC or making its way through the ceiling  
18 tiles and raining down into the workspaces, has also reached the end of its useful life and has  
19 failed. As a consequence asbestos material is dislodged during ordinary use of the building and  
20 makes its way into the work spaces on a constant basis despite extraordinary, repetitive and  
21 expensive cleaning. As with all the other systems, the obsolescence of the asbestos containment  
22 affects the capability of the CITY to occupy the building and contradicts representations made by  
23 Defendants when the CITY was induced to enter into the LPA.

24 45. Undisclosed to City officials at the time of the LPA was the fact that SDG&E  
25 representatives in November 2014 disclosed to State regulators The Sempra Building had major  
26 defects. The SDG&E agents told the State regulators that a Building Condition Assessment  
27 (“BCA”) was also prepared. The BCS indicated there was likely a minimum of \$3 million of  
28 building infrastructure capital repairs that would be required to keep the building operational for

1 an additional 10 years. To remove the existing asbestos and rebuild the impacted space was  
2 estimated to cost \$16 to \$25 million.

3 46. As a direct and proximate result of the asbestos containment systems failure,  
4 exacerbated by the decaying ducting and the obsolete design of the ducting returns, the San Diego  
5 County Air Pollution Control District observed repeated instances of asbestos contamination in  
6 the work spaces and issued a series violation notices beginning in August, 2019, and continuing  
7 as frequently as weekly resulting in the unprecedented issuance of a Nuisance Violation in  
8 January, 2020, which caused CITY to suspend further moving in of CITY workers and the  
9 immediate evacuation of the 1,300 CITY workers who had just been moved into the building  
10 three weeks prior.

11 47. In 2020, the CITY's team of outside experts has confirmed that the asbestos  
12 containment, which dates back to original construction, has also exceeded its reasonably expected  
13 useful life necessitating abatement costs of in excess of \$20 million to make the building capable  
14 of safe occupancy for the next 40 years. These conditions were known or should have been  
15 known to Defendants at the time the false representations were made that the building was  
16 capable of immediate occupancy with a remaining useful life of 40 years. Regardless, the true  
17 facts are that the asbestos containment has failed because it has exceeded its reasonably expected  
18 useful life, which failure has prevented and will continue to prevent the CITY from being capable  
19 of occupying the building, thus rendering the LPA unconstitutional under its express terms.

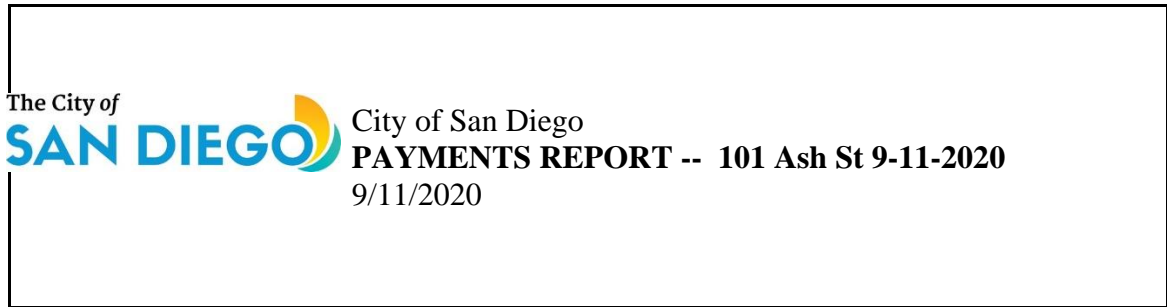
20 **D. Disgorgement of Illegal Payments**

21 48. On January 3, 2017, Defendant 101 ASH, LLC served a "Rent Direction Letter"  
22 on the City of San Diego which provided, in pertinent part:

23 Please be advised that, unless otherwise instructed by Lender in writing, from the  
24 date hereof until all amounts due Lender under the Note have been paid in full,  
25 Tenant is hereby authorized and directed, and by acknowledging this letter agrees,  
26 to remit when due under the terms of the Lease (i) any and all payments of Rent,  
27 and (ii) any and all other sums owed to Borrower under the Lease, directly to  
28 Lender by wire transfer in immediately available federal funds to the account  
shown on **Exhibit A** or to such other account as Lender may designate by funds  
to the account shown on **Exhibit A** or to such other account as Lender may  
designate by written notice to Tenant. Lender's address is as follows:

WILMINGTON TRUST, National Association, as trustee for the registered certificate holders, from time to time, of the CGA Capital Credit Lease-Backed Pass Through Trust, Series 2017-CTL-1 c/o Corporate Trust Administration 25 South Charles Street, 11th Floor  
 Baltimore, Maryland 21201  
 Attention: Corporate Trust Administration

49. As provided in the Rent Direction Letter, and in violation of Section 18 of Article 16 of the California State Constitution, the City made the following payments to WILMINGTON TRUST on the following dates:



DATE / LEASE	RENT \$
LEASE CITY/101 ASH, LLC	\$0.00
JANUARY 2017	\$534,726.50
FEBRUARY 2017	\$534,726.50
MARCH 2017	\$534,726.50
APRIL 2017	\$534,726.50
MAY 2017	\$534,726.50
JUNE 2017	\$534,726.50
JULY 2017	\$534,726.50
AUGUST 2017	\$534,726.50
SEPTEMBER 2017	\$534,726.50
OCTOBER 2017	\$534,726.50
NOVEMBER 2017	\$534,726.50
DECEMBER 2017	\$534,726.50
JANUARY 2018	\$534,726.50
FEBRUARY 2018	\$534,726.50
MARCH 2018	\$534,726.50
APRIL 2018	\$534,726.50
MAY 2018	\$534,726.50
JUNE 2018	\$534,726.50
JULY 2018	\$534,726.50
AUGUST 2018	\$534,726.50
SEPTEMBER 2018	\$534,726.50



1	OCTOBER 2018	\$534,726.50
2	NOVEMBER 2018	\$534,726.50
3	DECEMBER 2018	\$534,726.50
4	JANUARY 2019	\$1,069,453.00
5	FEBRUARY 2019	\$534,726.50
6	MARCH 2019	\$534,726.50
7	APRIL 2019	\$534,726.50
8	JULY 2019	\$534,726.50
9	AUGUST 2019	\$534,726.50
10	SEPTEMBER 2019	\$534,726.50
11	OCTOBER 2019	\$534,726.50
12	NOVEMBER 2019	\$534,726.50
13	DECEMBER 2019	\$534,726.50
14	JANUARY 2020	\$534,726.50
15	FEBRUARY 2020	\$534,726.50
16	MARCH 2020	\$534,726.50
17	APRIL 2020	\$534,726.50
18	MAY 2020	\$534,726.50
19	JUNE 2020	\$534,726.50
20	JULY 2020	\$534,726.50
21	AUGUST 2020	\$534,726.50
22	SEPTEMBER 2020	\$534,726.50

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23	REPORT TOTALS	\$23,527,966.00
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50. Plaintiff GORDON filed suit against Defendants 101 ASH, LLC, and as necessary parties, the CITY and ROLANDO CHARVEL, on August 17, 2020 to stop the waste of public funds paid by the CITY related to the 101 Ash Street/Sempre Building.

51. On August 21, 2020, Plaintiff’s counsel sent a letter to then City of San Diego Mayor demanding CITY stop making further payments in the approximate amounts of Five Hundred Thirty-Four Thousand Seven Hundred Twenty-Six and 50/100 Dollars (\$534,726.50) per month under the 20-year LPA because the 20-year lease constitutes a violation of the debt limits in Section 18 of Article XVI of the California State Constitution. A copy of the August 21, 2020, lawsuit was attached.

52. On September 1, 2020, Defendant CHARVEL, in his capacity as City Chief Financial Officer, wrote to Defendant 101 ASH, LLC to advise that Defendant CITY would begin suspending payment under the LPA. Mr. CHARVEL represented he was “writing to advise that

1 effective with the September 1, 2020, lease payment due under the Lease Agreement Between 101  
2 Ash, LLC and the City of San Diego ('Lease Agreement'), the City is suspending its lease payments  
3 because the City cannot use the building for the intended purposes of its leasing and possibly for  
4 additional reasons including, but not limited to, those set forth below which are currently under  
5 review. The City has lost use of the building due, in part, to direct physical loss and damage to the  
6 premises, including from widespread and negligent disturbance of asbestos.”

7 53. The September 1, 2020, CITY letter was also sent to Cisterra, LexTerra PLC -  
8 Attention: David L. Dick, CGA Servicing, LLC, and Defendant WILMINGTON TRUST, National  
9 Association, as trustee for the registered certificate holders, from time to time, of the CGA Capital  
10 Credit Lease-Backed Pass-Through Trust, Series 2017-CTL-1.

11 54. After CITY publicly represented it would suspend payments under the LPA, it was  
12 discovered the City was taking money from the General Fund in the same amount of payments  
13 heretofore made, and segregating them under undisclosed terms and conditions. This gave the false  
14 appearance to the public that CITY had stopped taking money from the General Fund in the monthly  
15 amounts required by the LPA, when in fact, it continued to do so.

16 **E. The Lease Purchase Agreement is Unconstitutional and Thus Void**

17 55. Under the LPA, CITY officials incurred indebtedness and liability of  
18 \$201,902,440 to lease-purchase the 49-year-old vacant Sempra Building in downtown San Diego  
19 that could not be occupied because of material asbestos, electrical and mechanical defects. The  
20 \$201,902,440 indebtedness and liability were incurred to lease-purchase The Sempra Building  
21 when it did not, as advertised, increase accessibility and ease of flow for the public, did not  
22 substantially improve working conditions for all affected CITY employees, did not provide  
23 savings in occupancy expenses, did not allow CITY to control its expenses, and did not allow  
24 CITY operations to be centralized in one building.

25 56. The LPA was knowingly drafted to require CITY to make payments under the  
26 LPA, even if the City could not occupy The Sempra Building.

27 57. The LPA stated the “Premises are leased to Tenant in their present condition  
28 without representation or warranty by Landlord.” CITY, as purchaser, was not familiar with or

1 knowledge about the physical condition of The Sempra Building, yet the LPA stated the  
2 opposite: “Tenant (the City) acknowledges that it is sufficiently familiar with and knowledgeable  
3 about the physical condition of the Premises, including any elements of deferred maintenance or  
4 the presence of any Hazardous Materials and is not relying on any representation or warranty by  
5 Landlord with regard to the condition of the Premises, and Tenant finds all of the same  
6 satisfactory for all purposes.”

7 58. The LPA’s attempted transfer of all risks regarding the building onto CITY did not  
8 provide CITY a value corresponding to the \$201,902,440 purchase price: “ALL RISKS  
9 INCIDENT THERETO, EXCEPT AS OTHERWISE SET FORTH HEREIN, ARE TO BE  
10 BORNE BY TENANT IN THE EVENT OF ANY DEFECT OR DEFICIENCY OF ANY  
11 NATURE IN THE PREMISES OR ANY PROPERTY OR FIXTURE OR OTHER ITEM  
12 CONSTITUTING A PORTION THEREOF, WHETHER PATENT OR LATENT, EXCEPT AS  
13 OTHERWISE STATED.”

14 59. The LPA provided CITY was to pay and “LANDLORD SHALL HAVE NO  
15 RESPONSIBILITY OR LIABILITY WITH RESPECT THERETO.” The LPA further provided  
16 that the liability limits of the LPA had been “NEGOTIATED AND ARE INTENDED TO BE A  
17 COMPLETE EXCLUSION AND NEGATION OF ANY WARRANTIES BY LANDLORD.”  
18 The LPA left no doubt CITY would be required to pay under the LPA, with no rent abatement  
19 provided no matter the reason. Under the LPA, CITY purportedly “fully and irrevocably  
20 release[d] Landlord and each person or entity acting by or on behalf of Landlord, and any  
21 member, partner, officer, director, employee, agent, affiliate, successor or assign of Landlord  
22 (collectively, the “**Landlord Parties**”).”

23 60. The LPA also purported to release the lender providing financing for the LPA.  
24 The LPA expressly released the lender under any loan (a “**Fee Loan**”) secured by a deed of trust  
25 that encumbers the Premises (a “**Fee Mortgage**”) and the holder of any ownership interests in the  
26 assets of a trust that is holding a loan secured by a Fee Mortgage (a “**Certificate Holder**”) and its  
27 agents, members, partners, employees, representatives, officers, directors, agents, related and  
28 affiliated entities, successors and assigns (collectively, the “**Lender Parties**”) from any and all

1 claims or choses in action that the Tenant Parties may have or thereafter acquire against any of  
2 the Landlord Parties or the Lender Parties for any cost, loss, liability, damage, expense, demand,  
3 action or cause of action (“**Claims**”) arising from or related to any matter of any nature relating  
4 to, and condition of, the Premises, including any latent or patent construction defects, errors or  
5 omissions, compliance with law matters, Hazardous Materials and other environmental matters  
6 within, under or upon, or in the vicinity of the Premises, any statutory or common law right  
7 Tenant may have to receive disclosures from Landlord, including, without limitation, any  
8 disclosures as to the Premises’ location within areas designated as subject to flooding, fire,  
9 seismic or earthquake risks by any federal, state or local entity, the need to obtain flood insurance,  
10 and/or the advisability of obtaining title insurance, or any other condition or circumstance  
11 affecting the Premises, its financial viability, use or operation, or any portion thereof.

12 61. The LPA made it clear there was no abatement of rent in case CITY was not able  
13 to occupy the building:

14 “This release includes Claims of which Tenant or any Tenant Party is presently  
15 unaware or which Tenant, or a Tenant Party does not presently suspect to exist in  
16 its favor which, if known by Tenant or such Tenant Party, would materially affect  
17 Tenant’s release of the Landlord Parties. In connection with the general release set  
18 forth in this subsection 1(c), Tenant specifically waives the provisions of  
19 California Civil Code Section 1542, which provides as follows:

20 “A general release does not extend to claims which the  
21 creditor does not know or suspect to exist in his or her favor  
22 at the time of executing the release, which if known by him  
23 or her must have materially affected his or her settlement  
24 with the debtor.”

25 \_\_\_\_\_  
26 Tenant’s Initials

27 62. Under the LPA, in violation of Section 18 of Article 16 of the California  
28 Constitution, CITY was required to make monthly payments of Five Hundred Thirty-Four  
Thousand Seven Hundred Twenty Six and 50/100 Dollars (\$534,726.50) per month for 240  
months or 20 years.

63. The LPA is unconstitutional in the context of the building condition that was either  
not adequately disclosed or where the disclosures were false. An LPA procured on

1 misrepresentations as to immediate occupancy without abatement is unconstitutional under  
2 Section 18.

3 64. The LPA language is unconstitutional on its face as there exists no abatement  
4 language in the event the building is incapable of use and regardless of the building's condition.

5 65. The LPA is further unconstitutional in the context of information discovered after  
6 the LPA was executed pertaining to the true condition of the building which made it  
7 uninhabitable. Such preclusion of abatement and an inability to occupy the building renders the  
8 LPA in violation of the Constitutional debt safeguards set forth in Section 18.

9 66. As the LPA is unconstitutional as violative of Section 18, it is void. Reformation  
10 is not the remedy as the LPA cannot be reframed as the LPA embodies the parties' agreement.  
11 Rather, the remedy is to void the LPA.

### 12 **FIRST CAUSE OF ACTION**

#### 13 **For a Declaration the LPA is Void Under Cal. Const. Article 16, Section 18**

#### 14 **(Against All Defendants and DOES)**

15 67. Plaintiff incorporates and realleges each allegation above as though fully set forth  
16 herein.

17 68. Section 18 of Article 16 of the California Constitution ("Section 18") provides in  
18 pertinent part:

19 (a) *No county, city \*\*\* shall incur any indebtedness or liability in any manner or*  
20 *for any purpose exceeding in any year the income and revenue provided for*  
21 *such year, without the assent of two-thirds of the voters of the public entity*  
22 *voting at an election to be held for that purpose \*\*\**

23 69. The LPA at issue here is invalid because the agreement obligated revenues and the  
24 payments without a contemporaneous contingent benefit of consideration.

25 70. Here, the LPA requires payments to be paid out of the ordinary revenue and  
26 income of the City, where each installment is not in payment of the consideration furnished that  
27 year as the building has not provided a beneficial use – has not been able to be occupied – in the  
28 period during which the payments have been and will be made.



1           79.     The primary purpose of CCP § 526a is to enable a large body of citizenry to  
2 challenge government action that would otherwise go unchallenged in the courts because of the  
3 standing requirements.

4           80.     Section 526a provides a mechanism for controlling and restraining Defendants’  
5 illegal, injurious, or wasteful action. Section 526a must be liberally construed to achieve the  
6 remedial purpose of allowing challenges to government action.

7           81.     Plaintiff is a resident of the City of San Diego and pays taxes to the City of San  
8 Diego to support its budget.

9           82.     Plaintiff brings this action to restrain Defendants public waste under CCP § 526a,  
10 and seeks to obtain a judgment, restraining, and preventing any illegal expenditure or waste of  
11 public funds regarding 101 Ash Street. Plaintiff also seeks damages.

12           83.     As detailed above, the City-leasehold for the building at 101 Ash Street is a waste  
13 of public funds because it is a dilapidated building unsafe for human occupancy and does not  
14 provide the requisite beneficial use for the City of San Diego or public.

15           84.     The building located at 101 Ash Street Building does not have the public benefit or  
16 useful purpose because it cannot be used for its intended purposes—providing City services to the  
17 public. Since the building is unsafe for human occupancy, and the extensive of amount of  
18 remedial work required to make the building safe, the public will not be able to use the building  
19 in the foreseeable future.

20           85.     The leasehold for the building located at 101 Ash Street has resulted in an  
21 unnecessary duplication of City-leased buildings and serves no useful purpose.

22           86.     The leasehold for the building located at 101 Ash Street has and will cost a great  
23 deal more than alternative plans considered, without any finding of an additional public benefit.

24           87.     As a result of the actions set forth herein, the City now has immediate and present  
25 indebtedness that exceeds the fair market value of the property and will exceed the City’s yearly  
26 income and revenue. Future fiscal years will be responsible for paying indebtedness in violation  
27 of Cal. Art. XVI, Sec. 18.

28     ///





1 **FOURTH CAUSE OF ACTION**

2 **Disgorgement**

3 **(Against 101 Ash, LLC and DOES 1 to 20)**

4 94. Plaintiff incorporates and realleges each allegation above as though fully set forth  
5 herein.

6 95. Plaintiff, as a taxpayer with standing to bring suit under Cal Code Civ. Proc § 526a  
7 to set aside void or illegal contracts, is authorized to bring this suit against a private entity to  
8 disgorge public funds paid by a local entity on an allegedly illegal public contract.

9 96. For the reasons set forth, above, the LPA is an illegal public contract that is void  
10 and should be set aside.

11 97. As Defendants 101 ASH, LLC and DOES 1 to 20 have received funds from the  
12 City under the LPA, they must disgorge those funds received

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff prays for judgment as follows:

15 1. For a Declaration that the LPA is void under Cal. Const. Article 16, Section 18;

16 2. For an order enjoining Defendants and each of them from continuing to waste  
17 public funds related to the City-leased building located at 101 Ash Street, San Diego, CA 92101  
18 under CCP § 526a;

19 3. For an order declaring Defendants' actions constitute an illegal expenditure and  
20 waste of public funds in violation of the California Constitution under CCP § 526a;

21 4. For the disgorgement of City funds paid to WILMINGTON TRUST under the  
22 LPA;

23 5. For the disgorgement of City funds paid to 101 ASH, LLC, and any other person  
24 or entity under the LPA;

25 6. For damages under CCP § 526a and other damages according to proof at trial;

26 7. For Plaintiff's attorney fees and costs of suit incurred in this matter as provided by  
27 Cal. Code. Civ. Proc. § 1021.5 and any other applicable law;

28 8. For interest at the legal rate; and

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9. For any other further relief, the Court deems just and proper.

AGUIRRE & SEVERSON, LLP

Dated: December 30, 2020

/s/Maria C. Severson  
Maria C. Severson, Esq.