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 REPLY

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INTRODUCTION

In a condemnation action, the owner can only protect its interest in its property. Unlike the condemnor, the owner acts on no one else's behalf and the law imposes no duty to others.

This is MTA's condemnation action.

MTA adopted the resolution of necessity to take the owner's property in spite of the owner's appearance at the hearing in opposition to preserve vital parking. It initiated its complaint in eminent domain to take the property a week later on April 1, 2004. It pushed for immediate possession of the property, depositing its estimate of the amount of probable compensation on the same day.

MTA entered into a stipulation on June 10, 2004 with the owner's lenders allowing them to withdraw from the deposit portions of the funds to satisfy their secured interests in the property. MTA agreed to the lenders' withdrawal with full knowledge of the owner's challenge to its take of the properties as set forth in owner's answer filed on May 21, 2004 and testimony at the resolution hearing. It did not require the lenders to post a bond or undertaking to assure repayment if the owner prevailed in its challenge.

MTA obtained possession of the property over the owner's objection, arguing the owner's had no probability of prevailing at trial on its right to take challenge. MTA is still in possession of the property. The owner has made no withdrawals from the deposit which has a remaining balance of $2.2 Million.

MTA, the condemning government authority, ignores its absolute control of the condemnation case. Instead, it tries to caste itself as a victim of a wily property owner. All the owner did was protect its property from an unlawful take by MTA within the legal means available. Law and public policy place the burden of overseeing the withdrawal of deposit by defendants on the condemnor. This is all the more necessary where there is a challenge to the condemnor's right to take.

ARGUMENT

A. THE OWNER HAS NO STATUTORY PROTECTION TO PRESERVE ITS RIGHT TO TAKE CHALLENGE IN FACE OF A LENDER'S WITHDRAWAL

MTA's answer is based on the faulty premise that the owner had the ability to protect against the lenders' withdrawal from the deposit and the resulting wavier of its challenge to the take. It contends: "All California property owners have a statutory right and a corresponding statutory obligation to object to any withdrawal made for their benefit." (Answer Brief on the Merits ("Answer"), p. 17.)

First, the owner disagrees that a lender's withdrawal is made solely for the owner's benefit. Second, there is nothing in the Quick-take procedure (Code of Civil Procedure Section 1255.010 *et seq.*), or anywhere in the Eminent Domain Law, bestowing on the owner the right or duty to object to a lender's withdrawal because of the owner's right to take challenge.[1] The owner's interest in the condemned property is not superior to that of the lenders. It does not exercise a veto power over the lenders' distinct, financial interest in the condemnation action. The lenders have a "present proprietary interest . . . " in the condemnation action independent of the owner. (*City of Vallejo v. Superior Court* (1926) 199 Cal. 408, 416.)

Section 1255.230 provides a procedure for the condemning plaintiff to object to an application for withdrawal on the following grounds:

1) other parties known or believed to have an interest in the property,

2) an undertaking should be filed,

3) the undertaking already filed is insufficient.

A defendant's right to object is set forth in Section 1255.230 subdivision (d) which states: "If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine upon hearing, the amounts to be withdrawn, if any."

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

Unlike the owner, the condemnor has both the right to object and the right to request a hearing on the withdrawal applications.

The type of objections generally relate to the issues of the existence and extent of an applicant's compensable interest in the property. Thus, Section 1255.230 subdivision (c) provides that the condemnor's required notice on an application to withdraw "shall advise such parties that their failure to object will result in a *waiver of the amount withdrawn*." (Italics added.) "Parties served in the manner provided in Section 1255.450 shall have no claim for compensation to *the extent of the amount withdrawn* by all applicants." (Italics added.)

Because APMI did not dispute the facts of the lenders' secured interests in the property and the amounts of the interests, there was no legal basis for APMI to object to their withdrawals. APMI's pending challenge to MTA's take provided it no right under Eminent Domain Law or its deeds of trust to object to the lenders' withdrawals. There was no statutory protection for the owner to preclude the lenders' withdrawals.

MTA's further contends that if the owner had objected to the lenders' withdrawal to preserve its right-to-take claim, the court would " . . . decide the right-to-take challenge *before* authorizing any withdrawals." (Answer, p. 43.) MTA can only speculate that the court would have denied the lenders' applications to

withdraw until it had ruled on the owner's challenge to the right to take. There is no legal basis to deny or delay these lenders' withdrawals on such an objection. The lenders had a secured interest in the property in the amounts they sought to withdraw from the deposit. The court under Section 1255.220 instead would have been compelled to allow the withdrawal. "The court shall order the amount requested in the application or such portion of that amount as the applicant is entitled to receive to be paid to the applicant." (Section 1255.220.) MTA even acknowledges the likelihood of the court allowing the withdrawal over objection. It explains that its subsequent acquiescence to the lenders' application " . . . was entirely unnecessary because the trial court could have granted the lenders' application over MTA's objection." (MTA's Answer to Petition for Review, p. 20).

Ultimately, if MTA was correct that the court upon being advised of the right to take challenge would have denied the withdrawal, then MTA had the responsibility of making the objection.

Even if the owner had objected to the withdrawal, it would still be facing a waiver challenge, under MTA's interpretation of Section 1255.260 wavier provision. For example, if over the owner's objection, the court authorized the lenders withdrawal of the deposit funds, MTA would still have its argument that the owner waived its right to take challenge under Section 1255.260, because the owner received the benefit of the lender's withdrawal with the payoff of its loan and

thereby the owner would be precluded from appealing a trial court's judgment in favor of MTA's right to take.

B. THE OWNER TOOK ALL ACTION IN ITS CONTROL TO PRESERVE ITS RIGHT TO CHALLENGE

MTA understands the difficulty it has in arguing waiver by association. Thus, it contends that the right to take challenge "was waived not by the lenders but by owner's own actions and failure to act." (Answer, p. 2.) It accuses APMI of "inaction" and that it could have taken steps to protect the status quo. APMI, the owner, had no such control. The control in the condemnation case lies with MTA, the condemnor. And, unlike APMI, MTA was not contractually bound to the terms of the deeds of trust mandating the lenders' access to the deposit funds. It was condemnor's responsibility to preserve the status quo and the deposit in light of the challenge to the take, and not instead stipulate to the lenders' withdrawals and jeopardize owner's right to take challenge. (See Petitioner's Opening Brief, pp. 37 - 40.) The facts demonstrate that APMI was consistent in its actions to preserve its challenge and did not fail to act to protect itself.

1. MTA's Recommended Options Do Not Protect the Owner from an Involuntary Waiver of its Challenge to the Take

MTA recommends three options to property owners trying to preserve their right to take challenges, none which provides any such protection to property owners.

The first one is that the owner can continue making payments on the debt to prevent any withdrawals. Yes, the owner could continue making payments, though it is no longer in possession of the property, but that does not prevent the lender from choosing instead to exercise its right under Section 1255.210 and the deed of trust to withdraw funds from the deposit to satisfy its secured interest in the property.

The second option is the owner can enter into an agreement with the lender that it can only withdraw the deposit if the owner is unsuccessful with its right to take challenge. Nice thought, but unrealistic when applied to an existing loan agreement. The owner has no legal or contractual right to compel the lender to agree to such an amendment to the loan. And, the lender has no impetus to enter into such an agreement and forestall immediate payment of its debt to a date unknown when the borrower has been dispossessed of the property by condemnation. Right to take cases are not as expeditiously resolved as MTA claims. This right to take case has been going on for seven years. No prudent lender would voluntarily agree to the risk associated with such a delayed payment

of its outstanding debt with no control over the use of the formerly, secured property.

MTA's third option, in recognition that options one and two would likely be rejected by the lender, is that the owner must simply object to the withdrawal and allow the trial court to decide on the right to take challenge *before* authorizing any withdrawals. (Answer, p. 43.) But, there is no statutory authority for the owners to request this of the court. The MTA cites to Sections 1260.010 and 1260.110 subdivision (b) for the proposition that " . . . 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." (Answer, p. 18.) Neither of these cited sections stands for the proposition asserted by MTA. Section 1260.010 provides for precedence of eminent domain actions over other civil actions in trial setting. Section 1260.110 subdivision (a) simply provides that objections to the right to take shall be heard and determined prior to the determination of the issue of compensation, and under subdivision (b) the court may on motion of any party specially set objections for trial. Section 1260.110 does not provide that the owner can request a right to take trial before the lender is authorized to withdraw from the deposit. However, APMI did rely on Section 1260.110 for the statute's intended purpose, to bifurcate the right to take objections from the valuation trial and the right to take challenge proceeded to trial on April 18, 2005.

2. APMI's Actions to Preserve Its Right to Take Challenge

APMI took all available legal action to assert and preserve its right to take challenge:

- At the resolution hearing, it urged the MTA not to take its property and testified why the taking did not meet the public necessity requirements of the Eminent Domain Law. (AR 581-582.)

- APMI challenged MTA's right to take in its answer to the complaint in eminent domain. (1 JA 0144-0149.)

- APMI has not received any funds from the $6.3 Million deposit and has not made any withdrawal from the deposit, which has a balance of $2.2 Million. (3 JA 0648.)

- APMI challenged the order of immediate possession and requested that the court under Section 1255.430 stay the order based on APMI's objection to MTA's right to take as raised in its answer. (1 JA 0236.) [2]

- APMI asked the court for a bifurcated trial so its right to take challenge could be decided prior to the valuation trial.

- APMI prevailed at trial on its right to take challenge. (4 JA 1115-116.)

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[2] MTA's *ex parte* application for an order of immediate possession was granted by the court on April 1, 2004 under former Section 1255.410 with an effective date of possession of ninety-one days after service (1 JA 0025 – 0029; 2 JA 0439-0443). MTA argued against APMI's request for a stay under former Section 1255.430 (specific authority for stay pending ruling on the objection to the right to take) on the basis that APMI's challenges to the take lacked merit and it had no probability of prevailing at trial. The court ruled in favor of MTA, finding that there was no reasonable probability that APMI would prevail on its right to take challenge and MTA obtained possession of APMI's interest in the property on July 8, 2004. (2 JA 0436.)

As to APMI's challenge to the order of possession and request for a stay, it is important to note that Section 1255.410 only controls objections to the condemnor's right to prejudgment possession, not objections to applications for withdrawals. And, as cited to by the MTA, under former Sections 1255.410 (1975), 1255.450 subd. (b) (1975), "the determination of plaintiff's right to take . . . is preliminary only." (Answer, p. 18.) Thus, the owner was not given the opportunity to have a full right to take trial before MTA's order of possession went into effect. As a result of the MTA's stipulation with the lenders, the lenders' withdrawal of the deposit occurred before MTA even acquired possession. This raises the question, why did MTA rush to accommodate lenders' withdrawal before it had actually taken possession particularly if it was of the opinion that lenders' withdrawals would waive the owner's right to take challenge?

C. DEFENDANT-LENDERS ARE ENTITLED TO WITHDRAW FROM THE DEPOSIT OF PROBABLE COMPENSATION UNDER THEIR DEEDS OF TRUST

When a condemnor invokes the Quick-take procedure and deposits the sum of probable compensation " . . . any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited." (Section 1255.210.)

The three lenders were named as defendants in the condemnation by MTA based on their secured interests in the property. The beneficiary of a deed of trust

on property sought to be condemned has a compensable interest in an eminent domain proceeding as to the property. (*People ex rel. Dept. of Transportation v. Redwood Baseline, LTD* (1978) 84 Cal.App.3d 662, 670.) The lenders, seeing their security impaired by the condemnation, promptly filed their respective applications to withdraw from the deposit. MTA stipulated with the lenders to their withdrawal from the deposit. (1 JA 0172-0179.) MTA states it had no legal basis to object to the lenders withdrawal (Appellant's Reply Brief, p. 11).

Despite its prior recognition of the lenders' rights to withdraw from the deposit (*i.e.*, it stipulated to the withdrawal), MTA now makes the argument that the lenders' trust deeds do not entitle the lenders to withdraw money from the deposit. There is no such limiting language in the deeds of trust. MTA can only reach such a conclusion by ignoring the plain meaning of the words and engaging in a tortuous interpretation of the operative provisions of the deeds of trust. Lenders, in their deeds of trust, would not, and did not here, restrict their access to the funds on deposit in a condemnation case. MTA's allegations, however, compel further discussion of the relevant provisions of the deeds of trust which contractually bound the lenders and the owner.

1. Lenders' Independent Right to Compromise with the MTA

The deeds of trust provide to each lender the right to appear in its name in the condemnation proceeding and make any compromise or settlement of the action. "Lender at its option may appear in and prosecute in its own name any action or proceeding to enforce any such cause of action and may make any compromise or settlement of any such action or proceeding." (1 JA 0090 and 8 JA 2121.) The lenders acted in accord with their contractual right. The lenders entered into a stipulation with MTA allowing the lenders to withdraw funds from the deposit to satisfy their respective interests in the property. The lenders then settled with the MTA through the filing of disclaimers of interest in the property and "to any further compensation to be awarded." (2 JA 0485-0488, 0489.) The borrower-owner had no control over its lenders' decisions to settle with the MTA their claims in the condemnation action.

2. NAMCO's Deed of Trust

In interpreting NAMCO'S deed of trust, MTA argues the monies have to first be "received by the owner APMI" before NAMCO would be entitled to compensation and because APMI did not receive any funds from the deposit then NAMCO was not entitled to withdraw funds from the deposit. (Answer, p. 20.)[3] MTA relies on the following statement in the deed: "All settlements, awards, damages and proceeds

[3] This statement contradicts MTA's position that APMI as a result of the lenders' withdrawal did "receive" the funds from the deposit through the lenders' pay-down of owner's loans.

received by [APMI] or any other person . . . in connection with any condemnation . . . of the property are assigned to Lender . . . " (8 JA 2120.)

The probable compensation, which is put on deposit, is for the benefit of all persons with a compensable interest in the property. The only reasonable interpretation of this provision is that the word "receipt" is to be broadly interpreted and the deposited funds, available to all persons with a compensable interest, would be considered to be "received by the owner or any other person". This interpretation is supported by other terms of the deed which make clear NAMCO's unfettered right to withdraw from the deposit.

For a condemnation proceeding, the deed broadly defines the term "award" to include " . . . settlements, awards, proceeds and damages." (8 JA 2121.) The deed states that Trustor-Owner grants to Trustee-Lender the following:

- "Trustee agrees to endorse in favor of Lender any Award which is made payable to Trustor or to Lender and Trustor deliver the same to Lender immediately upon receipt." (8 JA 2121.)
- All right, title and interest which Trustor now has or may later acquire in any and all awards . . . made by any governmental authorities . . . to Trustor . . . as a result of the exercise of eminent domain . . . (8 JA 2116).
- Any and all claims or demands which Trustor now has or may hereafter acquire against anyone with respect to any damage . . . of the Premises (8 JA 2116).

- All right, title interest which Trustor now has or may later acquire in any and all instruments . . . deposit accounts, accounts, . . . relating to the foregoing property . . . including without limitation . . . deposits or other payments made in connection therewith . . . (8 JA 2116)."

The deed of trust gives NAMCO the right and authority, without regard to the owner's wishes, to withdraw funds from the deposit.

3. California National Bank's Deed of Trust

MTA argues that California National Bank's deed of trust entitles the lender to share in "the compensation, award, and other payments or relief" but only resulting from "a taking" (Answer, p. 20). MTA claims the taking did not occur until it took physical possession of the property in November 2004. So, apparently, one of MTA's arguments is that the Bank's withdrawal was premature. MTA further argues that the deed of trust "says nothing about the lender's entitlement to withdraw a prejudgment deposit. (Answer, p. 20.)

There is no definition in the deed of trust for the term "taking" and there is nothing to indicate the parties to the loan intended the term to be restricted to MTA's definition of "physical possession". The term "taking" in the context of the deed of trust is a short-hand, generic word for a condemnation proceeding. This is how the Bank interpreted and understood the term "taking" as stated in its declaration to withdraw: "The deed of trust contains a standard provision requiring

all sums paid in a condemnation proceeding to first be paid to California National Bank to satisfy the note." (8 JA 2160.) This accords with *Section 3.1 Casualty or Condemnation* of the deed which states:

> " . . . Should all or any portion of the property be taken or damaged by reason of any public improvement or condemnation proceeding. [Lender] shall be entitled to all insurance proceeds, compensation, awards, and other payments or relief therefore (all hereinafter referred to as "proceeds") and whether or not the security for the loan secured by this Deed of Trust is impaired. [Lender] shall be entitled to apply the proceeds collected . . . " (8 JA 2174.)

Neither is there anything to support MTA's contention that a lender is not entitled to share in the deposit because the deposit is not "compensation," an "award" or "other payment of relief" until the owner converts it into compensation by withdrawing the funds. (Answer, p. 21 FN 10.) The deposit is considered to be probable compensation. Section 1255.010 provides: "At any time before entry of judgment the plaintiff may deposit with the State Treasury *the probable amount of compensation* based on an appraisal that will be awarded on the proceeding." (Italics added.) There is no legal distinction between the terms "award" and "deposit of probable compensation" in determining a lender's right to withdraw from the deposit and MTA cites to no law supporting its "conversion" theory.[4]

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[4] In *Mt. San Jacinto Community College District v. Superior Court* (2007) 40 Cal.App.4th 648, this court in reviewing the development of the quick-take procedure cites to the Commission Report which made no pre-and-post judgment distinction when referring to the compensation. "In ordinary condemnation proceedings the owner received no compensation until the end of litigation. The Commission proposed that in quick-take or immediate possession proceedings the owner should have the right to withdraw the compensation when the condemnor actually takes possession." (*Id.* at 658.)

MTA cites to the treatise *Matteoni & Veit Condemnation Practice in California*, (Cont. Ed. Bar 2008) Section 10.16 for support of its misguided perspective that " . . . standard deed of trust provisions entitle lenders to share in condemnation *awards* not to withdraw precondemnation deposits against the owner's wishes." (Answer, p. 20.) The section, titled "Apportionment, Judgment and Post-Trial," does not pertain to prejudgment deposits. There is no statement in Section 10.16 that the standard deed of trust provisions limit lenders entitlement only to awards. Lenders' deeds of trust do not restrict their right to access the funds or deposit in a condemnation case and delay payment of the outstanding loan obligation until entry of an award or settlement. Section 1255.210 allows for lenders withdrawals from the deposit in accordance with their secured interests in the property.

4. VCC Alameda's Deed of Trust

The deed of trust for VCC Alameda is missing from the record. But, the facts are that it was named by MTA as a defendant in the condemnation action given its secured interest in the property, MTA and the owner acknowledged its secured interest in the property and its right to withdraw its share of the deposit funds based on that interest. These facts are evidence of this lender's contractual right to withdraw funds from the deposit in accordance with its secured interest in the property.

5. Lenders' Potential Action Against the Owners for Impairment of Security

MTA asserts that if the owner had objected to the lenders' withdrawal from the deposit the owner would be protected by the litigation privilege of Civil Code Section 47 against a lawsuit from the lenders for impairment of security. The owner disagrees and believes that the litigation privilege would not protect it from a potential action by its lenders under Civil Code Section 2929 for impairing their security interests by objecting to their withdrawals.

California cases have applied the litigation privilege of Civil Code Section 47 outside of the defamation arena to a wide variety of tort theories (*ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 317). But, there is no case that has considered the applicability of Civil Code Section 47 to a lender's statutory cause of action under Civil Code Section 2929 against a borrower for impairment of the lender's security interest.

Civil Code Section 2929 protects lenders from "any act which will substantially impair the mortgagee's security." It is APMI's position that an objection by it to preclude the lenders' right to withdraw from the deposit would impair the lenders' security. It would deny the lenders the right of immediate access to the funds to pay off the outstanding debt on the secured property and require them, at their financial risk, to potentially wait years for repayment. And,

due to the condemnor's possession of the property the lender asserts no control over the condemnor's use of the property.

MTA claims that an owner's objection to the lender's application for withdrawal would not impair the lender's security because the "owner maintains possession of the property pending the determination of the right to take challenge and the deposit remains in place." There is absolutely no assurance that owner's objection to the withdrawal would result in the owner remaining in possession of the property. The MTA forgets the record in this case. The owner fought and lost the battle to prevent MTA from acquiring prejudgment possession of its property.

The purpose of Civil Code Section 47 is not served by barring a lender's action against the borrower where the borrower's action of objecting in the judicial proceeding to the lender's withdrawal is in breach of its contractual obligations under the deed of trust. "The principal purpose of the litigation privilege is to afford litigants and witnesses the upmost freedom of access to the courts without fear of being harassed subsequently by derivative tort action." *Wenthand v. Wass* (2005) 126 Cal.App.4th 1484, 1492. Protecting the borrower's act of objection in the condemnation proceeding to preclude the lender from accessing funds to which it is contractually entitled does not serve the purpose of the litigation privilege. In *ITT Telecom Products Corp. v. Dooley, supra,* 214 Cal.App.3d at 320 the court found that the privilege for statements made in judicial proceedings under Civil Code

Section 47 did not apply to voluntary disclosure of trade secrets in violation of a contract of confidentiality.

In the end, whether the owner's filing of an objection would be considered a privileged act that cannot lead to statutory liability under Civil Code Section 2929 is for another case to determine.

D. THE ACCEPTANCE OF THE BENEFITS DOCTRINE DOES NOT APPLY TO WAIVE APMI'S DEFENSES TO THE TAKE

There is no basis in California law for imputing waiver to a party who was neither a signatory to the stipulation and order nor an actual recipient of the funds. Section 1255.260 does not call for such a result. Rather, it limits the waiver of defenses application solely to "the person receiving such payment." (Section 1255.260.) APMI's lenders received the payment. APMI had no alternative but to step back and let the lenders withdraw the funds from the deposit to which they were entitled, and to which the condemnor expressly agreed.

1. The Elements of Waiver Are Not Met

MTA's assertion that the "knowing and intelligent "standard is only applicable to criminal cases is incorrect. A cursory search finds that this court has used this standard in deciding cases related to debtors and entitlement to a pension at a

minimum. (*Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 66 [A judgment based solely upon an executed confession is constitutionally defective because that confession is insufficient to demonstrate that the debtor has voluntarily, knowingly, and intelligently waived his due process rights.]; *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 389, ["The first requirement of any waiver of statutory or constitutional rights, of course, is that it be knowingly and intelligently made."])

Regardless of what standard is applied there is no evidence of the required elements of waiver in this case. Waiver is the (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* (1973) 9 Cal.3d 330, 343; *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107. These elements are not established in this case. MTA's answer fails to adequately address how the acceptance of the benefits of a stipulation and order, that APMI was not a party to, by a different party with a different interest in the case, can effect a waiver by APMI.

2. APMI Did Not Accept the Benefits

MTA's case authority overwhelmingly concerns a factual setting different than the present case. These cases apply the acceptance of the benefit doctrine against the exact same party that received the fruits or benefit of the judgment.

MTA, like the court in *Mesdaq*, assumes without legal citation that the lenders can be treated as the alter ego of APMI the borrower, for the purposes of the withdrawal. (*Redevelopment Agency of City of San Diego v. Mesdaq* (2007) 154 Cal. App. 4th 1111, 1140 ["We do not believe there is any legal distinction under section 1255.260 between [the lender] and Mesdaq with respect to the withdrawal of funds..."]). This faulty assumption -- that there is no legal distinction between a borrower-owner and a lender in an eminent domain action -- is not supported by the law or the withdrawal statute which specifically recognizes the independent interest of all parties with an interest in the property.[5] In this case, this mistaken assumption has resulted in the application of waiver under 1255.260 against a non-signatory, co-defendant with interest different from the owner in the case. Such a waiver by association is not supported by the law. Section 1255.260 is not a punitive statute and neither is its purpose to snatch away an owner's challenge to the take because of the lenders' actions over which the owner has no control.

In addition to its non-relevant taxation cases (discussed below), all of the other cases MTA cites for support of its argument that a third party acceptance of the benefit constitutes a waiver to the other party are also inapposite. None of the cases cited by MTA hold that the acceptance of benefits by one party, absent express consent, constitutes a waiver by another party. Rather, all of the cases

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5 For example, Code of Civil Procedure section 1250.220 requires the 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." Section 1235.125 defines "interest in real property" as including " . . . any right, title or estate in property."

deal solely with the party that received the money being the party to which the acceptance of the benefit waiver was applied. (*People ex rel Dept. of Public Works v. Gutierrez* (1962) 207 Cal.App.2d 759 [same party that withdrew the money also sought new trial]; *County of San Bernardino v. County of Riverside* (1902) 135 Cal. 618, 620 [parties seeking appeal had actually received the money]; *Sherman v. McKeon* [N.Y., 1868] 38 N.Y. 266 [party had actually received the money waived any objections to the [taking]; *Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, waiver applied to a party that received the money directly]; *Satchmed Plaza Owner's Assn. v. UWMC Hospital Corp.,* (2008) 167 Cal.App.4th 1034 [party who had exercised option under judgment to purchase 22 units could not object to other portions of the order]; *Regents of Univ. of Cal. v. Morris* (1968) 266 Cal.App.2d 616 [owner who submitted withdrawal form which explicitly stated it was waiving all defenses and received the money from the withdrawal could not challenge the right to take]; *San Diego Gas & Electric Company v. 3250 Corp.* (1988) 205 Cal.App.3d 1075 [owners withdrawal of the initial deposit and balance deposited after entry of judgment waived owners rights to object to condemnation.]) The aforementioned cases applied and found acceptance of the benefit only against the actual party that had received the payment. APMI itself did not receive the money from the withdrawal, only its lenders.

MTA cites to two cases which are inapposite because the express consent of a party resulted in a finding of waiver by virtue of acceptance of the benefits. First

is a one-hundred-plus-year old case from Michigan dealing in equity with fraudulent assignments of timberlands aimed at defrauding creditors. (*Bigelow v. Sheehan* (Michigan 1907) 114 W. 389, 507.) In balancing those equities, the court found that Bigelow and Sheehan had unclean hands and that they consented to the withdrawal by the mortgagee, and therefore the two con men could not question the validity of the sales agreement. (*Id.* at 513, 511.) This case is not relevant to the present case as there is no consent by APMI who was not a party to the stipulation and order for withdrawal. The second case is *Redevelopment Agency of City of San Diego v. Mesdaq* (2007) 154 Cal. App. 4th 1111, 1140 ["The payment of Mesdaq's indebtedness with the deposit funds was accomplished with Mesdaq's explicit consent" although the Bank " . . . did not have the legal authority to withdraw the deposit."] But here, there was no explicit consent, the lenders had the authority to withdraw. APMI was not a party to the stipulation for withdrawal and APMI has consistently asserted its intent to challenge the take and left its portion of the deposit untouched. Thus, these cases do not support MTA's position that APMI waived under its right to challenge thee take, under Section 1255.260, solely as the result of the lenders' independent and lawful act of withdrawal.

MTA provides a shot-gun cite of decisions from other jurisdictions which it contends support its acceptance of the benefit theory. (Answer, p. 27, FN 13.)

They do not. In each case, the party who accepted the benefits was the same party that waiver by way of acceptance of the benefits was applied to. [6]

Unable to find cases that have applied acceptance of the benefits doctrine to non-parties to an order, MTA resorts to taxation cases to try to find support for its arguments that a third party's receipt of funds can result in acceptance of benefits by the party not receiving the funds. These cases are not supportive however, as taxation cases focus on what is taxable and have no bearing on other substantive areas of law and certainly no bearing on what constitutes the waiver of a right to take challenge under Section 1255.260. (*Atlantic Oil Company v. County of Los Angeles* (1968) 69 Cal.2d 585, pp. 594-595, ["for purposes of taxation, the definitions of real property in the Revenue and Taxation laws of the State control whether or not they conform to the definitions used for other purposes."]) Similarly, in *Placer County Water Agency v. Jonas* (1969) 275 Cal.App.2d 691, the court

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6 (*Windslow v. Baltimore and Ohio Railroad Co.* (1908) 208 U.S. 59 [Owners of the property cannot challenge a petition in eminent domain where they have accepted and received the sum awarded]; *Hitchcock v. Danbury & Norwalk Railroad Co.* (1857) 25 Conn. 516 [Owners demand and receipt of money deposited preclude owner from challenging railroad and could not bring an action in trespass]; *Kile v. Town of Yellowhead* (1875) 80 Ill. 208 [Owner whose land is taken for a highway is, by accepting the damage awarded, estopped from questioning the validity of the proceedings]; *Test v. Larsh* (1881) 76 Ind. 452 [acceptance of award by owner precluded owner from challenging the taking]; *State of Missouri ex rel State Highway Com. of Missouri v. Howald* (MO., 1958) 315 S.W. 2d 786 [Owners acceptance of amount awarded by commissioner's estopped owner from litigating any issues except just compensation]; *Shapiro v. Maryland – Nat. Capital Park & Planning Kom.* (MD., 1964) 201 A.2d 804 [Acceptance of the benefit doctrine does not apply to appeals where only the amount of compensation is appealed]; *In Re Courthouse in City of New York* (N.Y. 1916) 111 N.E. 65 [Acceptance of the benefits doctrine does not apply where the appeal concerns an inadequate amount of just compensation]; *State v. Jackson* (Tex., 1965) 388 S.W.2d 924 [Acceptance of commissioner's award precluded landowner from contesting state's right to take the property]; *Burns v. Milwaukee and Mississippi Railroad Co.* (1859) 9 Wis. 450 [acceptance of land damages without objecting to the right to take estops the owner from disputing the taking].

explicitly stated that the concept of 'property interest' for taxation purposes is entirely different from that of a compensable interest in eminent domain. (*Id.* at 698.)

Interestingly, MTA cites to *Metropolitan Life Insurance Company v. State Board of Equalization* (1982) 32 Cal.3d 649 for the principle that insurance premiums paid by employees to their employers are taxable as gross premiums inuring to the benefit of the insurer. This case proves APMI's contention that taxation cases are of little value beyond the issue of what is taxable. In *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1329 the court rejected an attempt to utilize the *Metropolitan Life* case beyond the issue of what is taxable as a gross premium stating that "because [*Metropolitan Life*] involve[s] the interpretation of the term "gross premiums" for purposes of insurance company taxation and [is] otherwise factually inapposite, we do not rely on [this] taxation cases in interpreting the meaning of the term "premium," as used in [Insurance Code] section 381, subdivision (f)." If *Metropolitan Life* has no application within the insurance law beyond the issue of what is a premium for taxation purposes, it certainly has no application to what constitutes a waiver of a right to take challenge under the Eminent Domain Law.

An appellate decision is not authority for everything said in the court's opinion but only "for the points actually involved and actually decided." *(Santisas v.*

Goodin (1989) 17 Cal.4th 599, 620.) The point "actually involved and actually decided" in MTA's taxation cases was whether money received was taxable. The cases do not present an issue concerning whether the receipt by one party could result in the waiver by another party. Thus MTA's taxation cases are not authority in this condemnation case.

3. APMI Was Relieved of its Mortgage Obligations on MTA's Deposit of Compensation and Possession of the Property

MTA argues that APMI received the full monetary benefit of the lenders withdrawal as the fund were used to pay off its debt and it was then relieved of its obligation to continue to make its mortgage payments. But, as a result of MTA's deposit of the probable amount of compensation and obtaining its order of possession for the entire property on April 1, 2004 (1 JA 0025-0029), the owner was no longer required to continue to make its mortgage payments under the doctrine of equitable conversion. As discussed in Petitioner's Opening Brief (pp. 19-20 and 25-26), the money, awarded or on deposit and available for withdrawal by persons with a compensable interest in the property, " . . . 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." In other words, as to the lender's interest, the condemnation award is a substitute for the condemned mortgaged property. (*Los Angeles Trust & Savings Bank v. Bortenstein* (1920) 47 Cal.App.421, 423.) (See also, *Pomona*

College v. Dunn (1935) 7 Cal.App.2d 227, 232.) The lien is effectively discharged with the condemnor's deposit of probable compensation and possession, and ends the owner's mortgage payment obligations.

The reasoning and holding in the case of *City of Orange Township v. Empire Mortgage Services, Inc.* (2001) 341 N.J. Super. 216, 775 A.2d is significant on the termination of the lender-borrower relationship through the condemnor's deposit of the probable compensation and possession. There the lender, pleased with the interest rate of 13.5% on its note, had sought to recover from the borrower the principal and interest rate stated in the mortgage note *after* the city had deposit its estimated just compensation to take possession of the entire property. The New Jersey quick-take procedure is similar to that of California, and either the mortgagor or mortgagee can apply for withdrawal of the funds on deposit. (*Id.* at 178.) The court held that the accrual of interest terminated when the mortgagee could apply for withdrawal of the deposit funds to pay off the debt.

The note, like APMI's deed of trust, provided, "The proceeds of any award or claim for damages . . . in connection with any condemnation of any part of the property . . . are hereby assigned and shall be paid to lender." (*Id.* at 179.) The court found the condemnation provision " . . . relieves the mortgagor from his obligation to make payments after the condemnation award is paid into court and the funds are available for withdrawal." (*Id.* at 180.) The condemnation award, the

deposit of estimated just compensation, was more than a mere substitute for the real property as continuing security for the debt. It actually constituted . . . a tender of payment to the mortgagee which it was not at liberty to ignore." (*Ibid.*) (See also, *JALA Corp. v. Berkely Savings and Loan* (1969) 104 J.J. Super . 394, 401, 450 A.2d 150, 154, [holding that a borrower was not liable for a prepayment penalty. "As a result of this action by the State the mortgagor's interest in the premises and the mortgagee's lien thereon were destroyed and by operation of law both were transmuted to a present right to the funds deposited by the State with the Clerk of the Court."]) Thus, under the doctrine of equitable conversion and the deed of trust's assignment of the proceeds in condemnation to the lender, the obligation of APMI, to continue making interest payments remained only until the funds were paid into court and made available for withdrawal.

E. THE LENDERS ACTED INDEPENDENT OF APMI IN WITHDRAWING FROM THE DEPOSIT TO PROTECT THEIR MONETARY INTEREST IN THE PROPERTY

In any condemnation case where the lender with a secured interest in the property withdraws from the deposit of probable compensation, the lender uses those funds to pay off the outstanding debt. Thus, the lender's withdrawal of the deposit results in reducing the owner's indebtedness. And, of course, that is one of the purposes of the Quick-take process, to provide immediate compensation to the persons with compensable interest in the property when the condemnor seeks

prejudgment possession of the property. That the lenders here withdrew funds from the deposit to satisfy their respective debts which reduced the owner's debt does *not* make the lender's withdrawal the owner's withdrawal for purposes of Section 1255.260. The lenders acted independently of, and adverse to the owner's own interest in challenging MTA's right to take the property.

To further support its theory of waiver by association, MTA launches into a factual attack of the legitimacy of the loan obligations. It makes spurious accusations that "APMI used [NAMCO] as a straw lender" and that it ". . . manufactured debt as a way to receive millions of dollars of MTA's deposit funds." (Answer, p. 32.) The allegations are ludicrous with no factual basis. The NAMCO loan to Merco Group, LLC (of which Richard Meurolo is sole shareholder) was in the sum of $22,200,000 and was used to finance Merco's purchase of a large parcel of vacant land. (3 JA 612.) The loan was an arm's length financial transaction between NAMCO and Merco, which had nothing to do with MTA's proposed condemnation of the subject property.

The property became encumbered with NAMCO loan when Merco defaulted on the note and requested the lender to reinstate the note and extend a line of credit to pay property taxes, which they had been discussing for several months prior to the amendment. (3 JA 612.) The lender demanded additional collateral on the note and the lender decided to take the subject property as additional security.

(3 JA 712.) An amendment was subsequently entered into which added the property as additional security for the existing $22,200,00 note; and an additional $2,250,000 interest reserve line of credit was made available to Merco Group. (3 JA 614, Ex. 59.)

MTA states that based on this line of credit, APMI received disbursements from NAMCO totaling $933,400, which were paid out after the condemnation action was filed *but* before the deposit funds were withdrawn. (Answer, p. 7, italics added.) The condemnation action does not take away an owner's right to access a line of credit. APMI's access to its line of credit does not equate to receipt of the funds on deposit. There is no relation between these distinct sources of funding.

NAMCO's withdrawal was limited to $2,250,000 as a result of the amount of the funds remaining on deposit after the withdrawal of the priority lien holders California National Bank and VCC Alameda (8 JA 2158; 4 Reporter's Transcript 1651). According to NAMCO, it would have withdrawn more money to satisfy the outstanding debt of $22,200,000, if more money was available. (3 JA 617.)

In spite of its stipulation to NAMCO's withdrawal, MTA argues that "NAMCO was not entitled to any of the deposit because NAMCO's credit line was zero as of the date of the filing of the complaint." (Answer, p. 32.) NAMCO's interest in the property was not limited to the line of credit amount, or its disbursements pursuant

to that credit line. As of the date of the filing of the complaint in eminent domain and the date of NAMCO'S application for withdrawal of the deposit, the property was encumbered by NAMCO's $22,200,000 note. NAMCO was entitled to withdraw from the deposit the sum of $2,250,000 to partially satisfy its outstanding debt. Again, NAMCO's right is evidenced by MTA's own stipulation with NAMCO acknowledging its secured interest in the property and right to its share of the deposit.

MTA's allegation of collusion between NAMCO and APMI is baseless and contradicted by the evidence and NAMCO's president testimony. NAMCO, pursuant to its rights under the deed and its singular intent to protect its secured interest in the property, dictated the action of the owner. NAMCO "gave Alameda Produce directions to" withdraw the money on deposit. (3 JA 0633, 8 JA 2262, 8 JA 2279.) According to NAMCO, Miguel Echemendia of APMI signed the verification for NAMCO's withdrawal of the funds, "[b]ecause we asked him to do that." (3 JA 0633.) NAMCO's intention with regard to the withdrawal was obvious: "I needed to get paid. Because if I have a secured debt – I didn't want the money to go [Meruelo]." (3 JA 617.)

APMI, like any borrower, responded to its lender's instructions to provide assistance in the withdrawal process and verified the application for withdrawal. This obligated assistance does not turn APMI into the applicant or a party to the

stipulation with MTA for withdrawal. APMI acted in conformance with its obligation under the deed of trust "to execute such further assignments of any settlements, awards, damages . . . as lender . . . may request," and " . . . to endorse in favor of lender any awards which is made payable to Trustor or Lender and Trustor and deliver the same to Lender immediately upon receipt." (8 JA 2121.) APMI as the borrower had no option, payment to the lender was mandated.

MTA falsely states that APMI hired the attorney for NAMCO and VCC Alameda. It did not. Mr. Mark Fox represented to the court that, as to the allegations of collusion between the parties, he was the attorney for NAMCO and VCC Alameda. He " . . . did not even know who Mr. Meruelo was, at that time" ". . . [the] lien holders took this money out, it had nothing to do with Mr. Meruelo." (4 Reporter's Transcript 1651.)

The evidence, as opposed to MTA's allegations, is the NAMCO loan was made in the ordinary course of business without regard to whether MTA would condemn the property and deposit funds to acquire immediate possession.

Neither is there any evidence to support MTA's allegation that NAMCO and APMI colluded to manufacture a debt so that APMI could through NAMCO withdraw funds from the deposit without waiving its right to take challenge. NAMCO withdrew the funds to reduce the Merco master loan secured by the subject property and the

advances made under the loan Amendment. (3 JA 616 - 617.) At the right to take trial, there was no testimony on MTA's accusations of "collusion" between NAMCO and the owner to access the deposit funds.

MTA's factual arguments are based on speculations and insinuations. It improperly seeks to make this court a finder of fact. Unfortunately, Petitioner is drawn into stripping away this web of confusion spun by MTA.

F. THE *MESDAQ* DECISION SHOULD BE LIMITED TO ITS FACT AND NOT APPLY TO APMI'S CASE WHERE THE LENDERS HAD THE LEGAL AUTHORITY TO WITHDRAW

The *Mesdaq* facts are not the facts of this case. The decision in *Redevelopment Aegncy of the City of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111 did not decide the issue here - - whether a waiver of the owner's challenge to the right to take would be found when the owner had no legal or factual basis to object to the lenders' withdrawal. The owner in *Mesdaq* had a legal basis to object to its lenders withdrawal from the deposit but did not and instead "explicitly consented to the withdrawal." (*Id.* at 1190.) MTA is wrong that the trust deed in *Mesdaq* was the same as the Trust deeds here only entitling the " . . . lender to share in condemnation awards not pre-judgment deposits of probable compensation." (Answer, p. 39.) As discussed herein (pp. 10 – 16), lenders right to access the compensation in a condemnation action is not limited to the final settlement or award. But, in *Mesdaq,* the owner and the lender expressly agreed

that the lender "would receive payment of the balance of its loan out of the proceeds of the compensation awarded." (*Id.* at 1137.) The deed of trust had similar restrictions on the lender only being able to "apply the award or settlement to its indebtedness. (*Id.* at 1139, FN 19.) As a result of *Mesdaq's* challenge to the right to take, the deed of trust and the owner's and lender's subsequent stipulation "both provide that [the lender] is *not* entitled to withdraw funds unless the case is settled or goes to judgment." (*Id.* at 1138, italics added.)

Here, there are no such agreements between the owner and its lenders. The deeds of trust do not require the lender to wait for payment until the case is settled or goes to judgment because of the owner's challenge to the take. Rather, the deeds provide lenders the unfettered right to immediately access the deposit of probable compensation.

G. MTA'S RESPONSIBILITY TO PROTECT ITS INTEREST IN THE DEPOSIT FUND AND ITS RIGHT OF REIMBURSMENT

By an imaginative play on the facts, MTA tries to avoid its obligation to protect the public funds on deposit. It wants this Court to place the burden on the owner, who is seeking to maintain ownership of its property, to protect MTA from the consequence of the owner prevailing on its right to take challenge and the risk of MTA not being reimbursed for money withdrawn from the deposit by the lenders.

In light of the pending challenge to its take and its choice to seek immediate possession of the property, MTA was obligated to protect itself. This court cannot pursue the *what ifs* of reimbursement. MTA initiated and controlled the quick-take process, not the owner:

- MTA could have objected to the lenders' applications for withdrawal or requested a hearing. (§ 1255.230 subds. (b) and (d).)

- MTA could have asked the court to require from the lenders an undertaking or posting of a bond. (§ 1255.230 subd. (b)(2), §§ 1255.240 and 1255.250.)

- MTA could have asked the court only to release monthly payments to the lenders.

- MTA could have asked the court to delay withdrawal until its order of possession was effective.

- MTA maintains the right to pursue reimbursement of the deposit monies. (§§ 1255.280 subd. (a) and1268.610 subd. (a).)

- MTA could have agreed to delay possession until the right to take was resolved, or asked for an immediate trial on the issue before the effective date of its order of possession.

MTA advises that the owner should have objected to the lenders' withdrawal based on its right to take challenge. MTA should have heeded its own advice and sought a court hearing before it stipulated to the lenders' withdrawal of the funds if it was of the opinion that there was both a risk of the owner prevailing on its challenge to the take and MTA not recovering the withdrawn deposit funds.

If the condemnation action is dismissed and there is no take of the property, MTA is entitled to the return of the deposit monies withdrawn. (§§ 1255.280 subd. (a) and 1268.160 subd. (a).) The issues here are one of timing and process. MTA claims that the trial court was required to order the return of the money withdrawn from the deposit at the time it ordered the dismissal and return of the property to APMI. It was not. Under section 1268.620, if an eminent domain action is dismissed, the court shall order the plaintiff to deliver possession of the property to the owner. Sections 1255.280(a) and 1268.160(a) provide that the court shall enter judgment requiring repayment of any amount withdrawn by a party in excess of the amount to which the person is entitled. The timing for the repayment of the deposit is post-final judgment. The Law Revision Comment to section 1255.280 states: "Section 1255.280 requires repayment of excess amounts withdrawn only after the

judgment in an eminent domain proceeding is final." This did not occur here because MTA filed its appeal before the judgment was entered and never filed with the trial court a formal pleading for repayment of the fund withdrawn from the deposit.

MTA has not been denied the right to recover the withdrawn deposit funds from the lenders or APMI. It maintains its statutory and equitable rights to seek reimbursement of the deposit funds withdrawn should APMI ultimately prevail on its right to take challenge.

There were other options only available to the condemnor to protect the deposit of compensation. The MTA has the right under Section 1268.510 to abandon the proceedings at any time from the filing of the complaint to thirty days after final judgment. After the trial court's July 12, 2006 ruling on right to take trial ordering the conditional dismissal of the condemnation based on its finding the resolution was invalid (4 JA 1114 – 1117), MTA could have adopted a second resolution and started the process over based on a resolution that was not conditional but met the statutory requirements of public necessity. Then, it would not be facing the predictament it now complains of the recovery of the deposit monies if the owner prevails. Moreover, it could have returned to its Board at any time after filing the action and advised the Board that the condition in the resolution to condemn was unworkable, requesting its removal and the adoption of a new

resolution and the abandonment of this condemnation action. It did not have to wait on a trial court ruling. Then, it could have refiled its action based on the second resolution.

CONCLUSION

In the case of *City of Los Angles v. Decker* (1977) 18 Cal.3d 680, this Court tells us that the condemnor's responsibility is of high order. "The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with deep understanding of the theory and practice of just compensation." The MTA as the condemnor has the responsibility to manage the condemnation action for itself, the public and the property owner. The condemnation of private property is an awesome power. The condemnor must not act to subvert the assessment and payment of just compensation, or to poison an owner's constitutional right to challenge the take of its property.

MATTEONI, O'LAUGHLIN & HECHTMAN

Dated: 4/25/11

By: _____
Norman E. Matteoni

Dated: April 25 2011

By: _____
Peggy M. O'Laughlin
Attorneys for Petitioner 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 REPLY** that said reply contains **9,461** words.

MATTEONI, O'LAUGHLIN & HECHTMAN

Dated: April 25 2011

By: Peggy O'Laughlin
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LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AGENCY
Plaintiff and Appellant

v.

VCC ALAMEDA, LLC
Defendant, Respondent and Petitioner

Case No. S188128

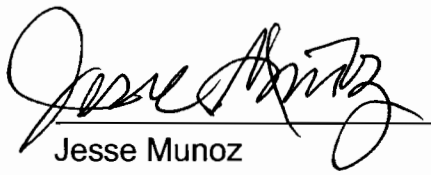
DECLARATION OF SERVICE

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 April 26, 2011, I served the **PETITIONER'S REPLY** in the above-referenced matter, on all parties in this action, in the manner indicated on the attached service list.

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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