

## Allen Matkins



**[Nicholas Waranoff](#)**

Partner  
San Francisco  
(415) 273-7483  
[nwaranoff@allenmatkins.com](mailto:nwaranoff@allenmatkins.com)



**[Tim McDonnell](#)**

Partner  
Los Angeles  
(213) 955-5508  
[tmcdonnell@allenmatkins.com](mailto:tmcdonnell@allenmatkins.com)



**[Stephen R. Thames](#)**

Partner  
Orange County  
(949) 851-5422  
[sthames@allenmatkins.com](mailto:s Thames@allenmatkins.com)

### About Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP is a California law firm with over 240 attorneys practicing out of seven offices in Orange County, Los

## Legal Alert

### Recent Case Highlights CAM and Forbearance Issues

A recent decision of the California Court of Appeal, Sixth Appellate District (San Jose), highlights issues that can arise with respect to common area maintenance charges ("CAM") and forbearing from enforcement of lease obligations. *Tin Tin Corp. v. Pacific Rim Park, LLC* (2/2/2009) No. H032371.

#### CAM Issues

In *Tin Tin*, a group of tenants complained that their landlord had improperly included in CAM costs the landlord's LLC taxes and fees. The tenants also complained that the landlord had failed to provide reasonably detailed annual statements of the CAM costs. The tenants sued the landlord, alleging causes of action for breach of contract, fraud, unfair business practices, and related causes of action.

The leases contained a broad definition of common area operating expenses, defining such expenses as including "all costs relating to the ownership and operation" of the shopping center. The landlord was a single-purpose entity, created for the sole purpose of owning and operating a shopping center.

Based upon this broad language, and expert witness testimony supporting the landlord's position, the trial court ruled for the landlord, but the Court of Appeal reversed. The Court of Appeal held that the LLC fees and taxes are "a cost of conducting business in a particular form," that such assessment would be the same for "any other occupation with the same income" and concluded "that LLC fees and taxes did not qualify as costs 'relating to the ownership and operation' of the Project within the meaning of the contract term 'Common Area Operating Expenses.'"

The tenants raised a second issue at trial concerning CAM expenses, asserting that the landlord failed to provide a "reasonably detailed statement" of each tenant's share of the CAM expenses, as expressly required by the subject leases. The tenants had accepted a one-page statement from the landlord for several years without asking for a more comprehensive statement. Instead, the tenants had asked for more information about the expenses, and in response the landlord had provided a detailed accounting and, when requested, supporting invoices. Based upon these facts, the trial court held that the plaintiffs had waived their right to a more detailed statement by accepting the one-page

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statement from the landlord for several years without asking for a more comprehensive statement. The trial court further held that the landlord substantially complied with its obligations under the lease by providing the more detailed accounting and invoices.

The Court of Appeal upheld the trial court on this issue. The Court of Appeal noted that the trial court finding that the additional information was sufficient to address the tenants' concerns was uncontested, and that tenants' failure to request additional information corroborated the conclusion that the landlord had either complied with the lease or cured any initial failure to do so.

## Forbearance Issues

The *Tin Tin* Court also addressed a third issue: the statute of limitations concerning a tenant's obligation, pursuant to its lease, to complete a remodeling of its premises by a certain date. The Court of Appeal concluded that the four-year statute of limitations applied; that it began to run on the date that the remodel was to have been completed; and that a letter from landlord, two and a half years after the deadline had passed which only reminded the tenant of the obligations and asserted that the tenant continued to be in breach, did not extend the date for performance and thus did not postpone the start of the four-year statute of limitations.

## Lessons

Because the Court of Appeal decision has been certified for publication, and now, more than ever, tenants may be paying closer scrutiny to CAM charges or seeking claims to assert against their landlords based upon alleged overcharging (if only to renegotiate rent), it is worth noting the following lessons from the decision:

1. Notwithstanding a broad CAM provision that authorizes the landlord to charge the tenants for costs relating to ownership of the shopping center, a landlord should not include in CAM LLC fees and taxes or similar fees and taxes relating to organizations that may own the project;
2. It is important to respond on a timely basis to reasonable tenant requests for information supporting CAM charges; and
3. Keep the four-year statute of limitations in mind if you forbear from enforcing tenant improvement obligations, remodeling or other similar obligations. If allowing additional time, consider a forbearance or tolling agreement.

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## Allen Matkins

**Century City**  
(310) 788-2400

**Los Angeles**  
(213) 622-5555

**San Francisco**  
(415) 837-1515

**Walnut Creek**  
(925) 943-5551

**Del Mar Heights**

(858) 481-5055

**Orange County**

(949) 553-1313

**San Diego**

(619) 233-1155

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