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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee, *et al.* Plaintiffs, v. CITY OF RICHMOND, CALIFORNIA, a municipality, and MORTGAGE RESOLUTION PARTNERS LLC, Defendants.	Case No. CV-13-3663-CRB **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM** Honorable Charles R. Breyer

At the September 12, 2013 hearing in this action, the Court invited the parties to submit supplemental briefing on the question of whether the Court has the discretion to hold this case in abeyance, assuming that the Court found that Plaintiffs' claims are unripe at this time. The answer to the Court's question is yes, the Court has the discretion to hold all of Plaintiffs' claims in abeyance if the Court were to deem them unripe at this time.

Defendants' arguments and the Court's stated concerns with respect to Plaintiffs' claims go to the issue of prudential ripeness, which, in contrast to the "case or controversy" requirements of Article III of the United States Constitution, is discretionary and not jurisdictional.

Federal courts evaluate two components of ripeness: "constitutional ripeness and prudential ripeness." *Educ. Credit Mgmt. Corp. v. Coleman* (In re Coleman), 560 F.3d 1000, 1005 (9th Cir. 2009). "The constitutional ripeness of a declaratory judgment action depends upon whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *U.S. v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003) (internal quotation omitted). The prudential ripeness inquiry, on the other hand, focuses on two separate considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (*quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The distinction between constitutional and prudential ripeness is critical: "While Article III ripeness is jurisdictional, '[p]rudential considerations of ripeness are discretionary....'" *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *abrogated on other grounds* by *Koontz vs. St Johns River Water Management Dist*., 133 S. Ct 2586 (US 2013); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc).

Defendants' ripeness argument in this case is premised on the assertion that their Loan Seizure Program "rests upon contingent future events" – specifically, the Richmond City Council's passage of a Resolution of Necessity. *See* Prelim. Inj. Opp. Br. at 5 (quoting *Texas v. U.S.*, 523 U.S. 296, 300 (1998)); Mtn. to Dismiss Br., at 3 (same); Mtn. to Dismiss Reply Br., at 3 (same). Although Defendants characterize their argument as an Article III issue, the actual case law upon which they principally rely, *Texas v. United States*, proves otherwise, specifically analyzing the

"contingent event" question in assessing "the fitness of the issues for judicial decision." *Texas v. United States*, 523 U.S. 296, 301 (1998); *see* Prelim. Inj. Opp. Br., at 5. The "fitness for judicial determination" question is an issue of prudential ripeness, not whether there is a case or controversy under Article III. 616 F.3d at 1060 (prudential ripeness turns upon "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

Numerous federal courts have held cases in abeyance as a procedural response to ripeness concerns premised, as in this case, on arguments that the claims at bar depend upon a "contingent future event" of further anticipated government decision-making. These courts have recognized that, because such contingent events raise prudential ripeness concerns, not whether there is an actual "case or controversy" under Article III, the appropriate exercise of discretion is to hold the pending case in abeyance rather than dismiss it. In a recent decision, the D.C. Circuit Court of Appeals explained the reasoning for holding such cases in abeyance in words that echo the concerns identified by this Court at the September 12, 2013 hearing: "[D]eclining jurisdiction over a dispute while there is still time for the challenging party to 'convince the agency to alter a tentative position' provides the agency 'an opportunity to correct its own mistakes and to apply its expertise,' potentially eliminating the need for (and costs of) judicial review." *API v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012); *compare* 9/12/13 Tr., at 17 ("If you could be successful persuading the Council not to go forward on this, even at the last minute, isn't that a better way than having the Court jump in, into basically a somewhat-novel [government program]").

The D.C. Circuit in *API* ordered that the case – which it had deemed unripe as a prudential matter – be held in abeyance, "subject to regular reports from EPA on its status," in order to "protect against the unlikely and the unpredictable," so that "if the rulemaking takes an unforeseen turn, we can reassess whether the dispute has ripened at that time." *API*, 683 F.3d at 387. Similarly, and consistent with the Ninth Circuit's explanation that issues of prudential ripeness are inherently discretionary rather than jurisdictional, other courts have held that "a claim may be unripe in the prudential sense (as here) without necessarily being constitutionally defective to a degree that it deprives a court of subject matter jurisdiction. *In such cases, unripe claims may be stayed rather*

than dismissed entirely." *Pardee v. Consumer Portfolio Servs., Inc*., 344 F.Supp.2d 823, 833 (D.R.I. 2004) (emphasis added).

Indeed, the federal court of appeals that most regularly adjudicates the ripeness of claims challenging governmental agency actions – the U.S. Court of Appeals for the District of Columbia Circuit – has repeatedly affirmed the propriety of holding cases in abeyance where the ripeness of such claims has been deemed contingent upon further governmental decision-making:

- In *API*, the opinion discussed above, the court held in abeyance an unripe challenge to a non-final EPA rule deregulating hazardous materials, "subject to regular reports from EPA on its status."
- In *Wheaton College v. Sebelius*, 703 F.3d 551, 553 (D.C. Cir. 2012), the D.C. Circuit held that a challenge to the Affordable Care Act's requirement that health insurance providers cover certain contraceptives was unripe, and as a result held that case in abeyance, requiring the government to file "regular status reports" every 60 days in order for the court to monitor the implementation of the challenged requirements.
- In *CTIA-The Wireless Association v. Federal Communications Commission*, 530 F.3d 984 (D.C. Cir. 2008), the D.C. Circuit determined that a challenge to a Federal Communications Commission rule was not ripe for review until the rule received the approval of the Office of Management and Budget ("OMB") following the submission of substantial information from industry participants and the public, all of which was required by the terms of the rule before it would take effect. Rather than dismissing the action for lack of jurisdiction, the Circuit Court ruled that the appropriate course was for the action to be held in "in abeyance pending OMB's action" regarding the rule. *Id*. at 989.
- In *Devia v. Nuclear Regulatory Commission*, 492 F.3d 421, 426 (D.C. Cir. 2007), the D.C. Circuit similarly held in abeyance an unripe challenge to a Nuclear Regulatory Commission rule that remained subject to approval by the Board of Indian Affairs.
- In *Blumenthal v. FERC*, Nos. 03-1066, 03-1075, 2003 WL 21803316, at *1 (D.C. Cir. July 31, 2003), the D.C. Circuit held an unripe challenge to Federal Energy Regulatory

Commission's approval of a pipeline in abeyance, pending the resolution of an administrative challenge to Connecticut's rejection of a required certification. Precisely as Defendants argue in this action, these cases all involved "contingent future events" dependent upon the anticipated but not yet final decision of a government agency. And, despite the determination by the courts in those cases that the pending claims at bar were unripe because they could be impacted by a "contingent future event," the cases were all stayed rather than dismissed given the discretionary nature of the prudential ripeness analysis.[1]

The Court's expressed concerns based on the "contingent future event" of Richmond's adopting a resolution of necessity properly fall within the rubric of prudential ripeness rather than Article III standing. Plaintiffs' claims satisfy Article III's basic requirement of an actual "case and controversy between parties having adverse legal interests." *Hulteen v. AT&T Corp*., 498 F.3d 1001, 1004 (9th Cir. 2007). Under the Declaratory Judgment Act, there is no requirement that the "final step" be taken and injury sustained before a justiciable Article III controversy exists. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 (2007). The test, as summarized by the Supreme Court, is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127. In numerous cases, courts have concluded that Article III's "case or controversy" requirement was met, even though contingent future events rendered the case not "fit for decision" on prudential ripeness grounds, including the cases described above that were held in abeyance for that reason. For example, in *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122 (2d. Cir. 2008), then Second Circuit Judge Sonia Sotomayor addressed the ripeness of a challenge by the New York Civil Liberties Union ("NYCLU") against a New York state lobbying regulation, requiring the reporting of certain lobbying expenses, after the NYCLU was sent a letter

[1] Other federal courts have also exercised their discretion to stay the action, or hold it in abeyance, in various types of unripe cases. *See Pardee*, 344 F.Supp.2d at 839 (staying indemnification claims pending the outcome of separate lawsuits where underlying liability claims were being litigated, since indemnification claims did not ripe prior to judgment in other lawsuits); *Puricelli v. Borough of Morrisville*, 820 F.Supp. 908, 919 (E.D. Pa.1993) (staying a federal due process claim that was "not 'ripe for adjudication'" because of the Third Circuit's "preference for 'holding federal civil rights claim in abeyance until state appellate proceedings that may affect the outcome of the federal action are decided." (citing *Linnen v. Armainis*, 991 F.2d 1102, 1107 (3d Cir.1993)).

requiring it to report expenses for a billboard advertisement under the regulation. The Court explained that the challenge to the regulation was not yet prudentially ripe, because it "would certainly benefit from additional factual development and is in many ways contingent on future events," including a formal inquiry by the state into NCLU's lobbying activity, and additional clarity from the state agency on the meaning of the regulations. *Id*. at 133. But the Court concluded that the case was ripe for Article III purposes because the new and still developing regulation could infringe on the NYCLU's constitutional rights and impose administrative burdens and expenses, thereby creating a "'concrete dispute affecting cognizable current concerns of the parties' sufficient to satisfy standing and constitutional ripeness." *Id*. at 131 (citing *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 546 (2d Cir. 2007)).

Here, the City has indisputably adopted a program to acquire the Plaintiff Trusts' loans by eminent domain. That program was adopted by a 6-0 vote of the City Council in April 2013, and the loan offers made by Defendants to Plaintiffs include an explicit threat that the property will be seized forcibly if Plaintiffs do not sell "voluntarily" (as previously explained to the Court, there is no reason for Defendants to have made the offers than to meet the requirements for eminent domain seizure, because they knowingly are targeting performing loans that cannot legally be voluntarily sold). The City Council reaffirmed the program at its September 10 meeting, during which the council voted 5-2 to reject a proposal to withdraw the offers and abandon eminent domain.

Specifically in the context of challenges to eminent domain seizures, the Supreme Court and other lower courts have confirmed that there is no requirement that a plaintiff wait until the final public act necessary to initiate a seizure before filing a declaratory judgment action in federal court. *See, e.g.*, *Hawaii v. Midkiff*, 467 U.S. 229, 234 (1984) (suit ripe for adjudication after "compulsory negotiations," a statutory prerequisite step to condemnation, had occurred, despite the fact that "compulsory arbitration," the next prerequisite step, had not); *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 142 (1974) (holding that a victim of an unconstitutional eminent domain process does "*not have to await* the consummation of threatened injury to obtain preventive relief" (emphasis added)); *99 Cents Only Stores v Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1128 (C.D. Cal. 2001) (holding that action to enjoin eminent domain program was justiciable, despite rescission of Resolutions of Necessity by the city) *aff'd in relevant part, appeal dismissed on mootness grounds due*

to changed facts, 60 Fed. Appx. 123 (9th Cir. 2003); *Chertkof v. Mayor & City Council of Baltimore*, 497 F. Supp. 1252, 1256 (D. Md. 1980) (exercising jurisdiction over case in which the municipality had drawn up an urban renewal plan that included property owned by the plaintiff and sought to have the property appraised, because "objective evidence does indicate a real threat of condemnation," notwithstanding the City's claim, like in this action, that it was just negotiating). The hypothetical chance that the City will abandon its program before the final act of a resolution of necessity (suggested by the Defendants on the basis of the Council's 4-3 vote on September 10 adopting a resolution stating that yet another City Council vote will take place before loans are seized), goes only to arguable concerns of prudential ripeness.[2]

Plaintiffs' reliance on Rule 12(h)(3) is therefore misplaced, as that rule applies only to cases where there is no Article III standing. It does not apply to cases such as this one implicating the discretionary question of prudential ripeness. *See White & Case LLP v. United States*, 67 Fed. Cl. 164, 168 (Fed. Cl. 2005) ("[S]ince the specific ripeness argument focuses on the lack of a 'final agency action,' which has been held to come within the prudential branch of Supreme Court ripeness jurisprudence in analogous situations, the Court concludes that subject matter jurisdiction is not an issue.") (*citing Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997) (absence of final decision regarding application of development rights regulation in a regulatory Takings claim was a matter of prudential, not constitutional, ripeness)).

Finally, the need for Plaintiffs' claims to be held in abeyance, rather than dismissed, is especially acute. Defendants have repeatedly refused to agree to defer the initiation of their intended state court "Quick Take" suit, which they plan to file immediately after issuing their resolution of necessity, until this Court has an opportunity to adjudicate Plaintiffs' federal constitutional claims, and Plaintiffs have argued that this Court would lack authority to adjudicate the issue once their state court condemnation action is filed. *See* Docket 32, p. 12. *Cf. 99 Cents Only Stores*, 237 F. Supp. 2d at 1128

[2] As counsel for Plaintiffs explained to the Court at the September 12, 2013 oral argument, there were numerous admissions made by Richmond City officials at the September 10-11 City Council hearing (would lasted roughly seven hours and continued until the wee hours of the morning) showing that the Seizure Program is not "hypothetical" as Defendants have claimed to the Court, but far along and on the last verge of moving to seize loans. To the extent the Court were inclined to find a lack of Article III standing without the benefit of this new information, Plaintiffs would ask the Court for leave to prepare and submit a transcript of the Council hearing.

(justiciability "heavily" supported by fact that city "persistently refused to enter into any stipulation agreeing not to condemn 99 Cents' leasehold interest at Costco's behest"). Holding Plaintiffs' claims in abeyance would ensure that Plaintiffs have full opportunity to litigate the facial illegality and unconstitutionality of the program *before* the City can irreversibly extinguish the loans, as the Quick Take proceeding does not provide a sufficient forum for Plaintiffs' serious constitutional and other objections to be addressed, nor sufficient protection against the irreparable harm the Defendant's Seizure Program will cause if allowed to proceed.

CONCLUSION

For the foregoing reasons, the Court should not dismiss this case, but instead should hold it in abeyance. Further, although we believe the Court can retain this case notwithstanding its ripeness concerns, should the Court elect to dismiss the case, it should provide leave to amend. Leave to amend shall be liberally provided. *See* FRCP 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."); *Eminence Capital, LLC v. Aspeon, Inc*., 316 F.3d 1048, 1051 (9th Cir. 2003) (the policy favoring amendment of complaint is "to be applied with extreme liberality") (citing *Owens v. Kaiser Found. Health Plan, Inc*., 244 F.3d 708, 712 (9th Cir. 2001)). As noted in Plaintiffs' reply brief, Plaintiffs intend to amend the complaint to provide additional grounds for relief, including preemption. In light of the rapid pace of developments, some of the bases for amendment are actions subsequent to the filing of the Complaint, including the opinion of the General Counsel of the Federal Housing and Finance Agency that the Seizure Program presents "the conflict of federal and state interests," s*ee* Federal Housing Finance Agency, General Counsel Memorandum: Summary of Comments and Additional Analysis Regarding Input on Use of Eminent Domain to Restructure Mortgages 3, 7 (Aug. 7, 2013), available at http://www.fhfa.gov/webfiles/25418/GCMemorandumEminentDomain.pdf. Assuming *arguendo* that the Court is not willing to hold the case in abeyance as the prudential ripeness issues develop, the Court could determine that preemption and other potential amendments are not premised on a resolution of necessity, or any other future act. Further, Plaintiffs should have the opportunity to plead the numerous facts relating to the ripeness issue that have occurred since the close of the

parties' briefing on Plaintiffs' Motion to Dismiss on September 5, 2013. Plaintiffs should be provided the opportunity to state their amendments.[3]

DATED: September 13, 2013

Respectfully submitted,

By: /s/ Rocky C. Tsai

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[3] If the Court were inclined to dismiss the action, it should also, in the alternative, condition any dismissal upon a requirement that the Defendants provide thirty days' notice to the Plaintiffs prior to filing any condemnation action, whether in an action brought by the City of Richmond alone or through a Joint Powers Authority. Courts have exercised their discretion to place conditions on a dismissal where the party seeking dismissal will use the dismissal to its advantage. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011) (district court abused its discretion by failing to condition its dismissal on defendant's waiver of any statute of limitations defenses available in Peru when it dismissed, where defendants' statements indicated that it would move to dismiss the suit based on the Peruvian statute of limitations); *see also Leetsch v. Freedman*, 260 F.3d 1100, 1103–04 (9th Cir. 2001) ("[a] district court can be required to impose conditions if there is a justifiable reason to doubt that a party will cooperate. . ."); *Gutierrez v. Advanced Medical Optic*, 640 F.3d 1025, 1032 (9th Cir. 2011) (reversing for abuse of discretion where matter was dismissed without condition, but defendant used dismissal without condition to gain advantage).

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