Case No. S188128

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY METROPOLITAN TRANSPORATION AUTHORITY Plaintiff and Appellant v. VCC ALAMEDA, LLC., a California limited liability company, et al., Defendants, Respondents and Petitioner.	Court of Appeal Case No. B212643 Los Angeles Superior Court Case No. BC 313 010

Appeal from a Judgment by
The Honorable James R. Dunn
Judge of Los Angeles Superior Court

PETITIONER'S OPENING BRIEF

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I. INTRODUCTION

In a rare property owner success, defendant Alameda Produce Market, Inc. prevailed at trial on its challenge to the condemnor's right to take its property. The Court of Appeal reversed. The Court never reached the merits of the owner's right to take challenge, because it held that the owner waived its defense to the take as a result of another defendants' withdrawal of funds from the deposit of probable compensation to satisfy their mortgage liens.

There is an interplay of two statutes in this case:

- Section 1255.210, the withdrawal statute, which allows "any defendant" to apply for the withdrawal from the deposit; and

- Section 1255.260, which provides that the receipt of the withdrawn money shall constitute a waiver of all defenses "in favor of the person receiving such payment."

The waiver statute is more narrowly drafted than the withdrawal statute to protect an owner's right to defend against the condemnation action. The statute does not state that *any defendant's* withdrawal from the deposit will result in the waiver of another defendant's defenses. But, that is the effect of the Court of Appeal's ruling.

The ruling allows the holder of a deed of trust to deprive the property owner of its right to object to the condemnation of its property, by simply withdrawing funds

from the deposit of probable compensation to satisfy its mortgage lien. It equates the owner-borrower with its lender when in fact their distinct interests in the real property make them adversaries in this litigation.

There can be no waiver of the owner's defense to the take by the independent act of the lender. The plain meaning of the waiver statute requires no such result.

II. ISSUES PRESENTED FOR REVIEW

1. Does the lender's withdrawal of a portion of the deposit of probable compensation, to which it is entitled, waive the owner's defense to the condemnor's right to take under Code of Civil Procedure Section 1255.260?

2. Is there an acceptance of the benefits by the owner when the lender uses the funds it withdrew from the deposit of probable compensation to satisfy the mortgage lien on the property?

III. FACTUAL STATEMENT

A. MTA's Use and Possession of the Property

Since 2004, Plaintiff, Los Angeles County Metropolitan Transportation Authority, (MTA) has been in continuous possession of the property owned by Alameda Produce Market, Inc. (APMI), an approximately 115,000 square feet of land located at the intersections of 7th and Alameda Streets in Los Angeles (the

property).[1] (2 JA 466.) In January 2004, the federal court ordered the MTA to increase the number of buses in service by 145 buses by the end of that year to comply with its earlier 1996 federal consent decree to improve the quality of bus service in Los Angeles. (2 JA 466.) The federal court did not specify what properties should be utilized to accommodate the additional buses. Acting on this decree, MTA initiated a condemnation action in 2004 to acquire APMI's property over any other alternative properties. By 2005, based on an order for prejudgment possession, MTA put the property into service for the storage and parking of 100 buses and associated employee parking. (11 JA 3209.) MTA completed nominal improvements on the property such as paving, fencing, and drainage to accommodate the bus parking as part of MTA's Division 1 Expansion Project. (4 JA 1081.)

B. The Owner's Objection to the Adoption of the Resolution of Necessity

On March 25, 2004, the MTA Board held a hearing on whether to adopt the resolution of necessity to acquire the property. Mr. Richard Meruelo, the property owner's principal appeared and urged the Board not to condemn the property for the reasons that the acquisition did not meet the public necessity test under California Eminent Domain Law and the property was needed to provide parking for

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[1] APMI has since filed a bankruptcy petition and was succeeded in the litigation by Alameda Produce Market LLC. (Court of Appeal Slip Opinion ("Slip Opinion", p. 10). Mr. Richard Meruelo has a controlling interest in both entities.

Citations to " JA " are to the volume and page number of the Appendix in support of Appellant's Opening Brief. Citations to "AR" are to the page number of the Administrative Record, which are followed by the applicable page.

the surrounding businesses.[2] (AR 581-582.) He explained that the property was purchased to provide needed parking for the adjacent buildings he owned containing over two million square feet of industrial space with over 2,600 employees. (AR 581-582.) A representative for American Apparel, one of the major tenants, appeared to oppose the proposed condemnation, and testified on the company's use of the property for employee parking and that the continued availability of this parking would enable the company to grow at this location. (AR 582-583.)

Prior to the hearing on the resolution of necessity, Mr. Meruelo and MTA had discussed the potential joint use and development of the property which would provide for both MTA bus and employee parking uses and the parking needs of nearby businesses, including American Apparel and the 7th Street Produce Market. (3 JA 646.) These discussions dated back to 2001 pursuant to the MTA Board's direction to its staff to consult with the property owners to see if MTA's expansion could be achieved while accommodating the economic development efforts of adjacent businesses. (AR 586.) None of the many specific joint development proposals exchanged between the parties satisfied MTA staff and in the spring of 2004 it decided not to proceed with a joint use of the property. (3 JA 0807.)

Mr. Meruelo was not dissuaded and persisted in his attempts to protect his property's parking use. At the hearing on the resolution he urged that "at the very least the board should direct staff to investigate alternative sites and/or a joint use

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[2] Mr. Meruelo is the president and sole shareholder of APMI and of Alameda North Parking, Inc., the latter of which had the ground lease and an option to purchase the property which was exercised. (1 JA 0257.)

proposal." (AR 581.) He presented to the Board a proposal for the development of the property that would provide bus parking and neighboring business parking. (AR 582.) Certain members of the MTA Board reacted favorably to the testimony, understood the need to protect the property's parking use for the businesses and to create "a win-win situation." (AR 583.) As a result, there were not a sufficient number of votes to adopt the resolution of necessity. To assure passage of the resolution that day, the Board took the unusual step of amending the resolution, which enabled the resolution to be adopted by the necessary two-thirds vote of the Board. (4 JA 1114-1117; AR 583-584.) The resolution of necessity provides:

> "Amendment: To negotiate with appropriate property owners for the development of adequate, common, mutually agreeable parking." (AR 578.)

There is no precedent in California of a resolution of necessity being conditioned on negotiation with the property owner for a joint use of the property subject to condemnation.

C. MTA's Complaint in Eminent Domain and Application for Prejudgment Possession

Days after the resolution was adopted, on April 1, 2004, MTA filed its complaint in eminent domain and its application for immediate possession of the property. (1 JA 0001-0014.) Pursuant to Code of Civil Procedure section

1255.010, it deposited with the court $6.3 Million, Plaintiff's appraised value of the property. (1 JA 0034-0035.)[3]

D. The Owner's Right-To-Take Challenge

To protect its need for parking to serve its adjacent tenants, APMI raised numerous defenses to MTA's right to take the property in its first amended answer to the complaint in eminent domain filed on May 21, 2004. The primary defense was that the MTA failed to adopt a resolution of necessity which satisfied the public necessity requirements of the Eminent Domain Law.[4] (1 JA 0144-0149.) Instead, it left for further negotiation and determination whether it would be necessary for MTA to acquire all or a portion of the property based on a potential joint public and private use. Thus, the required findings could not be made that the project is planned in a manner most compatible with the greatest public good and least private injury and that the property is necessary for the project. (2 JA 0498-0500.) The resolution of necessity is highly unusual, if not entirely unique. It states, by the condition, that all the property is *not* necessary for the project. It allowed staff to make that determination.

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[3] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[4] The resolution of necessity must contain findings that the three statutory elements of Section 1240.030 have been satisfied. They are:

- the public interest and necessity require the proposed project,
- the project is planned in the manner most compatible with the greatest public good and least private injury, and
- the property is necessary for the project.

(§§1245.230, subd. (c), 1245.030, subds. (a) – (c)).

To protect its objection, APMI opposed MTA's request for an order enforcing the Order of Immediate Possession issued on April 1, 2004 and sought a stay of the order of possession based on its right to take challenge. (1JA 0235-0237.) The court overruled APMI's objection and APMI was dispossessed of its property on July 8, 2004. (2 JA 0436.)[5]

E. The Lenders' Stipulation with MTA for Withdrawal of a Portion of the Deposit

Three defendants in the condemnation action had interests independent and distinct from the owner and its challenge to MTA's order of prejudgment possession and right to take the property. These defendants, VCC Alameda LLC, NAMCO, and California National Bank, held notes secured by deeds of trust on the property. MTA availed itself of what is commonly known as the "quick-take procedure" under Section 1255.410 and deposited the probable compensation to obtain prejudgment possession of the property. The defendant-lenders seeing their security impaired promptly filed verified applications for withdrawal of a portion of the deposit to satisfy their respective liens on the property. (1 JA 0043-0052, 1 JA 0074-0138, and 1 JA 0048-0051).

MTA filed its Notice of Right to Object to the defendant-lenders' applications for withdrawal of the deposit. APMI opposed MTA's prejudgment possession based on its pending challenge to the take. But, there was no legal or factual basis to

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[5] American Apparel joined APMI in its challenge to the condemnation and filed an opposition to MTA's *ex parte* application for an order of immediate possession. (2 JA 0343-0350.) and an answer defending against MTA's right to take. (2 JA 0391-0397.) MTA obtained possession of the property as against American Apparel on November 24, 2004.

object to the lenders' applications for withdrawal. Accordingly, APMI did not go on record with an objection, recognizing the lenders were entitled, under their respective deeds of trust, to the funds on deposit to satisfy the outstanding liens secured by the property. APMI did not dispute the amounts owed to the lenders as set forth in their respective applications for withdrawal which amounts were consistent with their deeds of trust.

California National Bank's promissory note secured by deed of trust established that the lender had a contractual right, independent of the owner, to withdraw a portion of the deposit of probable compensation. In the event of the condemnation of the property the Bank was entitled to "all . . . compensation, awards, and other payments or relief therefor (all hereinafter referred to as "proceeds")." (1 JA 0090; Slip Opinion, p. 5, fn. 6.) Further, independent of the owner, the Bank was "entitled to commence, appear in, and prosecute any action or proceedings or to make any compromise or settlement . . . in connection with such . . . taking." (*Ibid.*)

The lender, NAMCO, obtained a security interest in the property based on a March 31, 2004 Amendment to Loan Documents, which memorialized the earlier loan agreement and provided that the property would act as additional security for the existing $22, 200,000 note (3 JA 0612; 3 JA 0647). (See Slip Opinion, p. 6 for details of NAMCO's loan.) The Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing for the loan agreement entered into January 2004 (3 JA 0647) had similar provisions to the California National Bank's note and deed on the lender's rights to participate and access funds in a condemnation action. It provides: "[a]ll settlements, awards, damages, and proceeds received by Trustor . .

. in connection with any condemnation for public use of, or injury to the Property . . . are assigned to Lender." (8 JA 2120.) Lender is entitled " . . . to appear in and prosecute in its own name any action or proceeding . . . and may make any compromise or settlement." (8 JA 2121.)

As set forth in its verified application for withdrawal of probable compensation, defendant VCC Alameda LLC is a holder of a note and deed of trust on the property in the amount of $1,450,000. (1 JA 0043-0044.) This note and deed of trust are not a part of the record.

NAMCO's and VCC Alameda LLC's applications for withdrawal of probable compensation were verified by Mr. Echemendia of APMI. (1 JA 0046, 0051.) NAMCO specifically directed the borrower, APMI, to assist in the withdrawal process and verify the application for withdrawal. (8 JA 2262 and 8 JA 2279.)

MTA entered into a stipulation with the defendant-lenders as to amounts of their respective withdrawals from the deposit of probable compensation only reserving funds to satisfy tax assessments. (1 JA 0172-0179.) Pursuant to the stipulation, the lender-defendants (VCC Alameda LLC, NAMCO, and California National Bank), who held deeds of trust on the subject property in the amounts of $1,495,205, $2,140,000, and $2,554,794 respectively, were entitled to withdraw these sums from the deposit. The stipulation prepared by MTA and the defendant-lenders recites that "Alameda Produce Market, Inc. is not objecting to the instant withdrawal of funds." But, neither was it a party to the stipulation for withdrawal.

MTA failed to seek from the court a protective order requiring the lenders to post bonds or provide an undertaking under Section 1255.240 subdivision (a) to guarantee repayment in the event MTA lost the right to take trial.

The lenders allocated the money received from the withdrawal of the deposit to payment of their respective indebtedness. Thereafter, the lenders filed disclaimers of interest in the property and to any further compensation to be awarded. (2 JA 0485-0488, 0489-0492; 1 JA 0274-0277.) The disclaimers will enable MTA to take title free and clear of the lenders' interests at the conclusion of the case, if it succeeded against the right to take challenge.

APMI never sought to withdraw any portion of the deposit as its intent was to defeat MTA's right to take the property. (3 JA 648.) $2.2 Million remains on deposit. (3 JA 648.)[6]

F. Trial Court's Conditional and Permanent Dismissal of MTA's Complaint in Eminent Domain

At the right to take trial, APMI and American Apparel prevailed in their defense to MTA's right to take the property. The court found: " . . . the Resolution of Necessity contained a condition in the form of an amendment to the Resolution (rather than merely a directive to staff) which committed the LACMTA to negotiate further with the appropriate defendants for a plan of 'mutually agreeable parking'."

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[6] The deposit of $2.2 Million resulted from APMI's motion for an order to increase the initial $6.3 Million deposit of probable compensation. MTA re-appraised the property and the court ordered MTA to increase the deposit by more than one-third, by $2.2 Million. (2 JA 419, 2 JA 425-426, 2 JA 451-452, 2 JA 451-452, 2 JA 453-454.)

(4 JA 1115.) The court ruled that MTA's attempts to negotiate with the owner regarding future uses of the property, including joint parking, did not satisfy the obligation specified in the resolution for "negotiation" for "mutually agreeable parking"; thus, the resolution was invalid. (4 JA 1116.)

The court, rather than issuing a permanent dismissal, responded to MTA's request to enter a conditional dismissal giving the MTA another opportunity to negotiate with APMI. (4 JA 1133-1137.) The court's conditional order for dismissal of the condemnation proceeding was entered on July 12, 2006, requiring MTA "to enter into good faith negotiations with APMI and AA." (4 JA 1118-1122, 1120.)

The parties selected retired, appellate justice John Zebrowski to act as the referee to oversee negotiation sessions and report back to the court. The negotiations were held over a sixteen-month period from February 2007 to May 2008, without result. In August 7, 2008, Justice Zebrowski issued his report to the trial court, in which he concluded that MTA had completely failed to negotiate in good faith for a joint use of the property "in an effort to vindicate the Board's concern about employee parking for adjacent businesses." (5 JA 1211-1224, 1217.)

As a result of the failed negotiations and Justice Zebrowski's conclusion, the trial court entered an order on September 5, 2008, making its conditional dismissal a permanent dismissal and directed MTA to return possession of the property to APMI. (7 JA 2015-2017.)

The trial court denied MTA's motion for new trial and it rejected MTA's claim that the owner had statutorily waived its right to take challenge under Section

1255.260 as a result of the lenders' withdrawal of a portion of the deposit. (7 JA 2042-2062, 2063-2083.) Three years into the litigation, an appellate decision was issued in another case, *Redevelopment Agency of The City of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111 ("*Mesdaq*"), which plaintiff urged on the trial court. The trial court held that the *Mesdaq* case was distinguishable because the owner in *Mesdaq* "represented directly to the court that there was no objection [to the withdrawal]." (5 RT 3645.) The court's order states: "The court does not find any affirmative act that would be sufficient to constitute a waiver . . ." (11 JA 3197).

The MTA filed its appeal on November 25, 2008. (11 JA 3230-3234.) The order requiring the return of the property was stayed (11 JA 3235) and the property remains in MTA's possession.

G. Court of Appeal Opinion

The trial court's judgment of dismissal of the condemnation action was reversed by the Court of Appeal in an opinion entered on October 6, 2010. The Court of Appeal held that APMI statutorily waived all claims and defenses, except the claim for greater compensation under Section 1255.260. (Slip Opinion, p. 10.) In reliance on the *Mesdaq* decision, the court held that the lenders' withdrawal and use of the deposited funds to pay off APMI's loan was indistinguishable from APMI's receipt of the funds and the evidence established that APMI's acceptance of the benefits was voluntary.[7] (Slip Opinion, p. 14.)

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[7] Despite the fact American Apparel was a named defendant, the Court of Appeal ruled that American Apparel, had no legal or equitable interest in the property and therefore had no standing to object to MTA's right to take and ordered its dismissal from the case. (Slip Opinion, pp. 15-16.)

This Court granted APMI's petition for review on December 21, 2010.

IV. ARGUMENT

A. The Waiver Rule of Section 1255.260 does not apply against the owner when the lender withdraws from the deposit of probable compensation to which it is entitled

1. The Waiver Rule – Section 1255.260

Surprisingly, the waiver rule of Section 1255.260 has existed virtually unchanged since 1897 (*Mt. San Jacinto Community College District v. Superior Court* (2007) 40 Cal.4th 648, 659 FN6), although the financial landscape of property ownership in California has substantially changed and most all commercial properties carry mortgages. Section 1255.260 is part of the statutory scheme (§§1255.010-1255.480) often referred to as the "quick-take provisions" governing the condemnor's right to immediate possession of the property upon deposit of the probable compensation and the defendant's ability to withdraw the deposit. Section 1255.260 provides:

> "If any portion of the money deposited pursuant to this chapter 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 person receiving such payment except a claim for greater compensation."

It is the owner's position that the Appellate Court erred in holding that the defendant-lenders' withdrawal of a portion of the deposit of probable compensation, to which the lenders were legally entitled, waives the owner's defense to the taking of the property under Section 1255.260.

Section 1255.260 must be read in the context of the entire Eminent Domain Law (Part 3 Title 7 of the Code of Civil Procedure). Condemnation actions are considered "special proceedings." (*City of Santa Cruz v. MacGregor* (1960) 178 Cal.App.2d 45, 49.) Section 1250.310 prescribes the contents of the complaint, and Section 1250.220 requires plaintiff to name as defendants " . . . those persons who appear of record or are known by Plaintiff to have or claim an interest in the property." "Any person who claims a legal or equitable interest in the property may appear in the proceeding whether or not such person is named as a defendant. (§ 1250.230.) The judgment clears title of all interests of named defendants. (§ 1250.220 subd. (d).)

A condemnation action differs from the typical civil action in that the defendant asserts its right by answer, not by cross-complaint (§ 1250.320); and there is no requirement that a defendant serve his answer upon other defendants. The court in *City of Santa Cruz v. MacGregor*, *supra* 178 Cal.App.2d at 49, observed this procedural quirk: " . . . [I]t is not required that one defendant deny or otherwise plead to the allegations of the answer of a co-defendant [citation omitted], even though such defendants are, in substance, litigating against each other (*Pomona College v. Dunn* 7 Cal.App.2d 227, 240-241, 46. P.2d 270; *Anderson v. Citizens' Savings & Trust Co.* 185 Cal. 386, 391, 197 P. 113)".

Given the nature of a condemnation action, the owner and the lender cannot be considered as co-defendants with shared interests such that the action of one defendant would result in the waiver of another defendant's claim. They are in fact adversaries with opposing interests as this case exemplifies. The owner is pursuing a challenge to the take and must leave the deposit untouched; and the lender is seeking to withdraw funds from the deposit to pay off its lien as expeditiously as possible.

2. The Lenders' Withdrawal – Section 1255.210

Soon after MTA's deposit of probable compensation with the court in the amount of $6.3 Million (1 JA 0034-0035), three lenders, California National Bank, NAMCO, and VCC Alameda, who had promissory notes secured by deeds of trust on the property, filed their applications for withdrawal of a portion of the deposit of to satisfy the amount of their secured interests in the property pursuant to Section 1255.210 [1 JA 0043-0047, 0048-0052 and 0074-0139].

The statutory application process is straightforward:

> "Prior to entry of judgment, *any defendant* may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff." (§1255.210, italics added.)

As to objections: "If any party objects to the withdrawal, or if plaintiff so requests, the court shall determine, upon hearing the amounts to be withdrawn, if any, and by whom". (§1255.230 subd. (d).)

There was no dispute that the lenders each had a compensable interest in the property pursuant to their notes secured by deeds of trust and that the withdrawal amounts sought by the lenders were consistent with the balances due on the mortgages. MTA's only objection to the lender's applications was whether there were sufficient funds to cover the outstanding taxes (1 JA 0056-0061, 0141-0143). Once that concern was addressed, MTA agreed with the three lenders to stipulate to the withdrawal of funds from the deposit. (1 JA 0172-0179.)

APMI was not a party to the stipulation for withdrawal between MTA and the lenders. The stipulation recital is correct that APMI did not expressly object to the lenders' withdrawal. (1 JA 0173.) There was no basis for APMI to object to the lenders' withdrawals. APMI did not dispute the amounts owed to the lenders. The lenders, with compensable interests in the property, were defendants in the action. The lenders' security documents contractually assured their right, independent of the owner, to access the condemnation funds and to fully participate in the condemnation action.

APMI, to preserve its right to take challenge, did not file an application to withdraw any portion of the deposit and $2.2 Million remains on deposit.

California National Bank's promissory note secured by the deed of trust states that the Bank is entitled to all compensation, awards, and other payments or

relief (Slip Opinion at p. 5, FN. 6; 1 JA 0090). The Bank had the right to act independently of the owner and was entitled to commence, appear in, prosecute any action or proceeding, or to make any compromise or settlement. NAMCO's deed of trust on the property has similar provisions protecting the lender's stake in the property in that all settlements, awards, damages, and proceeds received by the owner in connection with the condemnation are assigned to the lender and may be applied as determined by the lender, and the lender is entitled to appear in its own name in the proceeding and make any compromise or settlement (8 JA 2120-2121).

The record does not contain VCC Alameda's note and deed of trust on the property. But, there is every reason to assume its indebtedness documents contain the standard provisions fully protecting the lender's entitlement to the condemnation proceeds and participation in the condemnation action to protect its secured interest in the property. As stated in the declaration of California National Bank, "The Deed of Trust contains a standard provision requiring all sums paid in a condemnation proceeding to first be paid over to California National Bank to satisfy the note" (8 JA 2160). Again, there was no dispute as to the monies owed to the lenders under their deeds of trusts.

MTA agrees " . . . that the deposit money is available for withdrawal by the property owner and others with compensable interests in the property." (Answer to Petition for Review, p. 11.) Moreover, to comply with the dictate of California Constitution Article I, Section 19, there must be a "prompt release" of the funds. The Legislative Committee Comments – Senate states that the 1975 addition to Section 1255.230, which allows for a withdrawal to proceed without personal

service on all parties "implements the constitutional requirement of 'prompt release' of the deposit to the owner. (*Cal. Const.,* Art. I, § 19.)" Given the statutory right of any defendant to make a withdrawal, the term "owner" here must be considered generic to anyone holding a compensable interest in the property.

Under the quick-take law, the owner has no right to restrict the right of lender, with a secured, compensable interest in the property, to make a withdrawal from the deposit. The lenders have " . . . a present proprietary interest" in the condemnation action. (*City of Vallejo v. Superior Court* (1926) 199 Cal. 408, 416.) APMI's pending challenge to MTA's right to take the property provided it no contractual right under the loan documents or legal right under the Eminent Domain Law to object to the lenders' withdrawal of the deposit. In contrast, as discussed below, MTA alone had the right to object to the lenders' withdrawal given the risk the condemnor faced should the owner prevail in its right to take challenge and the funds in deposit had been withdrawn by the lenders without the lenders posting a security or undertaking to assure condemnor's repayment. Section 1255.230 subdivision (d) provides that whether or not any party objects to the withdrawal " . . . *if the plaintiff so requests*, the court shall determine upon hearing the amounts to be withdrawn, if any, and by whom." (Italics added.)

3. The owner and the lenders have competing interests in the condemnation action because of the pending right to take challenge.

The condemnor, by simply depositing the amount of probable compensation and providing the required notice, can acquire possession of the property even in the face of a pending right to take challenge. As this Court observed, the impact of

the condemnor's possession of the property under the quick-take provisions is tantamount to ownership:

> "These sections give effect to the fact that except for defenses to the exercise of eminent domain, a landowner in California is permanently deprived of all of his rights in property sought by a public agency when the agency exercises its option to deposit the estimated value and obtain early possession for the intended public use." *Redevelopment Agency of the City of Burbank v. Gilmore* (1985) 38 Cal.3d 790, 801.

On the condemnor's possession of the entire property, the security transaction and the debtor-creditor relationship between the owner and lender is effectively terminated. The owner, now dispossessed, is no longer liable for subsequently accruing mortgage payments. The lender's interest in the property is protected by the condemnor's deposit of probable compensation to pay off the outstanding mortgage on the property.

The condemnation of the entire mortgaged property in effect substitutes a money award for the security of the land mortgaged, under the doctrine of equitable conversion. As explained by the court in *Los Angeles Trust & Savings Bank v. Bortenstein,* (1920) 47 Cal.App.421, 423:

> "It is a well recognized rule of equity, based upon the doctrine of equitable conversion, that when land is taken for public use, the money awarded for such land remains, and is to be considered as

land in respect to all rights and interests relating thereto. The money, in such cases, is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance with the legal or equitable rights of creditors or encumbrancers in respect to such land." (See also *Sacramento, etc. Drainage Dist. v. Truslow* (1954) 125 Cal.App. 478, 498.)

This is a reasonable process to avoid a foreclosure action compromising a condemnation action.

APMI did not object to the lender's withdrawal because there was no legal basis for an objection. Moreover, such an objection, to the extent it impaired in any way the lender's right to promptly receive all the moneys owed on their note, secured by property no longer in the possession of the owner would place the owner in violation of Civil Code Section 2929. This section states: "No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security."

If the owner sought to delay or otherwise interfere with lender's right to be compensated from the deposit, such an act would impair the lender's security. The lender would no longer be receiving mortgage payments from the owner, given the condemnor's possession of the property, but it would not have immediate access to

the funds to satisfy its lien.[8] Generally, the cases involving impairment are directed towards physical impairment, waste of the land. However, the statute makes no such distinction between types of impairment. The courts have found that a mortgagor's failure to pay property tax installment impaired mortgagee's security interest under Civil Code Section 2929. (*Osuna v. Albertson* (1982) 134 Cal.App.3d 71, 77 and *The Nippon Credit Bank v. 1333 North Cal Boulevard* (2001) 86 Cal.App.4th 486, 498-499.

The condemnor, seeking clear title of the property it possesses, must satisfy all outstanding liens on the property. As happened here, the condemnor and the lenders entered into a mutually agreeable stipulation for order of withdrawal of the deposit to satisfy the mortgaged liens on property the condemnor possesses. The lienholder defendants disclaimed any further interest in the condemnation (1 JA 0274, 2 JA 0185-0488, 2 JA 0489-0492).

4. The actions of one defendant cannot bind or result in the waiver of another defendant's claim or defense

Certainly, the Legislature knew that there are likely multiple defendants in a condemnation action. Section 1250.220 requires the plaintiff to name as defendants "those persons who appear of record or are known by plaintiff to have

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[8] The lenders' deeds of trust contain acceleration causes whereby, the conveyance of the property, voluntarily or nonvoluntarily, will cause the outstanding principal balance, interest and other sums secured by the deed of trust to immediately become due and payable (8 JA 2127 and 2182.) Such acceleration clauses are common provisions in deeds of trust. "Lenders often insert a due-on-sale clause in the note and deed of trust to have some control over the transfer of the property. The beneficiary wants the right to demand the full payment of the debt if the borrower transfers the property." 4 Miller & Starr, CA Real Estate, 3d § 10.106, p. 318.

or claim an interest in the property." Section 1235.125 defines "interest in real property" as including " . . . any right, title or estate in property."

Given the Legislature's recognition that there are distinct interests of lienholders, easement grantees and tenants in any given property, it is reasonable that the Legislature gives all such defendants under Section 1255.210 the right to make an application for withdrawal. The waiver provision in Section 1255.260 is not so broad. Rather, the waiver runs to "the persons receiving such payment." The more restrictive application of wavier is reasonable as well. The Legislature would want to protect a defendant's right to challenge the condemnation and not have its defense waived by another defendant's withdrawal. The problem here is that the Appellate Court equated owner and lender.

Properties are encumbered with various liens and estates. And, the Eminent Domain Law recognizes the competing rights of the various "persons" with compensable interests in the property. The law provides that the value of each interest shall be separately assessed among competing defendants, (§ 1260.220); it limits a lender's right in a partial take case to the extent of the impairment of security (§ 1265.225 subd. (a)); it prohibits a lender's enforcement of a prepayment penalty (§ 1265.240); it allows an owner of business conducted on the property to seek compensation for loss of goodwill (§ 1263.510); and it gives a tenant the right to compensation for taking of its lease. (§ 1265.150.)

The property owner and the lender are typically adversaries in a condemnation action, as the case of *Pomona College v. Dunn* (1935) 7 Cal.App.2d 227 illustrates. There, in a subsequent foreclosure action brought by the

lender/mortgagee seeking recourse to the award granted to the owner, the court held that the prior judgment in condemnation, finding that the defendant-mortgagee was not entitled to receive compensation for the partial take of the property, was *res judicata* when the issue of the mortgagee's right to share in the award of compensation for portion of mortgaged land was adjudicated. The *res judicata* holding was based on the court's finding that despite the fact that the parties were aligned as defendants in the condemnation action they were in effect adversaries. The court explained the co-defendants' unique relationship:

> "The very character of the peculiar action in which respondent and mortgagor were joined as parties defendant indicates that these parties were adversaries, although they were there named on the same side of the action. They were in reality adversary parties, because the mortgagee was primarily interested that the security of the mortgage would not be impaired by the taking of the property. The mortgagor's primary interest was that he should receive full compensation for the land which he owned, and which was then being taken. These interests were by no means identical. On the contrary, they were antagonistic. The effect of the decree in the condemnation action granting no award to the mortgagee was prejudicial to the mortgagee. It was not injurious to the mortgagor. The award granted to the mortgagor was the value of the land taken." (*Id.* at p. 241)

In *Redevelopment Agency of the San Diego v. Attisha* (2005) 128 Cal.App.4th 357, a loss of business goodwill case, the court's decision recognized defendants' competing interests and held that one defendant's action did not bind

or result in the waiver of another defendant's claim. The court ruled that a tenant who sought compensation for loss of a business goodwill was not bound by the terms of a stipulated judgment between the agency and the property owner, to which it was not a party, and which established that the property's highest and best use was redevelopment, not the existing use. (*Id.* at p. 369.) The court found, in reliance on *People, ex rel. Dept. of Pub. Wks. v. Amsden Corp.* (1973) 33 Cal.App.3d 83, 88, that the stipulated judgment did not bind the Attishas as they were not parties to the stipulation. (*Id.* at p. 369.)

Then, the court distinguished *Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083 on the basis that there the *owner* was claiming inconsistent uses and that the land cannot be valued based on one use and the improvements based on another use. (*Ibid.*) In *Attisha*, the *owner* and the *tenant* were claiming inconsistent uses and as independent defendants with different interests in the property, the owner's stipulation with the Agency, which excluded the tenant's claim, did not preclude the tenant from pursuing its loss of business goodwill claim premised on a different opinion of the property's highest and best use. (*Id.* at p. 369.)

The case of *Ventura County Flood Control District v. Campbell* (1999) 71 Cal.App.4th 211, while not directly involving the issue of waiver between co-defendants, nevertheless provides an example of a defendant owner with one-half fee interest in the property who was allowed to proceed with his challenge to the District's right to take, although the owner of the other half of the property settled with the District.

B. The Plain Meaning of Section 1255.260 Does Not Result in Waiver under the "Acceptance of the Benefits" Theory

The Legislature chose plain and unambiguous words for the waiver of defenses upon withdrawal of deposit under Section 1255.260 limiting its application solely to "the person receiving such payment."

The general rule of statutory interpretation is that "ordinarily, the literal meaning of the words of a statute governs." (*People ex rel. Dept. of Transportation v. Southern Cal. Edison Co.,* (2000) 22 Cal.4th at 791, 798,.) In this case, the Appellate Court ignored the express language of section 1255.260 that the waiver is only to apply against the person receiving the money withdrawn and interjected an "acceptance of the benefit" theory. It is undisputed that APMI did not request or receive the deposited funds. The Court of Appeal, however, found in reliance on *Mesdaq* that the lenders' withdrawal and use of the deposited funds to pay APMI"s loan was indistinguishable from APMI's receipt of the funds. (Slip Opinion, p.14.) Thus, the court reasoned that APMI had accepted the benefit of the order for withdrawal which resulted in a statutory waiver.

Moreover, the Appellate Court's opinion misconstrues the elements necessary for a finding of acceptance of the benefits. As a threshold matter, the principle of "acceptance of benefits" has only been applied in cases of judgment or order awarding money to a party, not to an application for withdrawal from the deposit of probable compensation in a condemnation proceeding. In a condemnation action, with the deposit available for withdrawal by any defendant, there is no "benefit" that accrues to the owner from a withdrawal by another

defendant. The owner no longer possesses the property. All outstanding liens and assessments will be paid off by the condemnor through the litigation. Any amounts owed and paid to the lienholder are then deducted from the owner's ultimate award or settlement. Such payoffs are a necessary consequence of the eminent domain action which is to compensate all persons with an interest in the property in one action so the condemnor acquires the property with clear title.

Second, the application of the rule in this instance is wrong because APMI was not a party to the Stipulation for Withdrawal which resulted in the order. Therefore, APMI could not have "accepted the benefits" of the order since the order did not have anything for APMI to either accept or reject. For the rule of voluntary acceptance of benefits of a judgment to apply the party "must demonstrate a clear and unmistakable acquiescence in, or, to put it another way, an 'unconditional, voluntary, and absolute' acceptance, of the fruits of the judgment." *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 744 [citing *Gudelja v. Gudelja* (1953) 41 Cal.2d 202, 214.].

The case law indicates that there cannot be a finding of unmistakable acquiescence where the party consistently and continuously objects such as APMI has done in the present case. For example, *In re Marriage of Cream,* (1993) 13 Cal.App.4th 81, the wife consistently objected to the trial court's auction procedure and the resulting valuation of a geyser which the family operated as a business. The wife, by default, ended up with the surviving bid at auction and thus received the geyser. The appellate court found there could be no finding of acceptance of the benefit rule simply based on the wife taking possession of the geyser, because

she consistently objected to the auction procedure for the valuation of the geyser and the terms of the judgment preserved the issue for appeal. (*Id.* at pp. 85-86.)

Similarly in *Shopoff & Caballo, LLP v. Hyon* (2008) 167 Cal.App.4th 1489, a party did not waive its right to appeal when it accepted distribution of a portion of the proceeds to which it was entitled, but sought a greater share of the award on appeal. Acceptance of the benefit did not result in a waiver because the party had preserved its right by "consistently pursuing his objections to the trial court's rulings." (*Id.* p. 1506.) See also *Phillips v. Isham* (1951) 105 Cal.App.2d 608 the court held there was no acceptance of the benefits where one party sent payment of a judgment and the attorney receiving the payment sent a letter notifying the payee that the money would be deposited into a trust account pending resolution of the appeal. (*Id.* at pp. 609-610.)

In the present case the evidence is clear that application of the acceptance of the benefit rule is inappropriate as APMI did not demonstrate a clear and unmistakable acquiescence nor did it receive any of the deposit withdrawn. APMI has consistently objected to MTD's right to take in this condemnation action and has never acquiesced in that regard. APMI has refused to withdraw the $2,300,000 remaining on deposit for seven years. Such objection by a party is all that is required to preclude a finding of waiver by virtue of the acceptance of the benefit rule.

The lenders were exercising their own rights to seek withdrawal of the deposit and those actions cannot result in a waiver to a co-defendant who was not a party to the order. And that the lenders used the withdrawn funds to satisfy the

outstanding mortgage balances on the property cannot be considered unconditional, voluntary and absolute intent on the part of APMI. The fact that the withdrawn funds resulted in reducing APMI's indebtedness does not alter the analysis because this collateral effect is not evidence of APMI's unequivocal intent to accept the benefits of the order. Without evidence of an unequivocal indication by APMI to accept the benefits of the order there can be no finding of waiver under the acceptance of the benefit rule.

Moreover, in the context of the condemnation action, as discussed above, the satisfaction of mortgagees' liens and clearance of the title to the property was of benefit to the condemnor in possession. APMI, no longer in possession of the property was no longer liable for accruing mortgage payments and interest; and as a result of MTA's deposit of probable compensation and possession, the lenders only recourse to have their liens satisfied was through the condemnation proceeding which by statute gave them the right to withdraw from the deposit.

The Court of Appeal's finding that the acceptance of the benefits was voluntarily hinges solely on the evidence that APMI had notice of the lenders' applications for withdrawal and did not object . (Slip Opinion, p. 14). But, as discussed, *infra*, there was no basis for APMI to object and thus any objection would have been futile.

C. The *Mesdaq* Case is Not on Point and Misguided, in Any Event

The Appellate Court below relied on *Mesdaq, supra,* to support its ruling that the withdrawal by a lender constitutes a waiver of the owner's defense to the take.

(Slip Opinion, p.14.) That decision is immediately distinguishable from the present case, because the ruling was based on the owner's "explicit consent" to the withdrawal for the payment of its indebtedness – the owner had the right to object because the lender did not have the right to withdraw the funds from the deposit. *Mesdaq, supra* 154 Cal.App.4th at p. 1140.

On the issue of the lender's limited rights, the decision states: "Mesdaq noted in his pleading with the court that FNB did *not* have the legal authority to withdraw the Agency's deposit, but nonetheless informed the court that he (the rightful owner of the deposit) did not object to FNB's withdrawal of the funds for the purposes of satisfying Mesdaq's loan obligation." (*Ibid.,* italics added.) There was a stipulation between the owner and the lender that precluded the lender from withdrawing the deposit of probable compensation by providing for payment to the lender only in the event the Agency was successful in taking the property. Then the mortgaged lender "would receive payment of the balance of its loan out of the proceeds of the compensation award." (*Id.* at 1137.) The deed of trust had similar restraints on the lender only being able to "apply the award or settlement to its indebtedness." (*Id.* at 1139, FN. 19.) Notwithstanding these protections, the owner changed its mind and expressly allowed the lender's early withdrawal.

The court in *Mesdaq* explicitly does not render an opinion on whether the owner's right to challenge the take would have been waived if the court had allowed for the lender's withdrawal over the objection of the owner. (*Id.* at p. 1140, FN. 20.)

The *Mesdaq* court did not decide the issue, here, as to whether a waiver by the owner would exist when the owner had no legal basis to object to the lenders'

withdrawal. By statute and by the deeds of trust, the lenders were entitled to make the withdrawal from the deposit. Nor does the decision acknowledge the situation in the present case that the plaintiff entered into a stipulation with the lenders for withdrawal of the deposit to which the owner was not a party (owner simply verified the NAMCO and VCC Alameda's applications). And, unlike *Mesdaq*, when the ruling of waiver was applied by the Appellate Court, APMI had prevailed at the trial court on its defense to MTA's take.

Moreover, the *Mesdaq* court was too hasty to take language from *Mt. San Jacinto* on the policy rationale behind section 1255.260, without analyzing the independent interests of the lender from the borrower/owner and the contractual and statutory rights that the lender has to the withdrawal. The lender has a statutory right to apply for withdrawal, when the plaintiff took possession of the property from the owner. (§ 1255.210.) Plaintiff did not contest that right by attempting to either condition or delay the withdrawal until the right to take challenge was decided by the court. Section 1255.240 subdivision (a) provides that where there is a conflicting claim to the amount withdrawn, as certainly exists when MTA faces a challenge to its right to take, the court may require an undertaking by the applicant.

This Court's decision in *Mt. San Jacinto Community College Dist. v Superior Court* (2007) 40 Cal.4th 648, presented a different issue than now before the court. The issue was whether defendant owner was unconstitutionally forced to waive the opportunity for withdrawal of probable compensation, while it pursued a right to take challenge, in the context of the owner asking for a date of value beyond the date of deposit. At first blush, a statement of the court in analyzing the statute and its

history appears to provide support for the plaintiff's position. The plaintiff seizes on the quote: "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." (*Id.* at p. 666.)

But there is the rub; the statute was analyzed in the context of date of value and thus the holding is that there are sufficient safeguards in the quick take procedures to provide constitutional protections. It was the defendant owner which made the election to challenge and thus delay the compensation trial for years (there actually was an earlier appellate decision in 2004,[9] regarding the compensability of improvements made after the service of summons in the eminent domain action).

D. There Has Been No Waiver of the Owner's Defense Under Section 1255.260 or the Common Law Principle of Waiver

It is owner's primary contention that the Court of Appeal erred in holding that the act of the lender in withdrawing from the deposit resulted in the statutory waiver of owner's defenses. Owner also contends there has been no waiver by the owner of its defenses to the right to take under the common law principle of waiver.

There are three elements required to make a finding of waiver. Waiver is (1) intentional relinquishment or abandonment of a (2) known right or privilege (3) with full awareness of the facts and likely consequences. *Roberts v. Superior Court*

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[9] *Mt. San Jacinto Community College Dist. v. Superior Court* (2004) 117 Cal.App.4th 98 .

(2002) 27 Cal.4th 793, 806-807; *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107. There is no evidence to establish that these elements were met in this case.

1. APMI lacked the requisite intent of relinquishing its defense for a finding of waiver

"All case law on the subject of waiver is unequivocal: 'waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.'" Thus, the pivotal issue in a claim of waiver is the "intent of the party who allegedly relinquished the known legal right." *DRG/Beverly Hills Limited v. ChopStix Dim Sum Café* (1994) 30 Cal.App.4th 54, 60-61; *Waller v. Truck Ins. Exchange, Inc.,* (1995) 11 Cal.4th 1, 31.

"The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc., supra* 11 Cal.4th at 31) *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) APMI neither expressly nor impliedly waived its right to object to the MTA's take.

There was no express waiver by APMI as it was not a party to the Stipulation and Order for the Withdrawal of the Deposit between the lenders and MTA. MTA's attempt to utilize a stipulation with some defendants to bind a defendant who was not a party to the stipulation is contrary to the law. *Staples v. Hawthorne* (1929) 208 Cal. 578, 589 ["stipulation of [a defendant] nor the judgment in plaintiff's favor against them can in any way affect the right of plaintiff as to the remaining defendants in the case"].

This principle is demonstrated in *Cowan v. Bunce* (1963) 212 Cal. App. 2d 48, where a statement by one defendant's counsel that there was no defense of contributory negligence, even if such statement constituted a stipulation, did not remove that defense in respect to another defendant. (*Id.* at p. 54.) See also, *Capital National Bank of Sacramento v. Theo. Smith et al,* (1944) 62 Cal.App.2d 328, 336 [stipulation not signed by two defendants did not bind them]. In the present case MTD's stipulations with the lenders were not intended to affect or bind APMI and therefore the stipulations have no impact as to APMI's defenses. Thus there is no express waiver in this instance.

Neither was there an implied waiver by APMI. "[A] waiver may be either express, based on the words of the waiving party, *or implied, based on conduct indicating an intent* to relinquish the right." (*Waller v. Truck Ins. Exchange, Inc., supra* 11 Cal.4th at 31, italics added.) California courts will find an implied waiver when that party's acts [i.e., conduct] are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished. (*Id.* at pp. 33-34.) Whether a party waives a right by expression or by conduct, that party must always intend to waive the right because waiver, express or implied, always rests upon intent. (*Id.* at p. 31.) In the present case, APMI's actions never exhibited an intent to waive, but rather consistently evidenced an intent to object to the right to take.

APMI objected to the taking at the hearing on the adoption of the resolution and in its answer to the complaint, it objected to MTA's order for immediate possession and it has steadfastly refused to withdraw the $2,300,000 remaining on

deposit for the past five years. APMI prevailed on its right to take challenge in the trial court and continues its legal battle on appeal to defeat MTA's take of its property. APMI's conduct shows a clear and convincing intent to challenge the right to take which precludes a finding of the requisite intent to waive this right.

The Appellate Court's finding of waiver was not based on the application of the knowing and intelligent waiver standard. Rather, the court found waiver based on APMI's conduct in not objecting to the lender's withdrawal. But, APMI's conduct was in accord with the withdrawal statute, entitling the lenders' withdrawal, and thus its non-objection could not constitute waiver.

In *Wienke v. Smith* (1918) 179 Cal. 220, this Court held that for waiver to be found, there has to be the existence of a choice. There, the lienholders in a suit to foreclose a mortgage were held not to have waived their right under the note and deed of trust to declare the principal sum due, although they accepted after the maturity of the installment payable a portion of the sum then due. The court found the payments were not made under the mortgage but paid pursuant to a collateral agreement and because the lienholders "had no right to refuse any such payments," (*Id.* at p. 226) there was no waiver by the lienholders' acceptance. As explained by this Court, the intentional relinquishment of a known right " . . . implies 'the intentional forbearance to enforce a right and necessarily, therefore, assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right. In this case, the Wienkes were not in a position to elect whether to accept the payment or refuse them." The owners here faced the same predictament. They had no choice on the lender's withdrawal or the lender's use of

the withdrawn funds to pay off the mortgage. With no opportunity of choice, there can be no waiver.

"The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver' [citation]." *Waller v. Truck Ins. Exchange, Inc.*, *supra* 11 Cal.4th at 31. There was no clear and convincing evidence of an intent by APMI to waive its defense to the take and the Appellate Court's finding of waiver is contrary to law.

2. APMI had no reason to know that a statutorily authorized withdrawal by its lenders would waive its defenses

"The first requirement of any waiver of statutory or constitutional rights, of course, is that it be knowingly and intelligently made." *In re Walker* (1969) 71 Cal.2d 54, 57; see also *Jones v. Brown* (1970) 13 Cal.App.3d 513, 519. There is no basis for asserting that APMI could have or should have known that failure to object to its lenders' statutory right to request to withdraw funds from the deposit would operate as a waiver of APMI's objections.

First, the text of section 1255.260 explicitly limits the waiver to the "persons receiving such payment". Since it was the lenders receiving the payment and not APMI, the waiver, by the terms of the statute, would apply only against the lenders. "[O]rdinarily, the literal meaning of the words of a statute governs." *People ex rel Dept. of Transportation v. Southern Cal. Edison Co., supra* 22 Cal.4th at 798. Secondly, *Mesdaq* had not been decided yet and there was no case law indicating

that one co-defendant could by withdrawing its share of the deposit unilaterally waive another defendant's defenses. Accordingly, APMI was unaware of the potential consequences of a withdrawal of the deposit by a lender; thus, there was no waiver by APMI. *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 343. [The waiver of an important right must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences.]

The Court of Appeal deemed the lender's withdrawal constituted a waiver by APMI, under its application of the theory of the benefit of the acceptance. But, the conduct of the lender is irrelevant in the determination of wavier by the owner. As explained by this Court in *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1051:

> "The doctrine of waiver, by contrast, focuses on the conduct of only one party; consent of the other party is irrelevant. As has been said: "Waiver refers to the act, or the consequences of the act, of one side."

Lastly, MTA providing APMI with the required statutory notice under Section 1255.230 of the lenders' application for withdrawal does not equate with APMI having the requisite knowledge for the purpose of a finding of waiver to its defense to take. It is important to note that the statutory notice provided under Section 1255.230 subdivision (c) only advises that the " . . . failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn." There was no express notice of MTA's position that a failure to object to the lenders' withdrawal would also result in waiver of all defenses to the condemnation.

E. Condemnor's Responsibility to Protect Deposited Funds in Light of Right to Take Challenge

The Appellate Court's decision establishes the principle of waiver by association – a third-party defendant which holds a deed of trust on property can waive the right to take challenge made by the owner of the property.

Putting the focus on the defendant-owner who was not a party to the stipulation for the withdrawal is misplaced. The conduct of the MTA in this case is what is relevant. The circumstances of the withdrawal in this case were within the control of MTA, not the defendant-owner. That control is manifested on several fronts.

Section 1255.230 subdivision (b) puts the obligation on the Plaintiff upon any request for withdrawal to file any objection it may have. MTA simply gave the statutory notice to other parties of the requests for withdrawal by lenders, although it knew of APMI's objection to the taking and the risk that the owner could prevail and the property be returned. Section 1255.230 subdivision (d) provides MTA the right to request a court hearing on the withdrawal requests. But, instead, MTA stipulated to allow the withdrawal of funds to pay off the deeds of trust and clear title.

As a result of the deposit, MTA had possession of the property. It was therefore in MTA's interest, not the owner's, to pay off the deeds of trust. Whether the lenders' secured interests in the property were paid soon after the deposit was made, or later, was of no concern to the owner as its security transaction with these lenders effectively terminated on MTA's possession of the property.

Section 1255.240 provides that the condemnor may seek an undertaking upon withdrawal for potential repayment. MTA did not request an undertaking. It excuses itself from this protective measure with the contention that once the lenders tender the application, it had no ability to require a bond. There is neither statute nor case law that supports MTA's position. Section 1255.240 offers a condemnor protection: if "an applicant is entitled to withdraw any portion of a deposit that another party claims or which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking." With a right to take challenge yet to be tried, the withdrawal certainly will involve monies on deposit to which another person (*i.e.,* plaintiff) may be entitled.

Of course, the MTA can always seek reimbursement from the lenders if there is a judgment dismissing the condemnation. (§§1255.280 and 1268.160.) It chose not to protect itself by conditioning the lenders' withdrawals accordingly. However, it continues to hold the statutory right to be reimbursed by the lenders.

Third, in *People ex rel. Dep't of Transportation v. Zivelonghi* (1986) 181 Cal.App.3d 1035, where there was no statutory guidance, the court said under its equitable powers it was proper for the court to extend the deposit rules to apply post-trial, utilizing the verdict as the best indicator of probable compensation pending appeal. The court had the means necessary to exercise its jurisdiction under Code of Civil Procedure Section 187 (implied powers to effectuate conferred powers). The court required the condemnor to deposit the verdict amount, notwithstanding there was no statute authorizing the procedure.

MTA complains there is no statute specifically authorizing a bond in the circumstances presented in this case. But, it did not even attempt to seek such protection although it now complains of the risk it faces in not being reimbursed from at least one of the lenders. "Parties who fail to avail themselves of the rights and safeguards which the law offers them cannot complain when such failure results in the disadvantage." *Marin Municipal Water Dist. v. North Coast Water* (1919) 40 Cal.App. 260, 263.

The *Mesdaq* rule, unqualified, can apply to all parties having any interest in the land, such as tax liens by public agencies and special assessment lines. The ruling literally would say that a County initiating condemnation could withdraw from deposit funds to pay a real property tax lien and this would constitute a waiver by the owner of its right to take challenge

It puts the burden on the owner who did nothing to cause the condemnation action to protect itself, rather than requiring the plaintiff, which initiated the action, to take protective action.

In California, the opportunity for property owner and lender to have adversarial positions in a condemnation action is great, when one considers the numbers. There are multi-million individual parcels in California with most commercial properties under deeds of trust.[10] The owners have the burden of

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[10] The 2004 Annual Report of the County Assessor for the County of Los Angeles indicates that there were 2,293,966 separate assessor parcels in that County (this includes all types of property) in the year this condemnation action was filed. The Los Angeles County Registrar Recorder's office indicated that there were a total of 1,009,770 deeds of trust recorded during the year 2004 on properties within Los Angeles County. There were no statistics for the percentage of all properties on which there were outstanding deeds of trust.

overall defense of any condemnation of those properties; the lender is only interested in pursuing its security interest.

IV. CONCLUSION

The defendant-lenders have the statutory right to have their liens satisfied through withdrawal of the deposit. That is a fair result.

What is not fair is that the lenders' withdrawal would absolutely defeat the owner's defense to take of the property. Section 1255.260 must be read to protect against such a result by restricting the application of the waiver only to the person receiving the payment from the amount withdrawn.

The trial court's decision was correct.

Dated: Feb 2, 2011

Respectfully submitted,
MATTEONI, O'LAUGHLIN & HECHTMAN

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By: Peggy O'Laughlin
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Alameda Produce Market, LLC

CRC RULE 14(c) CERTIFICATE

I, PEGGY M. O'LAUGHLIN, hereby certify, in reliance on the word count of the computer program used to prepare this **PETITIONER'S OPENING BRIEF** that said reply contains 11,725 words.

Date: Feb 2 2011

By: _____

Peggy M. O'Laughlin, Attorneys for
Alameda Produce Market, LLC

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AGENCY
Plaintiff and Appellant

v.

VCC ALAMEDA, LLC
Defendant, Respondent and Petitioner

Case No. S188128

DECLARATION OF SERVICE

I, JESSE MUNOZ, hereby declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am employed in the County of Santa Clara; my business address is 848 The Alameda, San Jose, CA 95126

On February 2, 2011, I served the within:

PETITIONER'S OPENING BRIEF

on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

SEE ATTACHED SERVICE LIST.

☒ VIA EXPRESS CARRIER: I caused such documents to be collected by an agent for Federal Express to be delivered to the offices of the stated parties.

☒ BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made, and that this declaration was executed at San Jose, California.

Jesse Munoz

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AGENCY
Plaintiff and Appellant

v.

VCC ALAMEDA, LLC
Defendant, Respondent and Petitioner
Supreme Court Case No. S188128

Court of Appeal Case No. B212643
Los Angeles Superior Court Case No. BC 313 010

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