S188128

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Plaintiff, Appellant, and Respondent,

v.

VCC ALAMEDA, LLC., et al.,

Defendants, Respondents, and Petitioner.

After An Unpublished Decision By The Court Of Appeal, Second Appellate District, Division Four
Case No. B212643

ANSWER TO PETITION FOR REVIEW

Elwood Lui (SBN 45538)
Brian D. Hershman (SBN 168175)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071-2300
Telephone: (213) 489-3939
Facsimile: (213) 243-2539

Andrea Sheridan Ordin (SBN 38235)
County Counsel
Charles M. Safer (SBN 82771)
Assistant County Counsel
Joyce L. Chang (SBN 136748)
Principal Deputy County Counsel
One Gateway Plaza, 25th Floor
Los Angeles, CA 90012
Telephone: (213) 922-2511

Attorneys for Respondent
LOS ANGELES COUNTY
METROPOLITAN TRANSPORTATION AUTHORITY

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Attorneys for Respondent
LOS ANGELES COUNTY
METROPOLITAN TRANSPORTATION AUTHORITY

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INTRODUCTION

Petitioner Alameda Produce Market, Inc. ("APMI") seeks review of a unanimous, unpublished Court of Appeal decision that stands for the unremarkable proposition that a property owner who indicates it has *no objection* to its lenders' withdrawal of deposited funds in an eminent domain action, and thereby materially benefits by having its encumbrances on the property extinguished, cannot thereafter maintain its right-to-take challenge. This well-established principle—dictating that a party cannot "have its cake and eat it too"—is fully consistent with the statutory scheme of Code of Civil Procedure, section 1255.260 ("Section 1255.260"), this Court's opinion in *Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 Cal.4th 648 (upholding the constitutionality of the statutory scheme, and explaining that "[i]t would be inconsistent for an owner to deny with condemner's right to take with one hand which it withdraws and used the condemner's deposit with the other." [*Id.* at p. 666]), and the Court of Appeal's decision in *Redevelopment Agency of City of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111, 1140 (review denied, Nov. 7, 2008) (holding property owner statutorily waived right to challenge taking when owner "received" equity in property as a result of lenders using deposit to pay down debts on property).

In its Petition, APMI attempts to manufacture a live controversy by (1) criticizing the Court of Appeal's holding in *Mesdaq* as bad law (Petn. at pp. 12, 20 [suggesting "[i]t expanded on the plain wording of the statute"]); and (2) arguing that *Mesdaq* is in conflict with another Court of Appeal decision, *Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357. (Petn. at p. 10.) Neither argument can prevail and therefore neither argument justifies this Court's review.

With respect to APMI's criticism of *Mesdaq*, the Court in *Mesdaq* correctly applied Section 1255.260 to find that a property owner who did

not object to its lenders' withdrawal of money and benefited from the withdrawal by having its liens extinguished, was thereby subject to the statutory waiver of its ability to challenge the agency's power to condemn the property. (*Mesdaq*, *supra*, 154 Cal.App.4th at 1140.) According to the Court of Appeal, the benefit to the property owner was no different than if the check was delivered directly to the owner; the owner effectively "received the payment" thereby triggering the statutory waiver. (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1140.) As APMI acknowledges, the Court of Appeal's holding here is entirely *consistent* with *Mesdaq* and therefore APMI's purported need for "clarification" rings hollow. (Petn. at p. 15.) To the extent APMI merely disagrees with the Court of Appeal's published decision in *Mesdaq*, APMI's disagreement provides no reason for this Court to grant review here. (Petn. at p. 20.)

With respect to APMI's assertion that *Mesdaq* is in conflict with the Court of Appeal's decision in *Attisha*, that assertion is without merit. *Attisha* does not discuss whether a property owner can maintain a right-to-take challenge after its lenders' withdrawal of probable compensation under Section 1255.260 of the eminent domain quick-take procedures. The issue decided in *Attisha* was whether a stipulation between a property owner and the condemnor as to the property's highest and best use had a collateral estoppel effect against another defendant's challenge to the value of the property's goodwill. (See *Attisha*, *supra*, 128 Cal.App.4th at p. 368.) Thus, *Attisha's* holding has nothing to do with the issue decided in *Mesdaq*. APMI's attempt to create a purported "conflict" where plainly none exists provides no reason for this Court to grant review.

This Court previously denied a request for certiorari when *Mesdaq* was published, and nothing about the unanimous, unpublished opinion at issue here warrants this Court revisiting that decision. (*Redevelopment Agency of the City of San Diego v. Mesdaq* (Cal. Nov. 28, 2007) Case No.

S157032, 2007 Cal. LEXIS 13356.) The Court of Appeal straightforwardly interpreted the governing statute and applicable law, and correctly concluded that APMI waived its right to challenge the taking—an outcome that properly remedied an unjust situation that would have permitted a property owner to not only recover possession of its property *with substantial improvements*, but also to *keep $6.3 million in taxpayer funds* for doing so. This Court should deny APMI's Petition for Review.

FACTUAL BACKGROUND

A. MTA ADOPTS A RESOLUTION OF NECESSITY DECLARING A NEED FOR THE EXPANSION OF ITS DIVISION ONE BUS FACILITY AND AUTHORIZING CONDEMNATION.

Respondent Los Angeles County Metropolitan Transportation Authority ("MTA") is the public agency statutorily charged with providing mass transit services, including bus services, to Los Angeles County residents. (Pub. Util. Code, §§ 130051.11, 130051.12, subd. (a)(1).) Finding itself with inadequate space for parking and servicing buses within one of its service areas in downtown Los Angeles (Division One), on March 25, 2004, MTA Board of Directors ("Board") condemned property located at the intersection of 7th and Alameda Streets in Los Angeles. (Opn. at p. 2.)[1]

[1] These facts are drawn from the Court of Appeal's decision. Because Petitioner failed to object to them, the facts are deemed correct for purposes of this Petition for Review. (See Cal. Rules of Court, rule 8.500(c)(2); *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 952 (quoting *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 415) ("Because neither party petitioned the Court of Appeal for a rehearing, we take [the] facts largely from that [C]ourt's opinion.").)

B. TRIAL COURT PROCEEDINGS PRIOR TO ENTRY OF CONDITIONAL DISMISSAL

1. MTA Files Eminent Domain Complaint and Obtains Prejudgment Possession of APMI's Property; APMI's Lenders Withdraw Deposited Funds to Pay Off APMI's Mortgages and its Line of Credit on the Subject Property.

On April 1, 2004, MTA filed the instant complaint in eminent domain against APMI (erroneously sued as Alameda North Parking, Inc.) with the Los Angeles Superior Court. (Opn. at pp. 2-3.) On the same day it filed the complaint, MTA sought prejudgment possession of the property and used "quick take"[2] procedures by depositing with the clerk of the superior court $6.3 million as the probable amount of compensation. (*Id.* at p. 3.) Thereafter, MTA notified the interested parties of its deposit of probable compensation. (*Ibid.*) Over the next several weeks, three of APMI's lenders—VCC Alameda; NAMCO Capital Group ("NAMCO"); and California National Bank—applied to the court to withdraw a portion of the deposited funds. (*Ibid.*) MTA objected to the lenders' applications for withdrawal of the deposit on the ground there were other interested parties. (*Ibid.*) MTA served the other interested parties with notice of the right to object to the lenders' applications for withdrawal, and requested that the trial court determine the appropriate amount of any withdrawal of the deposit. (*Id.* at pp. 3-4.)

APMI received notice of the lenders' applications for withdrawal of the deposit and *did not object* to the lenders' withdrawals. (Opn. at p. 4.)

[2] When certain statutory conditions are met, public agencies may take possession of property prior to completion of condemnation proceedings under special "quick take" procedures. (Code Civ. Proc., § 1255.010 et seq.) These proceedings require the agencies' deposit of probable compensation, made available for withdrawal by the property owner, with the clerk of the court. (*Ibid.*) If any portion of the deposited funds are withdrawn, any persons who "receive[s]" the money waives their right to challenge the taking by operation of law. (Code Civ. Proc., § 1255.260.)

On the contrary, APMI actively participated in the lenders' (VCC Alameda and NAMCO in particular) withdrawals: The day APMI acquired the property from VCC Alameda (one day before the eminent domain action was filed), APMI obtained a $2.25 million "line of credit" from NAMCO. [See Tr. Ex. 59.] NAMCO's verified application to withdraw (dated April 13, 2004) stated that NAMCO held a deed of trust and a note in the amount of $2,250,000, even though the line of credit balance on that date was only $355,264. [See Tr. Ex. 69-1.] After the eminent domain action was filed, APMI received three disbursements from NAMCO—which admittedly is not a bank [3 JA 0856]—totaling approximately $943,000. [Tr. Ex. 69-1.] *APMI's* Miguel Echemendia *signed the verified applications for withdrawal* of both VCC Alameda and NAMCO. (Opn. at p. 4.)

California National Bank did not file a verified application, but attached a copy of its deed of trust, which conferred upon the bank "entitle[ment] to all insurance proceeds, compensation, awards and other payments of relief," including the right to "apply the proceeds . . . to any and all indebtedness." [1 JA 0090; *see also id.* at 0085 (entitling bank to "judgments, awards of damages and settlements hereafter made as a result of in lieu of any taking of the property."); Opn. at p. 5, fn. 6.]

The lenders signed a stipulation with MTA regarding the amounts of their respective withdrawals from the deposit of probable compensation. (Opn. at p. 4.) On June 10, 2004, VCC Alameda filed the stipulation with the following recitals, among others:

(i) MTA deposited $6,300,000;

(ii) VCC Alameda, NAMCO and California National Bank each held deeds of trust on the Subject Property in the amounts of $1,495,205; $2,140,000; and $2,554,795, respectively, and had filed applications to withdraw these sums;

(iii) "APMI . . . is not objecting to instant withdrawal of funds"; and

(iv) The remaining $110,000 of the deposit would be used for three different tax assessments.

(*Ibid.*) The stipulation was served on Connie Sandifer, counsel for APMI. [Tr. Ex. 62 at p. 10.] When added to California National Bank's $2.5 million outstanding lien on the property, NAMCO's $2.25 million line of credit and VCC Alameda's $1.5 million deed of trust (minus $110,00 left with the court for tax assessments) conveniently totaled the property's *entire* pre-condemnation appraisal and deposit of $6.3 million. It is undisputed that the funds were used to pay APMI's loans—effectively increasing APMI's equity in the property by $6.19 million—and that disclaimers of interest were filed by the lenders in this litigation. (Opn. at P. 6.)

2. MTA Takes Possession of the Subject Property, Makes Improvements, and Begins Using It As An Expansion to Its Division One Bus Facility.

After taking possession, MTA began paving, fencing and drainage improvements on the lot, and constructed a new fuel and vacuum island. (Opn. at p. 6.) With these improvements completed, MTA began using the property as the expansion to the Division One facility in June 2005. (*Ibid.*)

3. The Trial Court Issues a Conditional Dismissal of MTA's Condemnation Action.

The trial court conducted a three-day bench trial on APMI's objections to MTA's right to take the property.[3] In its pre-trial briefs, MTA argued, among other things, that APMI had waived its right to challenge the

[3] By this time, all other defendants (except APMI and another defendant who claimed an interest in the property—American Apparel) originally named in MTA's eminent domain complaint had either filed Disclaimers of Interest or had settled with MTA. [1 JA 0053-0055, 0164-0167, 0160-0163, 0168-0171, 4 JA 0939-0944.]

taking in light of APMI's statutory waiver. (*Id.* at p. 7.) In addition to the waiver and other issues, the argument and discussion at trial focused on MTA's taking of the property. (*Id.* at pp. 6-7.)

The trial court, on July 12, 2006, issued a conditional dismissal of MTA's condemnation action. (Opn. at p. 7.) Under its Order and Ruling, the court specified the matter would be permanently dismissed unless MTA engaged in "fully informed, good faith negotiations" with APMI regarding the development of "mutually agreeable parking . . . . as contemplated by the Resolution." (*Ibid.*) The court directed the parties to select a mediator to oversee the negotiations, during which time MTA would be allowed to use the property. (*Ibid.*) The court did not rule on the threshold issue of whether APMI had waived its right to challenge the taking by allowing its lenders to withdraw $6.1 million of the deposit. (*Id.* at p. 6-7)[4]

4. The Trial Court Enters An Order of Permanent Dismissal.

The parties negotiated for sixteen months. (*Ibid.*) On August 7, 2008, the Mediator filed a Report of Referee in which he concluded MTA's staff had not negotiated in good faith. (*Ibid.*) The trial court signaled its intention to adopt the Mediator's conclusions and dismiss MTA's case. [5 RT 2407-2408.]

On August 25, 2008, MTA filed a supplemental brief in which it renewed its as-yet-unruled-upon argument that APMI had waived its right to challenge the taking and cited to *Mesdaq,* 154 Cal.App.4th 1111. (Opn. at p. 8.) *Mesdaq* held that the mortgage lender's withdrawal of the deposit of probable compensation to satisfy the owner's indebtedness had resulted in the owner's waiver of all claims and defenses under Section 1255.260 except as to a claim for greater compensation. (*Ibid.*) The trial court

[4] The court also did not rule on whether American Apparel had any sort of enforceable interest in the property. (Opn. at p. 7.)

refused to hear the waiver argument and struck MTA's filings. (*Ibid.*) When MTA asked the court whether APMI was "required to pay back the $6.3 million [from the withdrawn deposit]" prior to MTA's surrender of the property, the court stated that MTA would have to pursue other remedies to recover the deposit. (*Ibid.*)

On September 5, 2008, MTA filed an *ex parte* application, again requesting a ruling on the statutory waiver claim against APMI under Section 1255.260 and *Mesdaq*. (*Ibid.*) The court responded that "there's no procedural device before this court that supports raising this issue at this point" and denied the application. (*Id.* at pp. 8-9.) That same day, the trial court issued its final order of dismissal and directed MTA to return possession of the property to APMI, but did not require the return of MTA's deposit. (*Id.* at p. 9-10.)

5. The Trial Court Denies All Post-Trial Relief By MTA and MTA Appeals.

MTA timely filed motions for new trial, to set aside the final order of dismissal, and to obtain a ruling on its claim of statutory waiver. (*Id.* at p. 9.) On November 4, 2008, the trial court denied all of MTA's motions. (*Ibid.*) The trial court purported to distinguish *Mesdaq* on the ground that APMI did not explicitly consent to the lenders' withdrawals. (*Ibid.*)

On November 25, 2008, MTA timely appealed from the September 5, 2008 order of dismissal and subsequent orders. (*Ibid.*) At some point during this period, APMI filed a bankruptcy petition and was succeeded in this litigation by Alameda Produce Market, LLC., which filed the sole respondent's brief on appeal. (*Id.* at p. 10.)[5]

[5] At the same time, APMI's lender, NAMCO, also filed a petition for bankruptcy. (See *In re NAMCO Capital Group, Inc.*, Case No: 2:08-bk-32333-BR [CD Cal., filed Dec. 22, 2008].) More recently, NAMCO's President, Ezri Namvar, was indicted on criminal fraud charges for allegedly stealing more than $23 million from investors. (Pfeifer &

C. THE COURT OF APPEAL REVERSES THE TRIAL COURT'S DECISION.

Following oral argument, on October 6, 2010, the Court of Appeal issued its sixteen-page, unpublished decision in which the court unanimously agreed with MTA that APMI was not entitled to challenge the taking in light of its statutory waiver. (*Id.* at p. 10.)

The court concluded there was "no valid basis to distinguish this case from *Mesdaq*." (*Id.* at p. 14.) It was not persuaded by APMI's argument that, because APMI's acceptance of the benefits was involuntary, there was no statutory waiver. (*Ibid.*) To the contrary, the court found the evidence was sufficient, as a matter of law, to establish that APMI's acceptance of benefits was voluntary. (*Ibid.*) The court further found that *Mesdaq* did not change existing law, rather *Mesdaq* applied an existing statute to facts that may not have been addressed in earlier published cases. (*Ibid.*) Finally, the court found that MTA complied with the statutory notice provisions, despite APMI's contention that such notice was deficient. (*Ibid.*) Accordingly, the court reversed the trial court's order of dismissal in its entirety, holding that APMI had waived its right to

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(continued...)

Faturechi, *Investors cheer indictment of L.A. real estate mogul*, Los Angeles Times (Sept. 24, 2010) part B, p. 1.) Between APMI and NAMCO's bankruptcies and Namvar's indictment, MTA's ability to track down the lenders and regain its deposit is highly questionable. While APMI complains of the "unfairness" of Section 1255.260's waiver, the trial's court ruling, if allowed to stand, would have had two immediate consequences: (1) It would have given APMI more than the "just compensation" the Constitution authorizes and, in so doing, (2) it would have resulted in an unconstitutional gift of public funds. (See *Bauman v. Ross* (1897) 167 U.S. 548, 574 ["To award him less would be unjust to him; to award him more would be unjust to the public."]; see also *Los Angeles County Metropolitan Trans. Auth. v. Continental Development* (1997) 16 Cal.4th 694, 716 ["compensation for taking or damage to property must be just to the public as well as to the land owner."].)

challenge the taking and that APMI's sole remedy was to pursue a claim for greater compensation. (*Id.* at p. 15.)

THE PETITION FOR REVIEW SHOULD BE DENIED

It is well settled that this Court does not sit to correct errors, but rather to "secure uniformity of decision or to settle . . . important question[s] of law." (Cal. Rules of Court, rule 8.500(b)(1); *People v. Davis* (1905) 147 Cal. 346, 348.)[6] Because neither concern is implicated by the Court of Appeal's unanimous, unpublished decision, this Court should deny APMI's Petition.

APMI's arguments generally fall within one of two categories in support of review: (1) the appellate court's unpublished opinion (and implicitly *Mesdaq*) conflicts with the plain and literal meaning of Section 1255.260 (Petn. at p. 3); and (2) the opinion is in conflict with *Attisha*, *supra*, 128 Cal.App.4th 357. (Petn. at p. 10.) As explained below, however, neither of these arguments provides a ground for review.

A. THE COURT OF APPEAL'S INTERPRETATION AND APPLICATION OF SECTION 1255.260 IS FULLY CONSISTENT WITH ITS TEXT AND *MESDAQ*.

APMI asserts that this Court should grant review to settle an important question of law—namely whether a property owner who elects not to object to his lenders' withdrawal of the quick-take deposit, and thereby benefits by having his liens reduced or extinguished, has waived his right to take challenge pursuant to Section 1255.260. This question, however, needs no settling. The Court of Appeal's opinion is (1) fully *consistent* with the plain language of Section 1255.260, and (2) fully *consistent* with the only published court of appeal decision to address this issue (*Mesdaq*), and of which the Court denied review.

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[6] Other grounds for review are enumerated in rule 8.500(b), but none of them is implicated by this Petition.

1. APMI Wrongly Asserts That the Court Erred in Concluding Section 1255.260 Was An Absolute Bar to APMI's Challenge to MTA's Taking.

APMI's argument that the Court of Appeal's opinion "conflicts" with the plain and literal meaning of Section 1255.260 is little more than a challenge to the court's finding that APMI voluntarily waived its rights *in this case*—a challenge outside of the scope of permissible grounds for review under rule 8.500(b)(1). Rather, APMI's argument really is just a (misplaced) call for error correction, a task almost never worthy of review. (See *Davis, supra,* 147 Cal. at p. 348.) Moreover, it is especially unwarranted here, where there was no error.

Both the United States Constitution and our Constitution recognize the sovereign power of the government (including local public agencies) to condemn property for public use so long as "just compensation" is awarded the property owner. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19.) Under certain conditions, California law empowers an agency to take possession of the property prior to completion of the condemnation action through a procedure called a "quick take." (Code Civ. Proc., §§ 1255.010-1255.480.) To take advantage of the quick take procedures, a public agency must deposit with the clerk of the court an amount equal to the appraised value of the property, so that the deposit money is available for withdrawal by the property owner and others with compensable interests in the property. (Code Civ. Proc., §§ 1255.010, 1255.210, 1263.110; *Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 666.)

Section 1255.260 provides: "If any portion of the money deposited pursuant to [the quick take procedures] is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation." (See also *San Diego Gas & Electric Company v. 3250 Corporation* (1988) 205 Cal.App.3d 1075, 1082.) As recently noted

in *Mt. San Jacinto, supra,* 40 Cal.4th at p. 666, Section 1255.260 effectuates the principle that a property owner cannot "have its cake and eat it, too":

> It would be inconsistent for an owner to deny the condemner's right to take with one hand while it withdraws and uses the condemner's deposit with the other. An owner cannot have it both ways. It is reasonable to require the owner to choose one or the other: either to deny the condemner's right to take the property and litigate, or to take the deposit.

(*Ibid*; *see also Mesdaq, supra,* 154 Cal.App.4th at p. 1139 [quoting *Mt. San Jacinto*].)

This principle is an adaptation of the "acceptance of benefits" rule long used by the California courts, which provides that

> if a person voluntarily acquiesces in or recognizes a judgment or decree, or otherwise takes a position inconsistent with the right to appeal therefrom, he thereby implicitly waives his right to have such judgment, order or decree reviewed by an appellate court.

(*Louis Gardens of Encino Homeowners Assn., Inc. v. Trade Ins. Exchange* (2000) 82 Cal.App.4th 648, 661; Trollope v. Jeffries (1976) 55 Cal.App.3d 816, 824; *Shopoff & Cavallo, LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1506; *People ex rel. Dept. of Public Works v. Gutierrez* (1962) 207 Cal.App.2d 759, 762; *Schubert v. Reich* (1950) 36 Cal.2d 298, 299-300; see also *County of San Bernardino v. County of Riverside* (1902) 135 Cal. 618, 620 ("a party cannot accept the benefit or advantage given him by an order then seek to have it reviewed.").)

While implementing the "acceptance of benefits" rule, Section 1255.260 nevertheless employs its own statutory definition of what

constitutes a "waiver by operation of law." (Code Civ. Proc., § 1255.260; *Clayton v. Superior Court* (1998) 67 Cal.App.4th 28, 34 [Section 1255.260 "is a statutory waiver provision"]; *Mesdaq*, *supra*, 154 Cal.App.4th at p. 1138 [owner "by statute . . . waived" right to object pursuant to Section 1255.260].) Notably, Section 1255.260 is more generous to property owners than the "acceptance of benefits" rule because it does not preclude all attacks and instead preserves the owner's right to make a "claim for greater compensation." (See *People ex rel. Dept. of Public Works v. Neider* (1961) 55 Cal.2d 832, 835; *People ex rel. Dept. of Public Works v. Loop* (1958) 161 Cal.App.2d 466, 479.)

The Court of Appeal's opinion is fully consistent with the statutory language. As the Court of Appeal found, "a portion of the money deposited" by MTA was withdrawn when VCC Alameda, NAMCO and California National Bank withdrew over $6.1 million of the $6.3 million "quick take" deposit. APMI "received such payments" when the proceeds from the deposit were used to pay off APMI's mortgages and its line of credit on the property, thereby increasing APMI's equity ownership. Indeed, APMI's withdrawal on its line of credit with NAMCO—after the eminent domain action was initiated—presents an even clearer case of the property owner "withdrawing" the deposit than in *Mesdaq*. Here, APMI effectively manufactured the encumbrance which NAMCO utilized to withdraw the "quick take" deposit *for the benefit of APMI*. This scenario is no different than if APMI withdrew the deposit directly. Finally, APMI's "receipt" was voluntary—APMI *did not object* to the lender's withdrawal of the funds; to the contrary, APMI's representative, Miguel Echemendia, assisted at least two of the lenders in withdrawing the deposit. All of the conditions of Section 1255.260 were satisfied here.

2. The Court of Appeal's Opinion is Fully Consistent with *Mesdaq*; APMI's Purported Need for Clarification Rings Hollow

APMI also takes issue with the Court of Appeal's conclusion that "there is no valid basis for distinguishing this case from *Mesdaq*." (Opn. at p. 14.) APMI contends that the Court of Appeal erred because the facts do not support the Court of Appeal's conclusion that APMI (like the property owner in *Mesdaq*) waived its right to take challenge by failing to object to (and actively assisting in) its lenders' withdrawal of the "quick take" deposit. As discussed above, APMI's challenge to the Court of Appeal's application of the facts *in this case* falls outside of the scope of permissible grounds for review under rule 8.500(b)(1). As such, APMI's Petition is without merit.

Ignoring the absence of any split of authority that might warrant this Court's intervention (see also *infra* Section B), APMI proffers three reasons why its Petition is still review-worthy. None has merit.

(a) APMI's "Third-Party" Waiver Argument is Factually and Legally Incorrect.

APMI argues that, unlike the property owner in *Mesdaq*, it had no legal basis to oppose the lenders' motion for withdrawal of deposited funds and that the owner and the lender have "competing rights and interests." (Petn. at p. 8.) Suggesting it lacked the ability to stop its lenders from withdrawing MTA's deposit under the terms of its deeds of trust with those lenders, APMI argues that it should not be faulted for making an ineffectual objection; APMI adds that applying Section 1255.260 in these circumstances amounts to allowing a third party to waive another's constitutional rights. (Petn. at p. 20.) This argument fails for two reasons.

First, Mesdaq is not distinguishable on this ground. APMI's deeds of trust, like those at issue in *Mesdaq*, only authorized the lender to share in the "compensation award." (Compare *Mesdaq, supra,* 154 Cal.App.4th at

p. 1138 [stipulation allowing lender to "receive payment of the balance of its loan out of the proceeds of the compensation award"] with Opn. at p. 5, n. 6 [entitling lender to "all . . . compensation" in an eminent domain proceeding].) The deeds of trust here, as was the case in *Mesdaq*, say nothing about the lender's right to withdraw a deposit the public agency makes *prior to* the conclusion of the eminent domain proceeding and thus prior to the fixing of a compensation award. Indeed, counsel for APMI conceded during the eminent domain proceedings that neither she nor her client had reviewed the deeds of trust prior to allowing the lender to withdraw the deposit. [5 RT 3633-3634.] Thus, the situation presented in *Mesdaq* is identical to that presented here. APMI's unfounded assertion that it had no ability to object to its lenders' withdrawal of the deposit is contrary to the terms of the deeds of trust and therefore APMI's argument must fail.[7]

Second, APMI's failure to exercise its right to object does not mean that Section 1255.260 empowers a third party (the lender) to vicariously waive the constitutional rights of property owners. APMI argues that

[7] Even if APMI had given up the right to object, its position would necessarily have been a product of its prior decision to prospectively forego that right as part of bargaining of its loan, and there is nothing inappropriate—or even questionable—about prospective waivers of statutory rights. In *Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, for example, the court held that a lessee could, in a lease agreement, prospectively waive its right to share in a condemnation compensation award. (See also *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1272 [holding party may prospectively waive limitations period under California Insurance Code]; *Trust One Mortgage Corp. v. Invest America Mortgage Corp.* (2005) 134 Cal.App.4th 1302, 1308-1309 [party may prospectively waive venue statutes in choice-of-law clause]; *Bloom v. Bender* (1957) 48 Cal.2d 793, 801 [holding individual may prospectively agree to further changes in surety agreement]; cf. *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 667-671 [holding individual consumer may not prospectively waive statutory protection against deficiency judgments enacted for their benefit].)

owners of real property are entitled, under Article 1, Section 19 of the California Constitution, "to contest the right of the condemning agency to take," but this assertion is incorrect. (Petn. at p. 20.) Although the right to "just compensation" is constitutionally grounded, it is satisfied entirely by making a public agency's deposit *available* for withdrawal (*cf. Steinhart v. Superior Court* (1902) 137 Cal. 575, 579 ["Surely he is not compensated until he may take the money"]); the Legislature's placement of conditions upon the withdrawal of those available funds burdens at most the owner's *statutory right* to further litigate the legality of the taking and thus "does not deny the owner just compensation," and does not threaten the deprivation of any constitutional right, as the California courts have long held. (See *Mt. San Jacinto, supra,* 40 Cal.4th at p. 665; *see also id.* (upholding Section 1255.260 against constitutional challenge); *Pacific Gas & Electric Co. v. Superior Court* (1973) 33 Cal.App.3d 321, 327 ["the fact that statutory limitations or conditions are [placed] upon a property owner's ability to withdraw such funds [deposited by an agency] in relation to [the] exercise of his sole statutory right to appeal, does not operate so as to constitute a denial of just compensation"]; *Regents of the University of California v. Morris* (1968) 266 Cal.App.2d 616, 634 [same; collecting cases].) For these reasons, APMI's claim of constitutional violation fails both legally (because no constitutional rights are implicated by Section 1255.260) and factually (because APMI's lack of objection and active assistance with the withdrawal render advisory any decision on the constitutional question).

(b) The Court of Appeal Correctly Found AMPI's Acceptance of the Benefits was Voluntary.

APMI argues the Court of Appeal introduced an "acceptance of the benefits" element to AMPI's "involuntary" receipt of the funds—and that

"'acceptance of benefits' has never been applied to the involuntary acceptance of benefits." (Petn. at p. 18.) This argument ignores that the Court of Appeal found that "APMI's acceptance of benefits was voluntary" *as a matter of law*. (Opn. at p. 14.)

The evidence was undisputed that APMI had notice of the lenders' applications for withdrawal and that APMI did not object. (*Ibid.*) Moreover, APMI's Miguel Echemendia signed the verified applications for withdrawal of VCC Alameda and Namco. (*Id.* at p. 4.) Finally, the evidence indicated that in authorizing the lenders' withdrawals, the trial court relied on the lenders' representations—which APMI does not deny—that APMI did not object to the withdrawals. (*Id.* at p. 14.) Under these facts, the court correctly concluded that APMI's acceptance of benefits was voluntary. (*Ibid.*)

Thus, APMI's purported "important question" as to whether the acceptance of the benefits does not apply to involuntary waivers simply is not implicated here, where APMI's acceptance was determined to be *voluntary*.

(c) MTA Does Not Have the Duty to Object.

APMI devotes most of its Petition trying to explain why applying Section 1255.260's statutory waiver rule would be "unfair." (Petn. at p. 14.) In essence, APMI asserts that it should not be held to the consequences of its knowing acquiescence to its lenders' withdrawal and subsequent use of MTA's deposit funds *to benefit APMI*, even though it is undisputed that APMI knew of and acquiesced to the withdrawals. As described below, each component of APMI's equitable case is faulty, and APMI's attempt to portray itself as the helpless victim is accordingly unpersuasive.

First and foremost, the central premise of APMI's entire argument—that it had "no legal basis" to object to its lenders' withdrawal (Petn. at pp. 8-9)—is untrue. The undisputed facts reveal that, with respect to California National Bank, the only right APMI surrendered as part of its mortgage contract was its right to object to the lender's "entitlement" to share in the "compensation, award, and other payment[] of relief" (Opn. at p. 5, fn. 6)—that deed of trust says nothing about the lender's entitlement to share in or withdraw a pre-judgment deposit, and thus the contract in no way eviscerated APMI's right to object to the lender's withdrawal *of the deposit*.[8] With respect to NAMCO, the deed of trust contains *no provision* authorizing NAMCO to share in the deposit or award.[9] There is therefore no basis for APMI's assertion that the decision "signals an impediment to all property owners, who have financed their real estate investment of a

[8] Of course, a lender would ostensibly be entitled, even under this deed of trust language, to share in deposit money should the owner effectively convert the deposit into "compensation" by waiving its right to challenge the taking (either through withdrawing any portion of the deposit itself or knowingly acquiescing in its withdrawal by others). Until that time, however, the deposit is merely a deposit—and not "compensation," an "award" or any "other payment[] of relief"—and the owner retains its right to object to withdrawal of the deposit. (See also Petn. at p. 12 [acknowledging plaintiff is the owner of the deposit until judgment and award].) For this reason, APMI's argument that its objection to the lenders' withdrawal of the quick-take deposit would impair the mortgagee's security under Civil Code section 2929 (Petn. at p. 12) lacks merit. Contrary to APMI's suggestion, the lender does not have a "right of withdrawal" under Civil Code section 2929; that section only provides the property owner may not impair the security. The lenders' security is protected because of the deposit and the lenders retain the right to the compensation or award *after* the right to take and value has been decided. Additionally, APMI makes this argument for the first time in its Petition for Review. Thus, APMI waived this issue because it was not briefed in the trial or appellate court.

[9] There is *no evidence* to support APMI's assertion that it lacked the ability to object to VCC Alameda's withdrawal because APMI did not include the actual indebtedness documents for VCC Alameda as part of the trial court's record.

home," suggesting they will be forcibly squeezed out of their property (Petn. at p. 3)—APMI's own contracts did not even so provide.

APMI ignores the plain language in its deeds of trust and instead urges this Court to find that its failure to object does not *legally* preclude its taking challenge and that MTA (not APMI) is statutorily obligated to object to the lender's withdrawal. (Petn. at p. 12.) Not only does this argument fail to confront the language in its instruments of indebtedness (detailed above), but APMI also misunderstands the legal significance of MTA's notice.

Indeed, APMI fails to acknowledge that the notice provision to which APMI cites is a notice MTA is *statutorily obligated* to give interest holders once a lender applies to withdraw a deposit.[10] (Code Civ. Proc., § 1255.230, subds. (b), (c).) And APMI further fails to acknowledge that the particular statute spells out consequences of not objecting *to the withdrawal.* (See *Ibid.*) The consequences of not objecting to the withdrawal *and not objecting to the subsequent receipt of deposited funds* is

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[10]APMI also erroneously contends that "[Deering's] Section 1255.230 is entitled 'Objections by Plaintiff,'" and this shows the duty to object is "clearly" placed on MTA. (See Petn. at p. 13.) APMI's contention is wrong for two reasons. *First*, Deering's title is irrelevant because publishers provide their own titles to code sections—and the titles vary. (See *Redevelopment Agency of City of San Diego v. San Diego Gas & Elec. Co.* (2003) 111 Cal.App.4th 912, 917 [calling section title "not significant because the title was not part of the law when enacted"].) Moreover, the California Law Review Commission Recommendations related to Section 1255.230 is titled "Objections to withdrawal;" Matthew Bender Four-in-One code book labels the section "Time for Withdrawal—Objections;" and the State's online version (as well as West's) labels it "Withdrawal; objections; grounds;" thus, all other authorities fail to support APMI's "duty" construction. *Second*, the plain language of this Section provides that parties *other than plaintiffs* have the ability to object to an applicant's withdrawal. (See e.g., Code Civ. Proc., § 1255.230, subd. (d) ["If *any party* objects to the withdrawal . . . the court shall determine . . . the amounts to be withdrawn, if any, and by whom."], emphasis added.)

spelled out in a different statute—namely, the waiver statute at issue in this Petition (Section 1255.260). APMI's request that this Court conflate these two different waiver statutes ignores this distinction and would effectively nullify Section 1255.260's waiver. In sum, it is APMI—not MTA—that is confused about the significance of APMI's conduct.

Both the text and rationale of the waiver provision of Section 1255.260 look to what the *property owner* has done (or not done) with respect to an application to withdraw the agency's deposit—not to *the agency's* position on that application. Indeed, MTA initially objected and its subsequent acquiescence was entirely unnecessary because the trial court could have granted the lenders' application over MTA's objection.

B. THIS COURT'S INTERVENTION IS UNNECESSARY TO SETTLE ANY IMPORTANT QUESTIONS OF LAW BECAUSE THE COURT OF APPEAL'S INTERPRETATION OF THIS ISSUE IS UNIFORM.

Finally, APMI suggests *Mesdaq* is in conflict with the Court of Appeal's decision in *Attisha*, but this contention lacks merit. *Attisha* did not involve the defendant's waiver of the right-to-take challenge; rather, *Attisha* held that the defendants, who were challenging the *goodwill value* of the property, were not bound by a stipulated judgment between the property's owner and the condemnor as to the property's *highest and best use*. (*Attisha*, *supra*, 128 Cal.App.4th at p. 368.) This has nothing to do with Section 1255.260's statutory waiver provision. Moreover, the defendant's counsel in *Attisha* signed the stipulation, but the signed stipulation *specifically excluded* defendant's right to challenge the goodwill value of the property. (*Id.* at p. 369.) APMI is not claiming error with respect to the property's valuation. Given that APMI's request for review specifically asks this Court's guidance on the construction of Section 1255.260, which is not at issue in *Attisha*, *Attisha's* facts and holding—

beyond any stretch of the imagination—are simply inapplicable, and certainly do not reflect any sort of conflict in the decisional law.

CONCLUSION

For all these reasons, APMI's Petition for Review presents no legal issues of sufficient importance, no split of authority, and no error to correct. MTA respectfully requests that the Petition be denied.

Dated: December 3, 2010

Respectfully submitted,

JONES DAY

By: 
Elwood Lui

Attorneys for Plaintiff, Appellant, and Respondent
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.504(d)(1), that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 6,418 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 3, 2010

Respectfully submitted,

JONES DAY

By: _____

Elwood Lui

Attorneys for Plaintiff, Appellant, and Respondent
LOS ANGELES COUNTY
METROPOLITAN
TRANSPORTATION AUTHORITY

LAI-3115437

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I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On December 3, 2010, I deposited with UPS Overnight Express, a true and correct copy of the within documents: **ANSWER TO PETITION FOR REVIEW,** in a sealed envelope, addressed as follows:

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Supreme Court of California 350 McAllister Street San Francisco, CA 94102-7303	Original and 13 copies
California Court of Appeal Second Appellate District 300 South Spring Street Floor 2, North Tower Los Angeles, CA 90013	
Hon. James R. Dunn c/o Clerk of the Court Los Angeles Superior Court Department 26 111 North Hill Street Los Angeles, CA 90012-3014	
Andrea S. Ordin, Esq. Charles M. Safer, Esq. Joyce L. Chang, Esq. Office of the County Counsel One Gateway Plaza, 25th Floor Los Angeles, CA 90012	Attorneys for Plaintiff and Appellant *Los Angeles County Metropolitan Transportation Authority*
Connie Cooke Sandifer, Esq. Cynthia C. Marian, Esq. Oliver, Sandifer & Murphy 281 S. Figueroa Street, Second Floor Los Angeles, CA 90012	Attorneys for Petitioner *VCC Alameda, LLC*
Norman E. Matteoni, Esq. Peggy M. O'Laughlin, Esq. Gerry Houlihan, Esq. Matteoni, O'Laughlin & Hechtman 848 The Alameda San Jose, CA 95126	Attorneys for Petitioner *VCC Alameda, LLC*
David Graeler, Esq. Nossaman LLP 445 S. Figueroa Street, 31st Floor Los Angeles, CA 90071	Attorneys for Plaintiff and Appellant *Los Angeles County Metropolitan Transportation Authority*

Patrick A. Hennessey, Esq.
Michael D. Angelo, Esq.
Anish J. Banker, Esq.
Palmieri, Tyler, Wiener, Wilhelm & Waldron
2603 Main Street
East Tower - Suite 1300
Irvine, CA 92614

Attorneys for Defendant and Respondent *American Apparel, Inc.*