

**FILED**  
San Francisco County Superior Court

MAY 14 2019

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
DEPARTMENT 318

LAURA S. LEHMAN,

Plaintiff,

vs.

TRANSBAY JOINT POWERS AUTHORITY,  
et al,

Defendant

Case No. CGC-16-553758

ORDER DENYING LANGAN  
ENGINEERING AND ENVIRONMENTAL  
SERVICES, INC.'S MOTION FOR  
SUMMARY JUDGMENT

This document applies to:

*Lehman, et al. v. Transbay Joint Powers  
Authority, et al.* (CGC-16-553758)

*Millennium Tower Association v. Mission Street  
Development LLC, et al.* (CGC-17-557830)

*Montana v. Mission Street Development LLC, et  
al.* (CGC-17-558649)

*Buttery v. Jeffries et al.* (CGC-17-556292)

*Ying v. Transbay Joint Powers Authority et al.*  
(CGC-17-559210)

*Maui Peaks Corporation v. Mission Street  
Development et al.* (CGC-17-560322)



1 time after 60 days have elapsed since the general appearance in the action or proceeding of each party  
2 against whom the motion is directed or at any earlier time after the general appearance that the court, with  
3 or without notice and upon good cause shown, may direct.” (C.C.P. § 437c(a)(1).)

4 “A party may move for summary adjudication as to one or more causes of action within an action,  
5 one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the  
6 party contends that the cause of action has no merit, that there is no affirmative defense to the cause of  
7 action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a  
8 claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either  
9 owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be  
10 granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or  
11 an issue of duty.” (C.C.P. § 437c(f)(1).)

12 “The purpose of the law of summary judgment is to provide courts with a mechanism to cut  
13 through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact  
14 necessary to resolve their dispute.” (*Aguilar, supra*, 25 Cal.4th at 843.)

15 “First, and generally, from commencement to conclusion, the party moving for summary judgment  
16 bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to  
17 judgment as a matter of law.” (*Id.* at 850.) “There is a triable issue of material fact if, and only if, the  
18 evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing  
19 the motion in accordance with the applicable standard of proof.” (*Id.*) “A defendant bears the burden of  
20 persuasion that ‘one or more elements of’ the cause of action’ in question ‘cannot be established,’ or that  
21 ‘there is a complete defense’ thereto.” (*Id.*)

22 “Second, and generally, the party moving for summary judgment bears an initial burden of  
23 production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he  
24 carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of  
25 production of his own to make a prima facie showing of the existence of a triable issue of material fact.”  
26 (*Id.*) “A burden of production entails only the presentation of ‘evidence.’” (*Id.*)

27 “Third, and generally, how the parties moving for, and opposing, summary judgment may each  
28 carry their burden of persuasion and/or production depends on which would bear what burden of proof

1 trial.” (*Id.* at 851.) “[I]f a defendant moves for summary judgment against such a plaintiff, he must  
2 present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more  
3 likely than not-otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to  
4 present *his* evidence to a trier of fact.” (*Id.*)

5 The pleadings “delimit the scope of the issues” and” frame “the outer measure of materiality in a  
6 summary judgment proceeding.” (*Hutton v. Fidelity Nat’l Title Co.* (2013) 213 Cal.App.4th 486, 493.)  
7 “[T]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff’s  
8 theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some  
9 theoretical possibility not included in the pleadings.” (*Ibid.*)

10 In a case such as this, where TJPA and MTA alleged that Langan is liable for T&R’s torts under a  
11 successor liability theory, TJPA and MTA bear the burden of establishing inadequate cash consideration  
12 paid for T&R’s assets (as discussed further below). (See *Maloney v. American Pharmaceutical Co.*  
13 (1988) 207 Cal.App.3d 282, 288 fn. 3 [on appeal from a grant of summary judgment, the court quoted  
14 Civil Code section 1615 for the proposition that “[t]he burden of showing a want of consideration  
15 sufficient to support an instrument lies with the party seeking to invalidate or avoid it.”]; see also *Katzir’s*  
16 *Floor and Home Design, Inc. v. M-MLS.com* (9th Cir. 2004) 394 F.3d 1143, 1151 [citing *Maloney* in a  
17 non-summary judgment context, and noting that the “party asserting the theory of successor liability bears  
18 the burden of establishing inadequate consideration.”]; *KNT, Inc., v. USA* (N.D. Cal., Feb. 15, 2019) 2019  
19 WL 1473458, at \*11 [“the Government has the burden of establishing that KNT acquired assets from  
20 MKM Inc. for inadequate consideration” at summary judgment].)

## 21 EVIDENTIARY OBJECTIONS

### 22 **I. Langan’s Objections to TJPA’s Experts.**

23 TJPA proffers the Declaration of Mr. Marcinkowski, as an expert on the valuation of businesses  
24 and assets in connection with mergers and acquisitions. (See Marcinkowski Dec., Ex. 1 at TJPA-DP-  
25 000002- TJPA-DP-000003 & Appendix A.) Mr. Marcinkowski’s opinion is that the stated purchase price  
26 of \$8,569,231 in the APA does not reflect the Fair Market Value of T&R’s assets as of November 1,  
27 2010, the Valuation Date. (See *id.* at TJPA-DP-000003 [“Summary of Opinions”], TJPA-DP-000015

1 Method and the Market Comparable Method to arrive at the opinion that the Fair Market Value of T&R's  
2 assets were \$9.75 million on the Valuation Date. (See *id.* at TJPA-DP-000003 [Summary of Opinions],  
3 TJPA-DP-000006-13 [Income Approach] & Exs. 2.0 and 3.0; TJPA-DP-000013-15 & Ex. 4.0 [Market  
4 Approach].)

5 TJPA proffers the Declaration of Dr. Mordecai, as an expert in forensic financial and economic  
6 analysis. (See Mordecai Dec., Ex. 1 at pp. 10-11 & Appendix B.) Dr. Mordecai's opinion is that the  
7 actual amount of the consideration given by Langan pursuant to the APA on the Valuation Date of  
8 November 1, 2010, was between \$5,045,951 and \$5,306,059, and that only \$4,071,106 was actually  
9 available for creditors of T&R. (See *id.* at pp. 16-26 & Exs. I, I-A.)

10 Langan objects to the opinions of Mr. Marcinkowski and Dr. Mordecai as (i) improper expert  
11 opinion, (ii) speculative and lacking in foundation, and (iii) insufficiently relevant. (See generally,  
12 Langan's Objections to TJPA's Declarations and Evidence Submitted in support of its Opposition to  
13 Langan's Motion for Summary Judgment ("Langan's Objections"); see also TJPA's Responses to  
14 Langan's Objections in support of Langan's Motion for Summary Judgment ("TJPA's Responses to  
15 Langan's Objections"), at pp. 4-76.) These objections are overruled. As outlined above, both Mr.  
16 Marcinkowski and Dr. Mordecai are qualified economists with relevant experience. Both use factors and  
17 methodology economists employ to arrive at their conclusions. (See, e.g., Mordecai Dec., Ex. 1 at pp. 18,  
18 20-23 & fns. 37, 41-43, 46-48 [discussing industry-accepted methodologies] and Marcinkowski Dec., Ex.  
19 1 at TJPA-DP-000003 [Summary of Opinions], TJPA-DP-000006-13 [Income Approach] & Exs. 2.0 and  
20 3.0; TJPA-DP-000013-15 & Ex. 4.0 [Market Approach].) Langan cites to the holding of the California  
21 Supreme Court in *Sargon Enterprises v. University of Southern California* (2012) 55 Cal.4th 747, in  
22 support of its objection to exclude these opinions. (See generally, Langan's Objections.) In *Sargon*, the  
23 forensic accountant's opinion was excluded because it was speculative and not supported by the material  
24 on which the expert relied. (*Id.* at 776-782.) However, in ruling, the Supreme Court cautioned that the  
25 court's "gatekeeping role does not involve choosing between competing expert opinions." (*Id.* at 772.)  
26 The court's gatekeeper's focus "must be solely on principles and methodology, not on the conclusions  
27 that they generate." (*Id.*) Langan's objections go to the weight to be given to the opinions of Mr.

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