S188128

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Plaintiff and Appellant,

v.

ALAMEDA PRODUCE MARKET, LLC, et al.,

Defendants and Respondents.

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

Los Angeles County Superior Court, Case No. BC 313010
Honorable James R. Dunn, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

At issue in this appeal is whether a lender's withdrawal of a portion of the deposit of probable compensation in an eminent domain proceeding can effect an involuntary waiver under Code of Civil Procedure section 1255.260[1] of the property owner's right to challenge the taking. The answer to this question is an unqualified "no." Every property owner in California who intends to challenge a public agency's right to exercise eminent domain has the opportunity, the right, and the obligation to object to a lender's application to withdraw deposited funds and to seek a trial on the right to take prior to any withdrawals. If, as in this case, the owner chooses not to avail itself of these statutory protections and instead receives the full monetary benefit of the deposited funds in the form of paid-down debt, then the property owner itself—as well as its lender—has waived the right to challenge the right to take.

Moreover, the Eminent Domain Law adequately protects an owner who does not intend to waive his or her right to object to the taking. Under section 1255.230, property owners receive notice of any withdrawal applications and of the right to object to them. If an owner objects to a lender's withdrawal and challenges the agency's right to take the property, the law provides for a specially expedited trial. A condemner may acquire possession of property only if the court finds that the plaintiff is entitled to take the property by eminent domain. Thus, right-to-take challenges must be adjudicated before possession can be had—and before any withdrawal of the deposit. These provisions allow owners to prevent *anyone* from triggering a waiver against the owner's wishes.

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[1] All statutory references are to the Code of Civil Procedure unless otherwise noted.

Respondent Alameda Produce Market (APMI) contends that waivers of right-to-take challenges under section 1255.260 may nevertheless be involuntary because property owners may lack a legal basis to object to their lenders' withdrawals, but this contention has no merit. Section 1255.230 sets out the procedure by which "any party" who has an interest in the property may object. A property owner may object on the basis that a withdrawal by a lender would waive a right-to-take challenge the owner intends to make. Contrary to what APMI asserts, nothing in the Eminent Domain Law, in APMI's deeds of trust, or in standard deeds of trust forecloses such an objection. Nor would an owner be at risk of violating the statute prohibiting impairment of security because the security is preserved in the form of the property and the deposit. Moreover, the filing of an objection is a privileged act that cannot result in statutory liability.

This case presents a particularly striking example of a property owner whose right to challenge the taking was waived not by lenders but by the owner's own actions and failures to act. Although APMI claims that this case involves the "involuntary" waiver of a right-to-take challenge by the actions of "independent" lenders who were "adverse," none of these characterizations is accurate. First, the waiver was not "involuntary." APMI was on notice of the intended withdrawals by its lenders and had the opportunity to come to court to state any objections. Far from objecting, APMI informed its lenders that it *did not object* and this representation was communicated to and relied on by the trial court when it approved withdrawals to pay down APMI's debt by $6.3 million. Thus, the waiver was not "involuntary" as APMI suggests—APMI made the affirmative decision to allow the withdrawal so that APMI could benefit by having its loans paid off and its equity in the property increased by millions of dollars.

Second, contrary to APMI's suggestion, the lenders were not in any way "independent." The evidence establishes that APMI and one of its lenders, NAMCO Capital Group (NAMCO), colluded to manufacture a purported $2.25 million indebtedness on the subject property *one day* before appellant Los Angeles County Metropolitan Transportation Authority ("MTA") filed the eminent domain action. The scheme worked as follows: NAMCO gave APMI a $2.25 million line of credit and then turned around and withdrew the full amount of the credit line from the condemnation deposit which MTA had lodged with the court. The $2.25 million credit line matched the exact remainder of the amount of MTA's deposit; in effect, the credit line was an advance withdrawal of the deposit. Thus, by withdrawing the deposit through a "lender," APMI planned to make an end-run around the waiver provision of section 1255.260, and thereby keep the deposit funds but still be allowed to challenge the condemnation.

Third, APMI lenders were not "adverse" as APMI contends. APMI took a number of steps to assist one of its lenders withdraw the very deposit that APMI contends was "involuntarily" withdrawn: (1) APMI hired attorneys for NAMCO to assist in the withdrawal; (2) APMI's chief operating officer verified the withdrawal applications on behalf of NAMCO; and (3) APMI directed how the money should be applied to its debt to NAMCO, among other things. Rather than being "adverse," the lenders worked with APMI so that APMI could receive the benefits of MTA's money—by paying off its debts and being relieved of its contractual obligation to continue making interest payments to its lenders—without directly withdrawing the funds on deposit.

Despite APMI's failure to object to the withdrawals and active involvement in making them, APMI contends it should be allowed to

challenge the taking because it did not *personally* withdraw the funds. The interpretation of section 1255.260 that APMI asks the Court to adopt would allow a property owner to reap the benefits of withdrawal, maintain a right-to-take challenge, secure return of the property, and refuse to pay back any of the deposited funds, simply because the owner's name does not appear on the withdrawal application. Such an interpretation would be contrary to the plain meaning of section 1255.260, its legislative purpose, the "acceptance of benefits" rule that underlies the provision, and the two Court of Appeal decisions that have addressed this issue. Such an interpretation would also be patently inequitable, as this case demonstrates: APMI would receive the full benefit of the deposit of probable compensation *and* could be allowed to keep the property for which that compensation was deposited, with the MTA having to seek recovery from bankrupt lenders. Finally, such an interpretation would do significant harm to cash-strapped public agencies across California by sanctioning a potential windfall for the property owner at the expense of the public.

For all these reasons, the Court should affirm the decision of the Court of Appeal and hold that a property owner who foregoes the statutory opportunities to object and instead receives the benefit of a lender's withdrawal waives all challenges to the taking other than a claim for greater compensation.

FACTUAL AND PROCEDURAL BACKGROUND

A. MTA Adopts a Resolution of Necessity Declaring a Need for the Expansion of its Division One Bus Facility and Authorizing Condemnation

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), MTA staff recommended that the MTA Board of Directors ("Board") expand the existing Division One facility by condemning an immediately adjacent "vacant" and "unimproved" property of irregular shape at the intersection of 7th and Alameda Streets in Los Angeles. (4 JA 1080-1081 at ¶ 5, 1 JA 2-3 at ¶ 8.)[2]

On March 25, 2004, the Board convened a public hearing to consider whether to exercise its power of eminent domain over this property. (4 JA 916-921.) At that hearing, Velma Marshall, on behalf of MTA staff, urged the Board to adopt a proposed resolution of necessity authorizing the condemnation. (4 JA 917.) Richard Meruelo, the sole shareholder of APMI, inaccurately identified himself as the property owner and spoke against the resolution, urging the Board not to condemn. (3 JA 644; 4 JA 917-918.)[3] The Board adopted a resolution of necessity that described the property to be condemned and directed MTA staff to negotiate with affected property owners during the condemnation process regarding the development of adequate, mutually agreeable parking. (1 JA 22-24.)

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[2] "__ JA __" refers to the volume and page number of the Joint Appendix; "__ RT __" refers to the volume and page number of the Reporter's Transcript; and "Tr. Ex. __" refers to the trial exhibits. "Opn." refers to the Court of Appeal's opinion, which is attached to the petition for review; "RB" refers to the respondent's brief APMI filed in the Court of Appeal; "Petn." refers to APMI's petition for review; and "POB" refers to the petitioner's opening brief on the merits.

[3] At the time, Mr. Meruelo was the sole shareholder of Alameda North Parking, Inc., which held a 30-year lease on the property and an option to purchase. (3 JA 645-646.) APMI did not purchase the property until six days later. (*Id.* at 647.)

B. One Day Before MTA Files its Eminent Domain Action, APMI Purchases the Subject Property and Increases its Debt to the Appraised Value

On April 1, 2004, MTA filed a complaint in eminent domain, naming defendants VCC Alameda (as the property's owner) and Alameda North Parking, Inc. (as a tenant), with the Superior Court. (1 JA 1-8.) On the same day it filed the complaint, MTA sought prejudgment possession of the property and used "quick take" procedures by depositing with the clerk of the superior court $6.3 million as the probable amount of just compensation to be paid for the property. (1 JA 15-18, 25-29, 34-35.) The court granted MTA an order for prejudgment possession. (1 JA 25.)

On March 31, 2004, just one day before MTA filed its complaint, VCC Alameda transferred the subject property to APMI. (1 JA 145; 3 JA 647.) Significantly, *on the very same day*, APMI obtained a credit line from NAMCO, a "non-traditional lender," in the amount of $2.25 million secured by the property. (3 JA 612, 856). The amount of the additional debt, when added to the existing debt on the subject property of $4.05 million, exactly matched the $6.3 million appraised value of the property. (3 JA 841-842.) The appraised value was communicated to Mr. Meruelo months earlier when MTA staff commissioned an appraisal of the property in order to make the precondemnation offer required for adoption of a resolution of necessity. (Tr. Ex. 21-1[4]; see Gov. Code, § 7267.2; Code Civ. Proc., § 1245.230, subd. (c)(4).)

NAMCO recorded its deed of trust on APMI's property that same day, after NAMCO added the subject property as additional collateral on a pre-existing $22,200,000 note for the acquisition of an unrelated parcel of

[4] MTA lodges several additional trial exhibits concurrently with the filing of this brief. (See Cal. Rules of Court, rule 8.124(b)(4).)

property by another one of Mr. Meruelo's companies, Merco Group, LLC. (3 JA 647; Tr. Ex. 59-3.) After the eminent domain action was filed, but before the deposit funds were withdrawn, APMI received three disbursements from NAMCO totaling approximately $933,400, which were paid directly to APMI. (Tr. Ex. 63-3, 64-3, 65, 69-1; see also 2 JA 571.)

C. APMI Does Not Object to its Lenders' Withdrawal of MTA's Pre-Judgment Deposit and Even Helps Them Withdraw the Money

Over the several weeks following the initiation of the eminent domain action, three of APMI's lenders—NAMCO, California National Bank, and VCC Alameda (which held a note and deed of trust on the property)—applied to the trial court to withdraw a portion of the deposited funds. (1 JA 43-47, 48-52, 74-139.)

Miguel Echemendia, the chief operating officer of APMI, verified the applications for withdrawal filed by NAMCO and VCC Alameda. (1 JA 46, 51; 8 JA 2278-2279, 5 RT 3604.) NAMCO's 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. (Compare 1 JA 49 with Tr. Ex. 69-1.) Its deed of trust conferred upon NAMCO "all settlements, awards, damages and proceeds *received by* [APMI] . . . in connection with any condemnation for public use of . . . the Property." (8 JA 2120, italics added.) VCC Alameda stated in its application that it held a note and trust deed on the subject property in the amount of $1,450,000. (1 JA 44.)

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 90; *see also id.* at 85 [entitling bank to "judgments, awards of damages and settlements hereafter made as a result of or in lieu of any taking of the property."].)

On April 28, 2004, MTA gave APMI the statutorily required notice of the lenders' withdrawal applications. (1 JA 63-66; see § 1255.230, subds. (b) & (c).) APMI filed no objection within the statutorily prescribed period or thereafter; indeed, APMI by its own admission "welcomed" the withdrawals and has not to this day raised any objections to the elimination of its debt. (RB at p. 31; see 5 RT 3632.) Counsel for VCC Alameda and NAMCO represented to the court that "[APMI was] not objecting to the instant withdrawal of funds." (1 JA 153 at ¶ 8, 173.)

MTA itself initially objected to the applications, concerned that they would collectively exceed the amount of the $6.3 million deposit and leave no reserve for taxes. (1 JA 56-61, 141-143.) Once that concern was allayed, MTA withdrew its opposition and agreed to stipulate to the withdrawal. On June 10, 2004, VCC Alameda filed a 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 $1,495,205.03; $2,140,000; and $2,554,794.97, 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.

(1 JA 173; TR Ex. 62-2.) The executed stipulation was signed by VCC Alameda, NAMCO, California National Bank, MTA, the Los Angeles County Tax Collector, and the City of Los Angeles. (1 JA 174-177.) It was served on counsel for APMI. (1 JA 179.) APMI did not object.

On June 10, 2004, the Court entered an order approving the lenders' withdrawals on the ground that it appeared "*all parties* . . . who ha[d] appeared in [the] action, ha[d] stipulated to an order authorizing withdrawal of a portion of the amount of probable just compensation on deposit with the Court." (1 JA 180, italics added.) When added to California National Bank's outstanding lien on the property, the additional debt APMI purportedly incurred on the eve of condemnation conveniently totaled the property's *entire* pre-condemnation appraisal and deposit of $6.3 million. (1 JA 172-179.)[5]

Before and after the trial court's order, APMI facilitated NAMCO's withdrawal. APMI hired legal counsel for NAMCO (8 JA 2252 [listing APMI's "Miguel Echemendia" as "client" for NAMCO withdrawal check]); APMI "handled" the withdrawal (8 JA 2262, 2278-2279); and APMI directed NAMCO how and where to apply the withdrawn funds (5 JA 1035 [showing admission of pages 100-101 from Hamid Tabatabai's February 12, 2005 deposition]; TR Ex. 68.) In this capacity, APMI and NAMCO arranged for the withdrawal of more than $2 million of the deposit—even though APMI had not drawn upon any of NAMCO's $2.25 million line of credit until after the condemnation lawsuit was filed (Tr. Ex. 69; 1 JA 1) and did not draw upon the last $1.17 million until after NAMCO had already withdrawn the deposit funds (Tr. Exs. 66, 69).

[5] California National Bank's existing lien was in the amount of $2.6 million. (1 JA 174.) APMI incurred last-minute debt to NAMCO ($2.25 million) and VCC Alameda ($1.45 million). (1 JA 44, 49.) These amounts total $6.3 million, the entire deposit.

The lenders used the withdrawn deposit funds to pay APMI's loans—increasing APMI's equity in the property by more than $6 million. (1 JA 274; 2 JA 485, 489; see Petn. at pp. 7-8.) The proceeds withdrawn by NAMCO were used to pay off APMI's balance on its credit line as well as to pay down other loans on other properties, including a loan not secured by the subject property. (Tr. Exs. 68-1, 69-1; see 3 JA 824, 864.) APMI thereafter moved for an *increase* in the initial deposit, which the trial court granted. (2 JA 419, 425-426, 451-452, 453-454.)

D. APMI Waited to Assert a Challenge Until After the Statutorily Prescribed Objection Period

Although APMI's principal had urged the Board not to adopt the resolution of necessity at the March 25, 2004 hearing, APMI remained silent about its intent to challenge the taking while its lenders applied to withdraw funds. MTA gave notice of the right to object to the withdrawals on April 28, 2004, and the statutory objection period ended on May 10, 2004. (1 JA 63-64; § 1255.230, subd. (c).) APMI answered the complaint on May 20, 2004. (1 JA 195.) The following day, APMI filed a first amended answer, changing the name of the answering party from Alameda North Parking, Inc. to APMI and pleading various hornbook affirmative defenses to eminent domain proceedings. (1 JA 144-151.)

In its amended answer, APMI gave no factual basis for the right-to-take defense upon which APMI eventually prevailed in the trial court—that the Board's resolution of necessity required MTA to negotiate with APMI on mutually agreeable parking. (See § 1250.350 ["The . . . answer shall state the specific ground upon which the objection is taken and . . . the specific facts upon which the objection is based."].) Instead, APMI alleged on information and belief only that "Plaintiff has failed to adopt a

Resolution of Necessity which satisfies the requirements of the Eminent Domain Law." (1 JA 148.)

APMI took no further action on its right-to-take defenses until August 9, 2004—almost two months after the deposit was withdrawn—when APMI objected to MTA's request for an order enforcing the prejudgment possession order. (1 JA 236 ["As disclosed in its Answer, APMI objects to MTA's right to take."].) MTA did not take possession of the property until November 2004. (2 JA 457-459, 467.)

E. Despite the Withdrawals of the Deposit, the Trial Court Dismisses the Action

After APMI had its debt eliminated with MTA's money, the trial court held a bench trial, beginning on December 12, 2005, to decide the right-to-take challenges APMI had pleaded in its amended answer. (4 JA 1032-1036.) MTA objected on the basis of section 1255.260, arguing that APMI had waived its right to challenge the taking because APMI had received the benefit of MTA's deposit. (2 JA 569-573, 3 JA 820-825.) The trial court took the case under submission. (4 JA 1036.)

During this time, the MTA negotiated with APMI in accordance with the direction from the Board, but after months of unsuccessful negotiations (4 JA 1114), the Board adopted a resolution on January 30, 2006 that "directed [MTA's] staff to not further pursue any joint development of the property which is the subject of this action." (4 JA 1052-1056.)

Following hearings in February and May 2006, the trial court issued its ruling on the right to take trial. The court did not rule on the waiver issue. (4 JA 1114-1117.) Instead, the trial court conditionally dismissed the condemnation action and required MTA to negotiate with APMI

regarding the development of mutually agreeable parking despite the Board's January 30, 2006 resolution to the contrary. (4 JA 1118-1121 at ¶¶ 1, 4, 5.) The parties negotiated for sixteen months with the assistance of a mediator. (5 JA 1204, 1217.) After the mediator filed a report in which he concluded that MTA's staff had not negotiated in good faith,[6] the trial court signaled its intention to dismiss MTA's case. (5 JA 1214-1217, 1222; 5 RT 2407-2408.)

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 the then-newly decided case *Redevelopment Agency of City of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111 (*Mesdaq*). (7 JA 1959-1961.) The trial court refused to hear the waiver argument and struck MTA's filings. (5 RT 2719, 2721.) 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. (*Id.* at p. 2721.)

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[6] The mediator reached this conclusion based on his interpretations of the Board's probable intentions in enacting the resolution of necessity and how the Board might have voted in other circumstances (5 JA 1214, 1216-1217), even though "the rule barring judicial probing of lawmakers' motivations applies to local legislators as well" (*County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726). Also, contrary to accepted rules of statutory construction, the mediator did not consider the Board's subsequent directive to terminate negotiations. (4 JA 1054; see *Aguiar v. Superior Court* (2009) 170 Cal.App.4th 313, 327 [city council's subsequent repeal of administrative regulation is "powerful evidence" of its intent in adopting original ordinance].) The mediator expressed concern regarding MTA's insistence on 100 bus parking spaces (5 JA 1215-1216), but disregarded APMI's acquiescence to this number and its eleventh-hour about-face on the issue. (See Appellant's Reply Brief in Court of Appeal, at pp. 28-29.)

MTA then filed an *ex parte* application, again requesting a ruling on the statutory waiver claim against APMI under section 1255.260 and *Mesdaq*. (7 JA 1994-1099.) The court responded that "there's no procedural device before this court that supports raising this issue at this point" and denied the application. (5 RT 3015; see also 7 JA 2012-2014.) Taking APMI's suggestion to leave the issue to the Court of Appeal (5 RT 3010), the court ruled that "[w]hether or not *Mesdaq* will cause this case to come back or not, [the court is] not going to address [it] at this point" (*id.* at 3015). 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. (7 JA 2015-2016.)

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. (7 JA 2042-2062, 2063-2083.) The trial court denied all of MTA's motions. (11 JA 3197.) The trial court purported to distinguish *Mesdaq* on the ground that APMI did not explicitly consent to the lenders' withdrawals. (5 RT 3639, 3645.)

F. The Court of Appeal Reverses

In a unanimous decision, the Court of Appeal held that APMI had waived the right to pursue its right-to-take defense by accepting the benefit of its lenders' withdrawals. (Opn. at p. 10.)[7] The court concluded that no valid basis existed to distinguish this case from *Mesdaq* because the evidence established as a matter of law that APMI's acceptance of the benefits of the deposit was voluntary. (*Id.* at p. 14.) The court further

[7] The Court of Appeal therefore did not reach the other issues presented, including whether the resolution of necessity was valid, whether the trial court improperly granted a permanent dismissal, and whether the trial court should have conditioned MTA's surrender of the property on repayment of the withdrawn deposit. (Opn. at p. 10.)

found that *Mesdaq* did not change existing law, and rejected APMI's argument that it did not receive adequate notice of its right to object. (*Ibid.*) Accordingly, the Court of Appeal reversed the order of dismissal, holding that APMI had waived its right to challenge the taking and that its sole remedy was to pursue a claim for greater compensation. (*Id.* at pp. 15-16.)

ARGUMENT

I. THE SECTION 1255.260 WAIVER PROVISION

Both the United States Constitution and our state's Constitution recognize the sovereign power of the government, including 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.) California law goes one step further and provides a "quick take" procedure that empowers an agency to take possession of property before condemnation litigation is complete and before "just compensation" is fixed and paid to the property owner—but only if certain conditions are met. (§§ 1255.010-1255.470.)

To avail itself of the "quick-take" procedure, a public agency must deposit with the Clerk of the Court an amount equal to the appraised value of the property as of the date the agency filed its condemnation action, so that the deposit money is available for withdrawal by the property owner and others with compensable interests in the property. (§§ 1255.010, 1255.210, 1263.110; *Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 Cal.4th 648, 666 (*Mt. San Jacinto*).) The deposit is made immediately available to the owner to ameliorate the loss of possession of his property. With the available funds, the owner—who has been denied the use of property and continues to be obligated to make payments on his loan—can pay off his loans and obtain replacement property.

Prior to entry of judgment, the property owner or any other defendant may apply to withdraw some or all of the deposit by filing a verified application and serving it on the plaintiff agency. (§ 1255.210.) Upon receipt of such an application, the plaintiff has 20 days to file any objections. (§ 1255.230, subd. (b).) If other parties are known to have interests in the property, the plaintiff must serve them with notice that they have ten days to object to the withdrawal. (*Id.*, subd. (c).) If any party objects, the court must determine whether to allow the withdrawal and whether to require an undertaking. (§§ 1255.230, subd. (d), 1255.240, subd. (a).)

If a property owner withdraws the deposit, or fails to object to a withdrawal for the owner's direct benefit, section 1255.260 identifies the consequences:

> 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 persons receiving such payment except a claim for greater compensation.

(§ 1255.260.) This waiver provision, whose statutory heritage dates back to 1897, effectuates the principle that "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." (*Mt. San Jacinto*, *supra*, 40 Cal.4th at pp. 659, fn. 6, 666.) This appeal concerns the application of section 1255.260.

In determining whether the section 1255.260 waiver applies to a property owner who voluntarily acquiesces in its lenders' withdrawals of deposit funds, and thereby receives the full benefit of the withdrawals, the Court construes the statutory language. " 'The basic rules of statutory

construction are well established. "When construing a statute, a court seeks to determine and give effect to the intent of the enacting legislative body." [Citation.] " '[The Court] first examine[s] the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' [Citation.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." [Citation.] But if the statutory language may reasonably be given more than one interpretation, " ' "courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." ' " ' [Citations.]" (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.)

Notably, section 1255.260 does not limit the reach of its waiver to only the withdrawing party. Had the Legislature intended to impose such a limitation, it could easily have substituted "persons withdrawing the money" for "persons receiving such payment." Instead, the waiver applies by operation of law to all "persons" who receive "any [deposit] money." (§ 1255.260.) Given the purpose of section 1255.260—to prevent owners from having it "both ways" (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 666)—the "receipt" language is most naturally read to prevent owners from *de facto* obtaining the deposit withdrawn by third parties and still challenging the condemnation (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1140.) "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." (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 666.)

Section 1255.260 codifies the "acceptance of benefits" rule long used by California courts, under which the voluntary acceptance of the

benefit of a judgment or order bars an appeal from it. (*Schubert v. Reich* (1950) 36 Cal.2d 298, 299.) "The rationale upon which this rule is based is that the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other." (*Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 824.) Similarly, the rationale of section 1255.260 is that it would be inconsistent for the owner to challenge the agency's right to take while enjoying the benefit of the deposit of probable compensation. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 665.) Also, like section 1255.260, the acceptance of benefits rule allows the person accepting benefits to make a claim for greater compensation when entitlement to the benefits is not in dispute. (See *Trollope*, *supra*, at p. 825 ["There is an exception . . . applicable where an appellant is concededly entitled to the benefits which are accepted and a reversal will not affect the right to those benefits."].)

II. THE EXISTING STATUTORY SCHEME, AS INTERPRETED BY *MESDAQ*, PREVENTS ANY INVOLUNTARY WAIVER OF RIGHT-TO-TAKE CHALLENGES

APMI's opening brief rests on a fundamentally flawed premise, namely, that under the interpretation of section 1255.260 applied in *Mesdaq* and by the Court of Appeal below, property owners will run the risk of having their right-to-take challenges *involuntarily* waived by lenders who may have adverse interests. This scenario cannot happen to *any* property owner in California and, as discussed in Section IV, *infra*, certainly did not happen to APMI in this case. To the contrary, all California property owners have a statutory right and a corresponding statutory obligation to object to any withdrawal made for their benefit.

The Eminent Domain Law specifically prevents any waiver from being involuntary. The law requires that property owners receive notice of

any withdrawal applications and be given an opportunity to object. (§ 1255.230.) If an owner objects to a lender's withdrawal and challenges the agency's right to take, the law provides for a specially expedited trial. (§§ 1260.010, 1260.110, subd. (b); *Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 665 [describing statutory scheme].) APMI tries to create the impression that a condemner can deprive a property owner of the ability to challenge a condemnation, asserting that

> [t]he 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.

(POB, at p. 18.) This is flatly incorrect. Section 1255.410 provides that a condemner may acquire possession of property *only* if the court finds that "the plaintiff is entitled to take the property by eminent domain." (§ 1255.410, subd. (d)(1)(A), (2)(A).) Today, courts decide orders for possession (with few exceptions) upon noticed motion, and the parties therefore have the opportunity to "fully litigate the [right-to-take] issue if raised by the defendant" at the outset. (See § 1255.410 Law Review Commission Comment (1975).)[8] Right-to-take challenges should be

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[8] The Legislature amended section 1255.410 in 2006 to require that orders for immediate possession not involving public emergencies be heard on noticed motion, giving the defendant 30 days to object. (Sen. Bill No. 1210 (2006 Reg. Sess.) § 3.) Thus, the court must consider the facts and conduct a hearing on the objections before finding the plaintiff is entitled to take the property. (§ 1255.410, subd. (d)(2)(A).)

Prior to 2006, an order for possession was obtained via ex parte application and the "determination of the plaintiff's right-to-take . . . [was] preliminary" only. (§§ 1255.410 (1975); 1255.450, subd. (b) (1975); Legs. Com. com., Deering's Ann., § 1255.410 (1981 ed.) p. 180.) But the pre-2006 defendant still had the ability to fully litigate the issue: if prior to possession, a defendant showed there was a "reasonable probability" its right-to-take challenge would prevail, the court would stay the order for

adjudicated before the agency takes possession, and such trials are typically specially set under section 1260.110, subdivision (b), where the condemner seeks prejudgment possession. The owner may seek immediate review of an adverse determination by extraordinary writ. (*Mt. San Jacinto*, *supra*, at p. 665.) The existing statutes, as applied by this Court in *Mt. San Jacinto* and by the Court of Appeal in *Mesdaq*, give all California property owners the right to prevent their lenders from triggering a waiver against the property owner's wishes.

In the face of these statutory protections, APMI argues that waivers of right-to-take challenges may nevertheless occur against property owners' wishes because they will lack a legal basis to object because their lenders are *entitled* to the deposit. (POB, p. 20.)[9] Yet APMI—like every other property owner in California—has the right to object to a withdrawal on the grounds that the owner challenges the right to take and wants to preserve the status quo. Section 1255.230 sets out the procedure by which "any party" who has an "interest in the property" may object. Nothing in the Eminent Domain Law or the court decisions interpreting it prevents an objection on the basis that a withdrawal by a lender would waive an owner's right-to-take challenge.

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possession pending ruling on the objection. (§ 1255.430 (repealed 2007).) If the defendant prevailed on its objection, the Legislature specifically authorized the court to vacate the order because it was issued ex parte. (See Law Revision Com. com., Deering's Ann., § 1255.440 (1981 ed.) p. 185.)

[9] APMI goes so far as to change the description of issues presented for review to assert that lenders are "entitled" to deposit funds. (Id at p. 2; see Cal. Rules of Court, rule 8.520(b)(2) [the petitioner's brief must quote "[a]ny order specifying the issues to be briefed" or "[t]he statement of issues in the petition for review"].)

APMI suggests that under standard deed of trust provisions, lenders are entitled to pre-condemnation deposit proceeds and therefore property owners will lack a proper basis upon which to object. (POB at p. 16-18.) To the contrary, however, standard deed of trust provisions entitle lenders to share in condemnation *awards*, not to withdraw pre-condemnation *deposits* against the owner's wishes. (See, e.g., 2 Matteoni & Veit, Condemnation Practice in Cal. (Cont.Ed.Bar 2008) Apportionment, Judgment, and Posttrial, § 10.16, p. 624.) Indeed, APMI's own trust deeds did not entitle its lenders to withdraw pre-condemnation deposits:

- APMI assigned to NAMCO all "settlements, awards, damages and proceeds *received by [APMI]* . . . in connection with any condemnation for public use." (8 JA 2120, italics added.) Had APMI objected, it would not have received any of the deposited funds. Moreover, APMI argues to this day that it did not receive any deposit funds. (E.g., POB at p. 25.) If that is the case, then the deposit is surely not a settlement, award, damage, or proceed received by APMI to which NAMCO was legally entitled.

- California National Bank's deed of trust entitled it to share in the "compensation, award, and other payments or relief" resulting from a *taking*, but says nothing about the lender's entitlement to withdraw a pre-judgment *deposit*, let alone a deposit made *long before* any taking. (1 JA 90.) California National Bank joined in the withdrawal applications in May 2004, and the trial court approved the withdrawals in June 2004, but MTA did not take possession of the subject property until November 2004. (1 JA 74-75, 180-182; 2 JA

457-459, 467.) APMI had every right to object to the withdrawal of a pre-taking deposit.[10]

- VCC Alameda's deed of trust is not part of the record and, contrary to APMI's suggestion, it would be improper simply to *assume* the contents of the deed of trust. (POB at p. 17.)

The record contains no evidence whatsoever that trust deed provisions entitle lenders to withdraw pre-condemnation deposits of probable compensation over property owners' objections.

APMI next contends that an owner's objection could violate Civil Code section 2929, which prohibits a mortgagor from substantially impairing a mortgagee's security. (POB at p. 20.) This contention is baseless. An objection would not impair the lender's security—let alone substantially—because the owner maintains possession of the property pending the determination of a right-to-take challenge *and* the deposit remains in place. For example, had APMI objected to the withdrawals based on its intent to raise a right-to-take challenge and prevailed, the subject property would have remained in APMI's possession. Alternatively, if MTA had prevailed, the deposit would have become part of the award of compensation. Either way, the lenders' security interest would have been protected. Moreover, even assuming some hypothetical substantial impairment, the filing of an objection is an absolutely privileged act that cannot lead to statutory liability. (Civ. Code, § 47, subd. (b) ["A

[10] A lender would ostensibly be entitled 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[] or relief"—and the owner retains its right to object to withdrawal of the deposit.

privileged publication or broadcast is one made . . . [i]n any . . . judicial proceeding . . . ."]; *Ribas v. Clark* (1985) 38 Cal.3d 355, 364 ["[T]he purpose of the judicial proceedings privilege seems no less relevant to [statutory] claims."].)[11]

In sum, a property owner who intends to challenge an agency's right to take can and must come to court and object to a lender's withdrawal. An owner's voluntary decision not to object, and instead to receive the full benefit of the deposit of probable compensation, forfeits any challenge to the condemnation other than as to the amount of compensation paid. (§ 1255.260.)

III. WAIVER OF RIGHT-TO-TAKE CHALLENGES BY VOLUNTARILY ACCEPTING THE BENEFIT OF WITHDRAWALS IS CONSISTENT WITH ESTABLISHED PRINCIPLES

A. The "Acceptance of Benefits" Rule Would Bar Challenges Even Absent a Statutory Waiver Provision

The Court of Appeal held that, pursuant to section 1255.260, APMI waived all defenses except a claim for greater compensation by voluntarily accepting the benefits of its lenders' withdrawals of deposited funds. As discussed above in Section I above, applying the waiver not only to the lender actually withdrawing the deposited funds (who is rarely if ever going to have grounds to challenge the condemnation) but also to the property owner (who receives the direct benefit of the withdrawal and nevertheless seeks dismissal of the condemnation action) is true to the plain meaning of the provision, which applies to any "persons receiving such payment" of withdrawn funds. (§ 1255.260.)

[11] Any lender which sought to prosecute an action for impairment would be subject to an anti-SLAPP dismissal and liability for attorneys' fees. (See § 425.16; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057-1058, 1065.)

Applying section 1255.260 in this circumstance is also consistent with the "acceptance of benefits" rule long applied by California courts, which provides that:

> [I]f a person voluntarily acquiesces in or recognizes the validity of 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.

(*Trollope*, *supra*, 55 Cal.App.3d at p. 824; accord *People ex rel. Dept. of Public Works v. Gutierrez* (1962) 207 Cal.App.2d 759, 762 ("*Gutierrez*"); *Schubert*, *supra*, 36 Cal.2d at pp. 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."].) The rationale for the rule is that the right to the fruits of an order or judgment and the right to challenge that order or judgment are wholly inconsistent: accepting the benefits of a judgment is in effect an affirmance of its validity. (*Satchmed Plaza Owners Assn. v. UWMC Hospital Corp.* (2008) 167 Cal.App.4th 1034, 1041; *Trollope*, *supra*, at pp. 822-824.)

Here, the trial court's order directing the deposit funds withdrawn pursuant to the parties' stipulation falls squarely within the definition of judgment, order, or decree to which courts apply the "acceptance of benefits" rule. The rule is recognized in eminent domain proceedings (see *Gutierrez*, *supra*, 207 Cal.App.2d at p. 762, citing cases) and, contrary to APMI's suggestion (POB at p. 25), is not limited to acceptance of money judgments. (See, e.g., *Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1466 [by accepting the benefits of oral contract modification, party was estopped from arguing the evidence is barred by the parol evidence rule].) In *Lovret*

v. Seyfarth (1972) 22 Cal.App.3d 841, for example, the Court of Appeal held that the appellant was bound by an arbitration judgment because she participated in and benefited from the arbitration award by securing a release of liens that had been encumbering her property. (*Id.* at pp. 861-862 ["[O]ne cannot blow hot and cold at various stages of a given proceeding[.]"].)

Also, it is unquestionable that owners receive the benefit of their lenders' withdrawals. Indeed, a third party's payment of a taxpayer's legal obligation constitutes the receipt of taxable income to the taxpayer. (26 U.S.C. § 61(a); 26 C.F.R. § 1.1033(a)-2(c)(11) (2011) [amount realized by taxpayer in condemnation proceeding includes amounts paid to satisfy liens and mortgages, whether or not taxpayer is personally liable for them]; see also *Old Colony Trust Co. v. Commissioner of Internal Revenue* (1929) 279 U.S. 716, 72 ["The discharge by a third person of an obligation to him is equivalent to receipt . . . ."]; cf. *Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 661-662 [insurance premiums paid by employees to their employers were "taxable as gross premiums inuring to the benefit of the insurer."].) Here, for example, APMI received a benefit in the form of $6.3 million in paid-off debt, the elimination of accruing interest on the debt, and a 100% equity interest in the subject property. If MTA had to return the subject property to APMI—the result it seeks—APMI would be required to report the payment of its obligations as taxable income. APMI's assertion that it did not benefit from the withdrawals blinks at reality. (POB at p. 25.)[12]

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[12] Petitioner's counsel has co-authored a treatise entitled Condemnation Practice in California, in which he notes that a condemnation award is normally split between the owner and lienholder, and "[a]ny sum so paid to the lienholder is part of the amount realized by the owner from the condemnation, whether or not the owner was personally

By not objecting and instead voluntarily accepting the benefit of the withdrawals, APMI waived its right to challenge the taking. (§ 1255.260.) Even if APMI had truly, but erroneously, believed that it was powerless to object, that fact would not alter the outcome. An alleged mistaken belief is insufficient to defeat a statutory waiver. (See *Mathys v. Turner* (1956) 46 Cal.2d 364, 366 [holding that a party acting under mistaken belief they were compelled to accept tendered benefit "cannot prevent the satisfaction from operating as a bar to prosecution of the appeal."].)

APMI cites four cases in an attempt to show that the acceptance of benefits rule does not apply (POB at pp. 26-27), but none is of any avail.

APMI first cites *In re Marriage of Fonstein* (1976) 17 Cal.3d 738 (*Fonstein*), for the proposition that a party must show an "unmistakable acquiescence" in the benefit received. In *Fonstein*, this Court held that a wife was not precluded from appealing a division of community property by continuing to reside in the family home because this did not show an "unmistakable acquiescence" in the benefit of the judgment. (*Id.* at p. 744.) The Court noted that the husband had expressed no desire to use the residence; the wife had not received a deed to the property; and record title remained joint. (*Ibid.*) Here, in stark contrast, APMI's actions (manufacturing debt, telling lenders it did not object, and helping lenders make the withdrawals) and failures to act (not lodging an objection despite a full opportunity to do so) conclusively demonstrate that APMI acquiesced in the withdrawals of the deposit for its own benefit. (See Section IV, *infra*.)

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liable for the underlying debt." (See 2 Matteoni & Veit, Condemnation Practice in Cal. (Cont.Ed.Bar 2008) Income Tax Consequences of Condemnation Awards, § 12.23, p. 728.)

APMI cites the remaining three cases for the proposition that the "acceptance of benefits" rule does not apply where the party receiving the benefit "consistently and continually objects." (POB at p. 26, citing *Shopoff & Cavallo, LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1506 (*Shopoff*) [party receiving benefit "consistently pursu[ed] his objections"]; *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 86 (*Cream*) [a party's "consistent objections to the auction procedure, the resultant valuation of the geyser, and the terms of the judgment preserved the issue on appeal"]; *Phillips v. Isham* (1951) 105 Cal.App.2d 608, 611 [no acceptance of benefits occurred where a party's counsel received payment through no action of his own, held the money in a trust account, informed the opposing counsel that the money would be held in trust pending appeal, and did not use the money].) These cases are singularly inapposite because APMI *did not object to the withdrawals* and instead sat silently on the sidelines while its lenders represented to the trial court that APMI did not object and then used the funds to eliminate APMI's debt. APMI points to its objections to MTA's right to take—which APMI litigated *after* the entire deposit was withdrawn—but the relevant inquiry is whether APMI objected to the $6.3 million in debt payoff it received. It did not.

Moreover, several of these cases involved an exception to the "acceptance of benefits" rule that section 1255.260 expressly incorporates but that is not at issue in this case: that acceptance of benefits does not bar a claim regarding the *value* of the benefits. (See *Shopoff*, *supra*, 167 Cal.App.4th at p. 1506 ["'[W]here the benefits accepted are those to which the appellant would be entitled even in the event of reversal, acceptance thereof does not bar prosecution of the appeal . . . .'"]; *Fonstein*, *supra*, 17 Cal.3d at p. 745 [a wife's receipt of an item of community property did not bar her from appealing the division of community property because,

regardless of the outcome of the appeal, she "would be entitled to community property having a value greater than the value of the [item] which she has received"]; *Cream*, *supra*, 13 Cal.App.4th at pp. 84-86 [a wife was entitled to half of the item of community property at issue and her appeal concerned how that item had been valued].)

Unlike the parties in the cases upon which APMI relies, APMI accepted the benefit of the withdrawals without objection but nevertheless seeks to challenge the very basis upon which the funds were deposited. APMI is trying to "have it both ways" by "inconsistent[ly]" "insist[ing] [on questioning MTA's] right to take [the] property while it enjoys the use and benefit of the probable amount of just compensation." (*Mt. San Jacinto*, *supra*, 40 Cal.4th at pp. 665-666).

Consistent with section 1255.260 and the "acceptance of benefits" rule, courts of many other jurisdictions have held that a condemnee cannot accept deposited funds and thereafter appeal the condemnation on any ground other than the amount of compensation due.[13] In *Sherman v. McKeon* (N.Y. 1868) 38 N.Y. 266, the court held that a property owner who "consented to receive [a condemnation award] without objection" had waived any objections to the taking. (*Id.* at pp. 274-275.) In a situation analogous to the one presented here, the Michigan Supreme Court held that the property owners' consent to a withdrawal from a court deposit for

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[13] See, e.g., *Winslow v. Baltimore & Ohio Railroad Co.* (1908) 208 U.S. 59, 62; *Hitchcock v. Danbury & Norwalk Railroad Co.* (1857) 25 Conn. 516, 518-519; *Kile v. Town of Yellowhead* (1875) 80 Ill. 208, 211; *Test v. Larsh* (1881) 76 Ind. 452, 460-461; *State of Missouri ex rel. State Highway Com. of Missouri v. Howald* (Mo. 1958) 315 S.W.2d 786, 788-789; *Shapiro v. Maryland-Nat. Capital Park & Planning Com.* (Md. 1964) 201 A.2d 804, 805-806; *In re Courthouse in City of New York* (N.Y. 1916) 111 N.E. 65, 66; *State v. Jackson* (Tex. 1965) 388 S.W.2d 924, 925; *Burns v. Milwaukee & Mississippi Railroad Co.* (1859) 9 Wis. 450, 457.

amounts due upon a mortgage rendered a determination of the validity of a contract for sale of lands unnecessary: "*This disposal of that portion of the fund was equivalent to a payment to them.* . . . Neither law nor equity will permit a litigant to accept from his opponents the money which he denies his opponent owes him, and then continue the litigation to an appellant court." (*Bigelow v. Sheehan* (Mich. 1907) 114 N.W. 389, 390, italics added.)

B. No Basis Exists for Determining the Statutory Waiver Under Constitutional Criminal Law Standards

Despite its voluntary acceptance of the benefit of the deposit withdrawals, APMI contends that it did not waive its right-to-take challenge because its waiver was not *knowing and intelligent.* This is the incorrect standard. The "knowing and intelligent" waiver standard is reserved for assessing whether a criminal defendant has properly waived his or her constitutional rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 465-467.) APMI thus attempts to substitute a common law definition of waiver drawn from criminal law cases for the definition that the Legislature chose—"the receipt of any [deposited] money shall constitute a waiver *by operation of law.*" (§ 1255.260, italics added.)

No single definition of waiver exists (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 270 [refusing to apply standard for evaluating waivers as to ambiguous verdicts to waivers of juror polling errors]), and section 1255.260 is a "substantive bas[i]s" for waiver separate from waiver under the common law (*San Diego Gas & Electric Co. v. 3250 Corp.* (1988) 205 Cal.App.3d 1075, 1081-1082). Indeed, the Court of Appeal has previously rejected the "knowing and intelligent waiver" standard in the context of a property owner's withdrawal of a deposit, concluding that the waiver standard from criminal cases has "no application to a litigant

confronted with a choice such as that which is provided by the condemnation statutes in question . . . ." (*Regents of Univ. of Cal. v. Morris* (1968) 266 Cal.App.2d 616, 634 (*Morris*).)

It bears noting that APMI's constitutional rights are not at issue. Although the right to "just compensation" is constitutionally grounded, it is satisfied by making a public agency's deposit available for withdrawal; the Legislature's placement of conditions upon the withdrawal of these funds burdens at most the owner's statutory right to challenge the legality of the taking and thus "does not deny the owner just compensation" or threaten the deprivation of any constitutional right. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at pp. 664-666 [upholding section 1255.260 against constitutional challenge]; see also *Pacific Gas & Electric Co. v. Superior Court* (1973) 33 Cal.App.3d 321, 327 ["[T]he 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"]; *Morris*, *supra*, 266 Cal.App.2d at pp. 634-635 [same, collecting cases].)

Here, the California Legislature has determined that a property owner waives challenges to the condemnation power when the owner receives any portion of the condemnation deposit, and the courts have correctly equated voluntary receipt of the benefit of withdrawn funds with "receipt." (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1140; Opn. at p. 14.) APMI had every opportunity to object to its lenders' withdrawals, which were used to eliminate its debt on the subject property, yet APMI failed to do so. APMI is therefore bound by the waiver provision of section 1255.260. APMI's position is analogous to that of a defendant who does not file a response to a summons and complaint, does not appear at the hearing, and had no excuse for its default. (§§ 471.5, subd. (a), 473, subd.

(b).) APMI's unprecedented argument that it should be allowed to *benefit* from its own default would turn the statutory waiver provision of section 1255.260 on its head.

IV. THE CIRCUMSTANCES OF THIS CASE CONCLUSIVELY DEMONSTRATE THAT APMI WAIVED ITS RIGHT TO CHALLENGE THE TAKING

This case is a good example of why the waiver provided for in section 1255.260 cannot be limited only to those parties who actually withdraw the deposit. Despite APMI's repeated assertions that its right to take challenge was "involuntarily" waived by the "independent" acts of "adverse" lenders, APMI itself waived its right. First, APMI used a straw lender to withdraw deposit funds, which constitutes "receipt" under any reasonable interpretation of that word. Second, APMI did not object when its lenders applied to withdraw deposit funds. To the contrary, APMI represented that it *did not object* and then facilitated the withdrawals. By doing so, APMI obtained significant direct benefits from its lenders' withdrawals, including a 100% equity interest in the property, elimination of the obligation to make mortgage payments, and no further accrual of interest. All of this is inconsistent with the maintenance of a challenge to MTA's right to take.

A. APMI Received Deposit Proceeds Through Use of Straw Lenders

Up until March 31, 2004, one day before MTA filed its eminent domain action, VCC Alameda owned the subject property and had an outstanding note and deed of trust to California National Bank in the amount of $2.6 million. (1 JA 44, 74; 3 JA 650.) On that day, APMI purchased the property from VCC Alameda for $4.05 million, giving a $1.45 million note to VCC Alameda and apparently assuming VCC

Alameda's note to California National Bank for the remainder of the purchase price. (1 JA 142 [showing total amount of holding company RPM Investments' lien on Property as equaling VCC Alameda's lien added to California National Bank's lien]; Tr. Ex. 67 [check for VCC Alameda's withdrawal made payable to RPM Investments].) APMI appears to have acquired the property without paying a single dollar of its own money.[14]

Also on the same day, March 31, 2004, APMI recorded a credit line in the amount of $2.25 million from NAMCO secured by the subject property. (Tr. Ex. 59.) The amount of the additional NAMCO debt when added to existing debt of $4.05 million *exactly matched* the $6.3 million full appraised value of the property, and the amount of the deposit that MTA would make the following day. (3 JA 841-842.) APMI knew exactly how much to increase the debt on the property because the pre-condemnation appraisal and offer requirements gave APMI four months' notice that the deposit of probable compensation would be $6.3 million. (Tr. Ex. 21-1; 3 JA 647.)

Thus, one day before MTA filed the eminent domain action, the debt on the subject property increased from $2.6 million to $6.3 million, and the new lenders (VCC Alameda and NAMCO) promptly applied to withdraw the deposit. (1 JA 43-52.) APMI's chief operating officer, Miguel Echemendia, verified these lenders' applications without disclosing his affiliation with APMI. (1 JA 0046, 0051; 8 JA 2278-2279; 5 RT 3604.)[15]

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[14] Thus, by not objecting to its lenders' withdrawals, APMI essentially bought the subject property with taxpayer money.

[15] APMI has characterized Mr. Echemendia as an employee not senior enough to represent the company. (RB at p. 32.) In fact, he served as chief operating officer and, as APMI's own president testified, "act[ed] with authority" for APMI. (4 JA 1034 [showing admission of page 155 from Mr. Echemendia's March 19, 2005 deposition], 1035 [showing admission of pages 62-63 of Ezri Namvar's February 17, 2005 deposition];

Mr. Echemendia even hired a law firm to represent the two lenders, the same firm that would later represent American Apparel, which brought its own challenge to the right to take. (8 JA 2252 [listing "Miguel Echemendia" as "client" for NAMCO withdrawal check]; see 1 JA 37, 40; 2 JA 521.) For NAMCO, APMI handled the entire withdrawal of deposit funds. (3 JA 633; 8 JA 2261-2262.)

The circumstances of NAMCO's withdrawals further indicate that APMI used it as a straw lender. NAMCO's right to compensation was set on the date the eminent domain action was filed (§ 1263.020)—April 1, 2004—and on that date APMI's balance on the NAMCO credit line was zero. (Tr. Ex. 69-1.) Thus, NAMCO was not entitled to *any* of the deposit. Even if one looks at how much money APMI owed NAMCO on the date of withdrawal ($943,165), it is substantially less than the amount NAMCO actually withdrew ($2.125 million). (Tr. Exs. 66-1, 69-1.) Nevertheless, APMI worked with NAMCO to apply to withdraw the entire amount of the credit line, and to handle the withdrawal of the deposited funds. (1 JA 48-51; 3 JA 633; 8 JA 2261-2262, 2278-2279.) APMI also instructed NAMCO how to apply the withdrawn funds, and directed it to properties that were not subject to the lender's security deposit. (Tr. Ex. 68.)

In the trial court, APMI argued that NAMCO obtained its interest in the subject property in the ordinary course of business and pursuant to its "[u]sual [p]ractices." (3 JA 615.) Specifically, APMI contends that it put up the subject property as additional collateral for an earlier $22 million loan entered into between Merco (another one of Mr. Meruelo's companies) and NAMCO. (3 JA 615-616.) Yet if the subject property were collateral

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2 RT I-16-17; see also 3 JA 636A [describing Mr. Echemendia as Mr. Meruelo's "right hand man"].)

for a $22 million loan, it is not plausible that NAMCO would have applied to withdraw only $2.25 million of the deposit. NAMCO represented in its application to withdraw the deposit that it "[held] a note and trust deed *in the amount of $2,250,000* on the real property sought to be condemned" *not* $22 million. (1 JA 49, italics added.) The $22 million NAMCO note provides for a *partial* release of the lien upon payment by Merco of $5 million (Tr. Ex. 59-3), but NAMCO released the *entire* lien after withdrawing less than half that much. (2 JA 485-486.) The "additional collateral" explanation does not add up.

In short, APMI manufactured debt as a way to receive millions of dollars of MTA's deposited funds while not having directly "withdrawn" the funds—an attempted end run around section 1255.260. APMI's actions are totally inconsistent with its preservation of a right-to-take challenge, and belie its oft-repeated assertion that the withdrawals were the "independent" and "unilateral" actions of "adverse" lenders. (See, e.g., POB at pp. 2, 7, 15, 27-28, 35-36.)

B. APMI Consented to its Lenders' Withdrawals and Received the Full Monetary Benefit

Even aside from APMI's manufacture of purported indebtedness as a pretext to withdraw deposit funds, APMI voluntarily received the monetary benefit of the deposit funds. Rather than continuing to make loan payments and objecting when the lenders applied to withdraw MTA's pre-condemnation deposit, it knowingly acquiesced in the withdrawal of the deposit to pay down its own debt.

APMI asserts that it had no obligation to continue making mortgage payments because "[o]n the condemnor's possession of the entire property, the security transaction and the debtor-creditor relationship between the

owner and lender is effectively terminated" and "[t]he owner, now dispossessed, is no longer liable for subsequently accruing mortgage payments." (POB at p. 19.) APMI cites no support for these propositions, either in the law or in any of its deeds of trust. Indeed, in the Court of Appeal, APMI conceded that it "welcomed" its lenders' withdrawals because they reduced its debt payment obligations, "which usually present such a heavy burden to property owners challenging a public agency's right to take their property." (RB at p. 31.) Moreover, although MTA deposited probable compensation in April 2004, it did not take possession of the property until November 2004. (1 JA 74-75; 2 JA 457-459, 467.) Thus, even assuming APMI were correct on the law, APMI remained in possession of the property throughout the withdrawal process. Had it continued making loan payments, as it was obligated, its lenders would have had little reason to withdraw the deposit.

APMI also had ample notice of the withdrawals and ample opportunity to object, and its failure to do so is plainly inconsistent with its claim of "involuntary" waiver of rights. Even before NAMCO and VCC Alameda applied to withdraw the deposit, APMI was aware of the proposed withdrawals because it verified both lenders' withdrawal applications. (1 JA 46, 51.) APMI's involvement was even greater for NAMCO, as APMI handled the entire withdrawal process. (3 JA 633.) Then, after the lenders filed and served their applications, MTA provided APMI with the required statutory notice of the applications and informed APMI that it had ten days to object. (1 JA 63-67; see § 1255.230.) APMI raised no objection, and instead told the lenders' counsel it *did not* object. (1 JA 153.) This representation was made to the court by VCC Alameda and NAMCO's attorney (1 JA 153), was reflected in the parties' stipulation regarding withdrawals (1 JA 173), and was relied on by the trial court in

approving the withdrawals (1 JA 180 [noting that "all parties" had stipulated to the withdrawals].) APMI received the stipulation and the trial court's order but nevertheless allowed $6.3 million of taxpayer funds to be withdrawn for its benefit.[16]

APMI attempts to excuse its failure to object by asserting that it had no basis to object because (1) it did not dispute the amounts owed to the lenders and (2) they had a right to participate in the condemnation action. (POB at pp. 8, 16). As noted above, however, "any party" may object to withdrawal on the ground that the party has an interest in the subject property. (§ 1255.230, subds. (c)-(d).) APMI had an obvious basis to object to its lenders' withdrawals: APMI *owned* the property and believed that MTA had *no right* to exercise eminent domain over the property. APMI could and should have objected to *anyone* withdrawing the pre-condemnation deposit and therefore receiving "just compensation" for the property given APMI's intent to challenge the taking and maintain ownership.

APMI incorrectly contends that its hands were tied by the lenders' deeds of trust which "contractually assured their right, independent of the owner, to access condemnation funds." (POB at p. 16.) First of all, APMI's attorney admitted that the decision not to object had nothing to do with any trust deed provisions, which she had not even read. (5 RT 3633-3634.) Second, as discussed above, nothing in the deeds of trust precluded an objection to the withdrawals at issue. (See *supra* at pp. 20-21.) APMI's

[16] APMI objected to "protect" its right-to-take challenge only *after* its debts had been eliminated. (See POB at p. 7; 2 JA 0236.)

after-the-fact justifications for not objecting to the withdrawals are refuted by the record.[17]

Finally, APMI points to its request for an increase in the deposit prior to MTA's possession, and APMI's subsequent decision not to withdraw the increased deposit, as demonstrating its intent to preserve its right-to-take challenges. (POB at pp. 10 & fn. 6, 27, 33-34.) To the contrary, if APMI intended to mount a legitimate challenge to the taking, it had no reason to ask MTA to deposit additional money after its lenders' withdrawals. Indeed, APMI's request was an implicit concession that the condemnation is proper. (Cf. §§ 1255.040, subd. (e), 1255.050 [owners of residential and leased properties may require the plaintiff to make a deposit of probable compensation, but doing so "constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff . . . , of all claims and defenses in favor of the defendant except his or her claim for greater compensation."].)

C. APMI's Attempt to Distinguish *Mesdaq* Fails

The Court of Appeal's finding of waiver by APMI is consistent with *Mesdaq*. There, the public agency exercising eminent domain invoked

[17] APMI also claims all its loans were due immediately under acceleration clauses in the deeds of trust. (POB at p. 21, fn. 8.) The NAMCO and California National Bank deeds of trust had *optional* acceleration clauses (8 JA 2127, 2182) and there is no evidence that either lender demanded immediate repayment. (1 JA 74-77; 3 JA 629, 633.) Under those circumstances, attempts by the lenders to enforce the acceleration clauses may have violated the covenant of good faith and fair dealing or constituted an unreasonable restraint on alienation. (See *Kreshek v. Sperling* (1984) 157 Cal.App.3d 279, 283 [absent established impairment to security, trust deed holder's attempt to enforce acceleration clause violated implied covenant of good faith and fair dealing]; *Dawn Invest. Co., Inc. v. Superior Court (Beck)* (1982) 30 Cal.3d 695, 703-704 [due-on-sale clauses are void as unreasonable restraints on alienation, absent established impairment to security].)

"quick take" procedures and deposited $3.1 million with the court. (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1138.) The property owner had a $1.17 million mortgage on the property and had agreed to pay the balance of the loan "out of the proceeds of the compensation award." (*Ibid.*) The lender did not wait for the award to be made, however, and applied to withdraw $1.19 million of the deposit, equaling the loan balance plus interest and attorney's fees. (*Ibid.*) The owner filed a response to the lender's application, stating that although the lender had "no legal basis" for the application (because the owner and lender had agreed only to share the end-of-case "compensation award" and not the deposit), the owner nonetheless objected only to the withdrawal of $19,590.76 for attorney's fees and did not object to the withdrawal of the outstanding mortgage amount plus interest. (*Id.* at pp. 1138-1139.) In light of the owner's lack of objection, the trial court authorized the lender to withdraw the requested amount of the deposit minus the attorney's fees. (*Id.* at p. 1139.)

When the owner attempted to renew his challenges to the agency's taking on appeal, the Court of Appeal held that the owner had, under section 1255.260, "waived by operation of law" any objections to the agency's right to condemn his property. (*Mesdaq*, *supra*, 154 Cal.App.4th at pp. 1139-1140.) It was "beyond dispute that a 'portion' of the Agency's deposit . . . was 'withdrawn,'" and the court concluded the owner was a "person[] receiving such payment." (*Id.* at p. 1140.) The court rejected the owner's argument that "since [the lender] (i.e., not [the owner]) actually received the deposit, any statutory waiver 'runs only to the [lender]'" and found instead that there was no "legal distinction under section 1255.260 between [the lender] and [the owner] with respect to the withdrawal of funds in this case." (*Ibid.*)

In reaching this conclusion, the court explained how the "transaction easily constitutes [the owner's] 'receipt of' the money withdrawn from the deposit." (*Ibid.*) First, the court noted that

> [t]he money withdrawn was used to satisfy [the owner's] indebtedness to [the lender], resulting in a direct increase in the value of [the owner's] ownership interest in the condemned property, and relieving him of his mortgage obligations and accrual of interest on those obligations.

(*Ibid.*) Second, the court noted that this payment was accomplished with the owner's consent, namely, his lack of objection as expressed in his response to the lender's request. (*Ibid.*) The court perceived "no distinction between this scenario—where [the owner] consented to the withdrawal of the deposit by his bank to pay off his loan on the property—and a scenario where [the owner] himself withdrew the deposit and forwarded it to [the lender] for that purpose." (*Ibid.*) In both situations, the owner has received funds from the agency's deposit and section 1255.260's waiver would apply. (*Ibid.*)

APMI contends that *Mesdaq* is distinguishable because there the property owner " 'explicit[ly] consent[ed]' " to his lender's withdrawal of the agency's deposit, whereas APMI merely failed to object. (POB at p. 29.) Yet the property owner in *Mesdaq* simply stated that he was "'not objecting to the withdrawal of the outstanding mortgage amount plus interest'" to pay off his loan. (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1138-1139.) Thus, his consent was identical to APMI's consent.

Likewise, it is of no significance that the owner in *Mesdaq* noted his non-objection in a paper he filed with the court whereas APMI did not sign the stipulation on withdrawals. It is undisputed that APMI had no objection to the withdrawals *and* that APMI remained silent when its lenders

informed the court of its non-objection. APMI's passive acquiescence to the stipulation constitutes assent to it. (*McBain v. Santa Clara Sav. & Loan Assn.* (1966) 241 Cal.App.2d 829, 838 [respondent bound by stipulation between plaintiff and defendants where respondent did not object and instead "withdrew to the sidelines"], superseded by statute on other grounds as stated in *Familian Corp. v. Imperial Bank* (1989) 213 Cal.App.3d 681, 685; *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142 ["Had defendant's counsel remained silent after dictation of this stipulation, his passive acquiescence would constitute assent."].)[18]

Nor, contrary to APMI's suggestion, does any significant difference exist between the trust deed provisions at issue. In *Mesdaq*, as here, the relevant trust deed entitled the lender to share in condemnation awards, not pre-judgment deposits of probable compensation. (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1138 & fn. 19.)

If anything, this case presents a clearer case for waiver under section 1255.260 than did *Mesdaq* because APMI manufactured the great majority of the debt on the eve of the condemnation action and thereafter actively worked with its new "lenders" to withdraw the funds, a collusive situation not present in *Mesdaq*.

Unable to distinguish *Mesdaq*, APMI argues that it was wrongly decided. APMI asserts that "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

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[18] See also *Wilson v. Mattei* (1927) 84 Cal.App. 567, 571 (counsel's silence in the face of a statement read to the court "impels the court to conclude that defendant assented to this statement"); *In re Marriage of Lionberger* (1979) 97 Cal.App.3d 56, 62 (the silence of counsel as the trial court recited a provision "is tantamount to assent to the provision.").

the borrower/owner and the contractual and statutory rights that the lender has to the withdrawal." (POB at p. 30.) Regarding "independent interests" of lenders and borrowers, the Court of Appeal noted that the property owner *did not object* to the withdrawals. (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1140.) Indeed, the Court of Appeal stated that it expressed no opinion as to whether the owner would have waived his rights had he objected. (*Id.* at fn. 20.) As to "contractual rights" of lenders, the court noted that the deed of trust entitled the lender to an "award or settlement," not a deposit. (*Id.* at p. 1139 & fn. 19.) Finally, although a lender may have a right to *apply* for a withdrawal of the deposit (§ 1255.210), the property owner has a right and obligation to object to preserve any right-to-take challenge (§§ 1255.230, subd. (d), 1255.260).

The *Mesdaq* court properly applied the plain language and policy rationale of section 1255.260 to a scenario where, as here, the property owner was trying to "have it both ways." Had the owner intended to assert independence from his lenders, he would have come into court and objected to their withdrawals. (Cf. *Reed Orchard Co. v. Superior Court* (1912) 19 Cal.App. 648, 661 [only defendants who appear and lodge objections may question the disposition of a condemnation fund: "If the owner of a [property] interest can lie by in this way until after the judgment and successfully interpose . . . an objection, it is manifest that fraud is likely to be encouraged thereby at the expense of the public welfare."].)

V. THE COURT OF APPEAL'S APPLICATION OF SECTION 1255.260 IS SOUND PUBLIC POLICY

A. It Will Prevent Collusion Between Owners and Lenders and Protect Taxpayer Funds

Under the Court of Appeal's application of section 1255.260, a property owner who intends to challenge an agency's right to take must

object if his or her lender seeks to withdraw the pre-condemnation deposit. Such a withdrawal directly benefits the owner by reducing his or her indebtedness on the subject property. By failing to object, despite being afforded notice and an opportunity to do so, the owner voluntarily receives the benefit of the withdrawal and is barred under section 1255.260 from pursuing any claim or defense except one for greater compensation.

In addition to being true to the statutory text and consistent with the principles that underlie the waiver provision, the Court of Appeal's construction of section 1255.260 is beneficial as a matter of public policy. First, it puts the obligation to object on the most knowledgeable party. Only the property owner knows whether it would rather oppose any withdrawals and thereby preserve its right-to-take challenge, or whether it would rather waive any such challenges in exchange for receiving the direct benefit of the deposited funds.

Second, this construction prevents large commercial property owners from using complex business relationships to circumvent section 1255.260. For example, upon notice of an agency's intent to exercise eminent domain, a company holding title to the subject property can transfer it to a related company in exchange for a promissory note and a deed of trust. By doing so, the "lender" company may withdraw the deposited funds while the related "owner" company argues that it has preserved its right-to-take challenge.[19] The simple step of requiring the owner to object forecloses such schemes.

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[19] Cf. *Kalway v. City of Berkeley* (2007) 151 Cal.App.4th 827, 834-835 (upholding denial of couple's mandamus petition to set aside City's determination to merge couple's parcels where husband's transfer of one of the parcels to his wife a few days prior to City's notice of intent was a "scheme designed to circumvent the Act.").

Third, the Court of Appeal's construction of section 1255.260 promotes efficiency and protection of public funds by allowing adjudication of right-to-take challenges *before* any withdrawals are approved. If the owner objects and the court denies a lender's application for withdrawal pending resolution of a condemning entities' right to take, the law provides for prompt resolution of such challenges. (§ 1260.010 ["Proceedings under this title take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined."]; § 1260.110 [right-to-take challenges shall be heard prior to the determination of compensation, and trial on such objections may be specially set].)[20] Thus, the court can expeditiously resolve the dispute and either affirm the right to take (overruling the objection and allowing the lender to withdraw the deposit funds) or uphold the right-to-take challenge (in which case the lender need not withdraw the deposit funds because the property remains in the owner's possession). Either way, the status quo is preserved pending the final determination.

B. Finding Waiver Where a Property Owner Has Notice of its Lenders' Withdrawals and Fails to Object Is Fair to All Parties

The Court of Appeal's construction of section 1255.260 is fair to property owners. To preserve a right-to-take challenge, the property owner

[20] The 1975 Law Revision Commission Comment to section 1255.430 (repealed 2007) explains that a stay of an order for immediate possession is typically unnecessary where a right-to-take challenge is asserted because "objections to the right to take are expeditiously resolved"—normally by the date of possession specified in the order. In 1975, this was 30 days after service of the order. (§§ 1255.410 (1975); 1255.450, subd. (b) (1975).) Today, hearings on motions for orders for immediate possession are set 60 days out from date of service and any defendant may oppose the motion. (§ 1255.410, subds. (b), (c) & (d)(2) (2011).)

has at least three options: First, the owner may continue making payments on debt secured by the property to prevent any withdrawals. The lender will continue to earn interest and receive payments due under the loan and its security (the property or the deposit) is preserved. Second, the owner might enter into an agreement with the lender providing that if the owner is unsuccessful with the right-to-take challenge, the lender may withdraw the deposit. (See, e.g., *Mesdaq*, *supra*, 154 Cal.App.4th at p. 1138.) Third, if the lender nevertheless seeks to withdraw the deposit, the owner can and *must* object to the lender's withdrawal to preserve any right-to-take claim. The simple step of lodging an objection will allow the trial court to decide the right-to-take challenge *before* authorizing any withdrawals.

This construction is also fair to lenders because it expedites the withdrawal process and reduces transaction costs. If there is no objection to withdrawal, the lender may withdraw the amount to which it is entitled without posting a bond or undertaking. (§ 1255.230.) Should the owner object because of a pending right-to-take challenge, the statutory scheme allows for prompt resolution of the challenge.

The Court of Appeal's construction is fair to public agencies, which will be put on notice of objections at the appropriate time (i.e., before the funds are withdrawn). Already cash-strapped public entities will not have to face situations in which property owners receive the full benefit of deposits of probable compensation *and* are allowed keep the property for which that compensation was deposited, with agencies in the position of seeking recovery from lenders.

C. The Interpretation APMI Proposes Would Work Great Mischief

APMI contends that under section 1255.260 only the withdrawing party waives defenses, even if the property owner receives the benefit of the withdrawals. Such an interpretation would contravene the very purpose of section 1255.260 by allowing what happened here. APMI borrowed money from third parties on the eve of condemnation—tantamount to an advance withdrawal of the deposit—and then allowed the third parties to withdraw the deposited funds, thus purportedly preserving the property owner's right-to-take challenge. The Legislature cannot have intended such an absurd result, where a property owner keeps its property *and* the monetary value of the deposit.

Indeed, by allowing the owner to receive the "just compensation" payment the Constitution authorizes *and yet also keep its property*, APMI's interpretation would result in an unconstitutional gift of public funds. Article XVI, section 6 of our Constitution provides that "[t]he Legislature shall have no . . . power to make any gift or authorize the making of any gift of any public money or thing of value . . . ." This provision bars the use of taxpayer funds for wholly private purposes. (See, e.g., *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 211; *Jordan v. Cal. Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450.) In *Los Angeles County v. Jessup* (1938) 11 Cal.2d 273, for example, this Court held that the Legislature violated section 6 when it forgave liens imposed on the real property of certain benefits recipients to secure reimbursement of overpayments. (*Id.* at pp. 277-278.) An interpretation that allows private landowners to use public funds (the "quick take" deposit) to create debt-free property ownership would contravene this constitutional provision.

Moreover, the interpretation APMI proposes could render a court incapable of restoring parties to their respective positions should the court sustain the right-to-take challenge.[21] Here, for example, if the Court of Appeal had affirmed the trial court's dismissal of the eminent domain action, MTA would have to return a property that it had spent money to improve *and* seek return of its funds from lenders (1) who are no longer parties to the proceeding, (2) who no longer have a contractual relationship with APMI, and (3) at least two of whom are bankrupt or in receivership. Even in the unlikely event MTA was able to recover its deposit from the lenders, the result would be unfair to the lenders, who no longer have a basis to restore their status as lien holders. Restoring the parties to their pre-withdrawal positions would prove impracticable if not impossible. Yet this is the exact outcome APMI urges this Court to approve: that APMI is under no obligation to return the withdrawn funds and that MTA must recover the deposit (if at all) from the lenders. (POB at p. 38.)

APMI contends that all this can be avoided if the *plaintiff* objects or seeks an undertaking. APMI's attempt to impose the burden on the public agency is inappropriate for at least two reasons. First, requiring public agencies to object to prevent property owners from having it "both ways" is backward, when preventing that result is the purpose of section 1255.260. (See e.g., *Mt. San Jacinto*, *supra*, 40 Cal.4th at pp. 665-666.) Second, requiring public agencies to seek an undertaking even though the property

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[21] See *Giometti v. Etienne* (1936) 5 Cal.2d 411, 415 (holding that appellants, who availed themselves of judgment's benefits in which they were awarded ownership of property by immediately encumbering property, could not appeal from adverse portion of judgment: "[I]t is obvious that appellants, by reason of their dealing with the property . . . would not be able to place respondent in the position theretofore occupied by him."); see also *Satchmed Plaza Owners Assn. v. UWMC Hospital Corp.* (2008) 167 Cal.App.4th 1034, 1037-1038.

owner *does not object* to withdrawals by its lenders is similarly backward. Bonds may be required only if there is a contest to any portion of the deposit. (§ 1255.240 ["If the court determines that an applicant is entitled to withdraw any portion of a deposit that *another party claims or to which another person may be entitled*, the court may require the applicant . . . to file an undertaking." (Italics added.)].) Requiring an undertaking when no interested party objects to the withdrawal will increase the burden on all parties and the trial court, to prevent an absurd and unjust result the Legislature cannot have intended.

CONCLUSION

An owner who wants to challenge a right to take will seek to protect the status quo—including continuing loan payments, objecting to any withdrawals of the deposit, and opposing prejudgment possession. Such an owner is certainly not going to help anyone withdraw the deposit, as APMI did here. An owner's objection to withdrawals provides the trial court an opportunity to decide the right-to-take challenge expeditiously, before authorizing any withdrawals from the deposit. The policy of the law should not reward owners like APMI, whose purposeful inaction results in outcomes section 1255.260 was specifically designed to prevent. The judgment of the Court of Appeal should be affirmed.

Dated: April 6, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.520, subdivision (c), that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 13,995 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

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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. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On April 6, 2011, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

1. **APPLICATION FOR PERMISSION TO TRANSMIT TRIAL EXHIBITS PURSUANT TO RULE 8.224; AND**
2. **ANSWER BRIEF ON THE MERITS**

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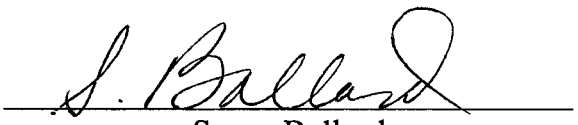

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