

1 ROCKY C. TSAI (SBN 221452)  
 2 (rocky.tsai@ropesgray.com)  
 3 **ROPES & GRAY LLP**  
 4 Three Embarcadero Center  
 San Francisco, CA 94111-4006  
 Telephone: (415) 315-6300  
 Facsimile: (415) 315-6350

5 Attorneys for Plaintiffs Wells Fargo Bank,  
 6 N.A., as Trustee, *et al.*

7 **ADDITIONAL COUNSEL LISTED**  
 8 **ON SIGNATURE PAGE**

9 **UNITED STATES DISTRICT COURT**  
 10 **NORTHERN DISTRICT OF CALIFORNIA**  
 11 **SAN FRANCISCO DIVISION**

14 WELLS FARGO BANK, NATIONAL  
ASSOCIATION, as Trustee, *et al.*  
 15  
 16 Plaintiffs,  
 17  
 18 v.  
 19 CITY OF RICHMOND, CALIFORNIA, a  
municipality, and MORTGAGE  
RESOLUTION PARTNERS LLC;  
 20  
 21 Defendants.  
 22  
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 26

Case No. CV-13-3663-CRB

**PLAINTIFFS' NOTICE OF MOTION AND  
 MOTION FOR PRELIMINARY  
 INJUNCTION; MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT THEREOF**

ACCOMPANYING PAPERS: Declarations of John  
 C. Ertman, Esq., David Stevens, Phillip R.  
 Burnaman, II, Kevin Trogdon, and Ronaldo  
 Reyes; [Proposed] Order

Date: September 13, 2013  
 Time: 10:00 a.m.  
 Judge: Hon. Charles R. Breyer

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on September 13, 2013, at 10:00 am Pacific Standard Time, or  
3 as soon thereafter as counsel may be heard by the above-entitled Court, Plaintiffs will move and  
4 hereby do move this Court for a preliminary injunction enjoining Defendants the City of Richmond,  
5 California and Mortgage Resolution Partners LLC (collectively, "Defendants") from taking any further  
6 action to implement their program to seize residential mortgage loans through eminent domain (the  
7 "Richmond Seizure Program") with respect to any mortgage loans held in residential mortgage-backed  
8 securitization trusts for which Plaintiffs serve as trustees (the "RMBS Trusts"), including taking any  
9 steps under state law to seize the loans through eminent domain.

10 Plaintiffs bring this Motion on the grounds that they are likely to prevail on the merits of their  
11 lawsuit, that the RMBS Trusts and their beneficiaries will suffer irreparable harm absent a preliminary  
12 injunction, and that the balance of equities and the public interest warrant the proposed injunction.  
13 This Motion is supported by the accompanying Memorandum of Points and Authorities; Plaintiffs'  
14 Complaint; the Declarations of John C. Ertman, Esq. ("Ertman Decl."), David Stevens ("Stevens  
15 Decl."), Phillip R. Burnaman, II ("Burnaman Decl."), Kevin Trogdon ("WF Decl."), and Ronaldo  
16 Reyes ("DB Decl.") in support and all exhibits thereto; any reply memorandum and reply Declarations  
17 that Plaintiffs may file; any testimony, evidence, or oral argument that Plaintiffs may present at the  
18 hearing; and any other further materials that this Court may consider.

19 **STATEMENT OF ISSUE TO BE DECIDED**

20 Should the Court preliminarily enjoin Defendants from further implementing the Richmond  
21 Seizure Program and from utilizing eminent domain powers to seize residential mortgage loans held in  
22 the RMBS Trusts?

23 Respectfully submitted,

24 By: /s/ Rocky C. Tsai

25 \_\_\_\_\_  
26 Rocky C. Tsai  
27 ROPES & GRAY LLP  
28 Attorneys for Plaintiffs

1 **SUMMARY OF THE ARGUMENT**

2 This is an injunction action to prevent the City of Richmond, California (“Richmond” or the  
3 “City”) and its partner Mortgage Resolution Partners (“MRP”), a private, for-profit California  
4 investment firm, from seizing residential mortgage loans held in residential mortgage-backed  
5 securitization (“RMBS”) trusts for which Plaintiffs serve as trustees (the “RMBS Trusts” or the  
6 “Trusts”), and which are located outside of Richmond. The Program would use Richmond’s power of  
7 eminent domain to generate significant profits for MRP and MRP’s investors, with a small cut going to  
8 Richmond.

9 Under the guise of providing “mortgage relief” to Richmond homeowners, Richmond and  
10 MRP intend to use Richmond’s eminent domain power to seize mostly performing mortgage loans  
11 hand-selected by MRP at steeply discounted prices (typically 80% of the current value of the home,  
12 but in many cases much less) and then allow MRP immediately to flip the loan to a new government-  
13 backed securitization pool trust for a much higher price (around 95% of the current value of the home).  
14 The substantial profit resulting from this eminent domain arbitrage would be shared by MRP, MRP’s  
15 investors, and Richmond.

16 Plaintiffs are the trustees of approximately 350 RMBS Trusts, the investors in which  
17 beneficially own loans being targeted by the Richmond Seizure Program. If the Program is allowed to  
18 proceed, the Trusts and their beneficiaries alone will incur tens of millions of dollars of losses, and  
19 together with other similarly-situated RMBS trusts holding Richmond loans and their beneficiaries, the  
20 losses from the Program could exceed \$200 million. Because the Trusts are essentially pass-through  
21 investment vehicles, these losses would immediately and directly be suffered by the Trusts’ investors,  
22 also known as “certificateholders,” which include a vast number of public and private pension funds,  
23 401(k) plans, insurance companies, mutual funds, university endowments and individual investors and  
24 retirees across the country. And if Richmond is allowed to proceed, other local governments would  
25 likely follow suit, with the result that losses across RMBS trusts and their investors would exceed  
26 billions of dollars.

27 The Program is a profit-driven scheme designed to enrich a private investment firm, its  
28 financial backers, and the City, at the expense of private RMBS trusts located outside of Richmond



1 and their beneficiaries. As such, the Program self-evidently does not involve a legitimate “public use”  
2 for which the power of eminent domain is expressly reserved. Richmond contends that the Program,  
3 by seizing underwater loans (i.e., those where the value of the home is less than the amount of the  
4 mortgage loan), will prevent defaults, foreclosures, home abandonment and blight in Richmond. But  
5 that justification is a mere façade, as the Program primarily targets performing loans – i.e., those of  
6 homeowners who have been making their monthly payments for years despite being “underwater,” and  
7 who have good credit ratings – as opposed to those loans that are in deep default. The Program targets  
8 performing loans precisely because they are not at serious risk of default and therefore can be easily  
9 refinanced and flipped to a new government-backed mortgage loan pool, with Richmond and MRP  
10 pocketing the profit. Thus, contrary to the assertions of Richmond and MRP, the vast majority of the  
11 loans being targeted by the Program are not at imminent risk of default, and the homeowners in  
12 question are not at risk of being foreclosed upon and evicted. For these reasons, the Richmond Seizure  
13 Program clearly violates multiple provisions of the U.S. Constitution, the California Constitution, and  
14 California statutes, even assuming for the sake of argument that the Program paid fair value for the  
15 loans (which it clearly does not, and by definition, cannot, or the Program would not work):

16 (1) The Program illegally reaches beyond Richmond’s geographic borders to seize mortgage  
17 loans located outside of Richmond, in violation of the due process requirements of the U.S.  
18 Constitution and the California Constitution, and California eminent domain law. *See Texas v. New*  
19 *Jersey*, 379 U.S. 674, 680-81 (1965) (holding that “a debt is property of the creditor, not of the debtor,”  
20 and is accordingly located in the creditor’s home state); *W. Union Tel. Co. v. Pennsylvania*, 368 U.S.  
21 71, 75 (1961) (“Pennsylvania does not and could not claim that the same debts or demands could be  
22 escheated by two States.”); *Mayor & City Council of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp.  
23 278, 286 (D. Md. 1985) (“[T]he [*Western Union*] Court was recognizing the *exclusive* nature of  
24 escheat – and by analogy, condemnation – proceedings.”).

25 (2) The Program targets for seizure mortgage loans for a purely private, rather than public, use,  
26 in violation of the Takings Clause of the U.S. Constitution, the California Constitution, and California  
27 eminent domain law. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (“[T]ransfers intended to  
28

1 confer benefits on particular, favored private entities, and with only incidental or pretextual public  
2 benefits, are forbidden by the Public Use Clause.”) (Kennedy, J., concurring).

3 (3) The Program seeks to regulate interstate commerce, in violation of the Commerce Clause  
4 of the U.S. Constitution, attempting to correct Defendants’ perception of a “market failure” by  
5 rewriting the contracts between local residents and out-of-Richmond and out-of-state creditors, with  
6 the resulting harm to the national mortgage and housing industries vastly outweighing the minimal  
7 purported local benefits of the Program. *See City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d  
8 414, 421 (Cal. App. 1st Dist. 1985) (holding that a city’s exercise of eminent domain that impacts  
9 interstate commerce “is the precise brand of parochial meddling with the national economy that the  
10 commerce clause was designed to prohibit.”); *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633,  
11 638 (9th Cir. 1993) (Dormant Commerce Clause prohibits state action that “1) directly regulates  
12 interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic  
13 interests over out-of-state interests.”)

14 (4) The Program abrogates the debts of local citizens at the expense of creditors without any  
15 legitimate public purpose, in violation of the Contracts Clause of the U.S. Constitution. *Energy*  
16 *Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (holding that state  
17 impairment of contracts is only permissible where based upon a “legitimate public purpose . . . rather  
18 than providing a benefit to special interests.”).

19 Plaintiffs now move for a preliminary injunction, to prevent Richmond and MRP from taking  
20 steps to seize loans while this Court is adjudicating whether the Program is unconstitutional, as  
21 Plaintiffs contend. A preliminary injunction is necessary because Defendants have now initiated their  
22 seizure efforts. On or around July 31, 2013, Richmond sent its first wave of coercive “offer” letters to  
23 Plaintiffs and other RMBS trustees and servicers, in which it identified approximately 624 loans that it  
24 proposed to buy for a fraction of their unpaid principal balance, under threat that the loans will be  
25 seized by eminent domain if Plaintiffs and other trustees and servicers do not accept Richmond’s offer.  
26 As set forth in the accompanying Declarations of Phillip Burnaman and David Stevens, if Richmond is  
27 not enjoined and is allowed to proceed with the Program, immediate, significant and irreversible harm  
28

1 would be inflicted on the Trusts and their beneficiaries, along with numerous other constituencies  
2 nationwide, which harm could not be compensated by Richmond or MRP, including the following:

- 3 • The value of the performing loans primarily targeted by Richmond is approximately the loan’s  
4 unpaid principal balance, plus more intangible value to the Trust pool as a whole, including the  
5 scheduled payments of anticipated cash flows and geographic diversity of the loan pool, and  
6 other risk control measures. If the Program is carried out, the immediate losses to the owners  
7 of the targeted loans could reach as high as \$200 million or more, with additional, incalculable  
8 harm to the remaining assets of the trusts. The harm to the Trusts alone could exceed \$65  
9 million. *See, e.g.*, Burnaman Decl. ¶¶ 40-44; WF Decl. ¶¶ 15-16.
- 10 • The immediate and irreparable harm to the Trusts and their beneficiaries would be impossible  
11 to unwind and would be exacerbated by California’s “Quick Take” procedure, Cal. Code Civ.  
12 Proc. § 1255.410, under which Richmond and MRP would take possession of targeted loans  
13 before final adjudication of the eminent domain action. That procedure would wreak havoc in  
14 the Trusts, because performing loans, and the Trust beneficiaries’ cash flows from those loans,  
15 could abruptly be removed from the Trusts, upending the diversification and risk mitigation  
16 features upon which the Trusts are organized, and upon which their investors based their  
17 investment decisions. Moreover, the Program’s subsequent refinancing of the loans at reduced  
18 amounts could not be undone, and the parties could not be restored to their original, pre-  
19 Program status. Burnaman Decl. ¶ 45.
- 20 • The Trusts are essentially pass-through investment vehicles, so the immediate harm from the  
21 seizures of the Trusts’ collateral would flow directly to the Trusts’ certificateholders, which  
22 include among others, numerous state and local pension plans, 401(k) plans, college savings  
23 plans, insurance companies, mutual funds, and university endowments. WF Decl. ¶ 6.
- 24 • If the Program is not enjoined and other municipalities implement similar programs, the harm  
25 to the Trusts’ beneficiaries and to investors in other RMBS trusts would exponentially  
26 multiply. Stevens Decl. ¶¶ 19-24.
- 27 • As explained in the Declaration of Mortgage Bankers Association CEO David Stevens,  
28 “[b]asic economics tells us that lenders will have to factor this risk into any new lending

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activity in Richmond. . . . It is my view that lenders and investors will use a combination of higher rates and down payments to mitigate the significant new risks arising from eminent domain.” Stevens Decl. ¶ 15. Mr. Stevens also explains that if the Program is adopted in other cities, “[t]he impact of eminent domain risk will ripple through the real estate market for years, largely in the form of higher down payments and higher interest rates to price-in the new market risk.” Stevens Decl. ¶ 20.

Thus, there is no adequate remedy at law for the irreparable harm that implementation of the Program would cause if it is not preliminarily enjoined. *See, e.g., Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (noting that “constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm”; and conditions that would “disrupt and change the whole nature of [plaintiff’s] business” most likely could not be compensated with damages alone); *Taylor v. Westley*, 488 F.3d 1197, 1201 (9th Cir. 2007) (finding irreparable harm because “it may be impossible for plaintiffs to reacquire” property seized under California’s escheat procedures); *EIG Global Energy Partners, LLC v. TCW Asset Mgmt. Co.*, No. CV 12-7173, 2012 WL 5990113, at \*9 (C.D. Cal. Nov. 30, 2012) (finding irreparable harm because “complex business transactions cannot be simply unwound”).

1 **I. STATEMENT OF FACTS**

2 **A. The Parties**

3 The Plaintiffs in this action are the Trustees of hundreds of specific RMBS Trusts that hold  
4 mortgage loans made to homeowners in Richmond, California that are being targeted by the Richmond  
5 Seizure Program (the “Richmond Loans”). Those Trusts’ investors include public and private pension  
6 funds, 401(k) plans, insurance companies, mutual funds, university endowments and individual  
7 retirees and investors across the country. WF Decl. ¶ 6.

8 Defendant Richmond is a California municipality. Defendant MRP is a privately-owned, for-  
9 profit, San Francisco-based investment company. MRP was formed solely for the purpose of  
10 partnering with local governments like Richmond to seize (or purchase under threat of seizure)  
11 residential mortgage loans using those local governments’ powers of eminent domain and then  
12 restructuring and reselling those loans, resulting in a profit to MRP and its investors. On information  
13 and belief, MRP has no other business operations. MRP has attempted to partner with numerous local  
14 governments in California and other states to implement its program. While several of these  
15 municipalities have taken steps towards implementing MRP’s program, Richmond is believed to be  
16 furthest along. Ertman Decl. Ex. J at 10; Ex. L; ¶ 13.

17 **B. The Richmond Seizure Program**

18 According to statements published by Defendants Richmond and MRP, under the Richmond  
19 Seizure Program, MRP would primarily target for seizure loans that are (a) performing (i.e., not in  
20 default), (b) underwater (i.e., where the loan balance is higher than the home value), and (c) held by  
21 borrowers with good credit ratings. Richmond and MRP plan to seize these loans from the Trusts  
22 through Richmond’s eminent domain powers, at prices equivalent to approximately 80% of the market  
23 value of the underlying home, although the offer letters often indicate an even lower price. After the  
24 loans are seized, MRP would refinance the seized loans with new loans priced at approximately 95%  
25 of the underlying home value. Ertman Decl. Ex. J at 7, 17-18. The purported premise of the Program  
26 is that RMBS trusts are often restricted by their governing documents from granting a wholesale  
27 permanent write-down of the principal amount owned on a loan to a borrower who is underwater, and  
28 therefore Richmond and MRP need to step in and, through eminent domain, effect permanent principal

1 reductions on mortgage debts, by seizing and extinguishing the homeowner’s existing loan, and  
2 replacing it with a new smaller one. According to Richmond and MRP, the Program, by granting  
3 permanent debt relief through re-writing the borrower-lender contract, corrects a “market failure” and  
4 allegedly avoids widespread evictions and home abandonment. *See, e.g.*, Ertman Decl. ¶ 12.

5 Richmond has stated that it does not intend to seize and hold the mortgage loans. Rather, for  
6 the Program to operate as planned and be profitable to its participants, the loans must be refinanced  
7 and resold. Loans targeted for seizure must meet the Federal Housing Administration’s (“FHA”)   
8 guidelines for loan-to-home value ratios and credit ratings. Otherwise, the new loans would not be  
9 accepted for sale into a government-backed securitization pool, and Richmond would remain the  
10 holder of the loans. *See, e.g.*, Ertman Decl. Ex. D at 7. In addition, for the Program to be profitable to  
11 Richmond, MRP, and MRP’s investors, loans must be acquired for prices far less than their  
12 outstanding principal balances. The difference between the stated 80% seizure price and the 95%  
13 refinancing price creates a substantial profit spread per loan, which (after deducting the expenses of the  
14 loan seizure) would be shared by Richmond, MRP, and MRP’s investors. Richmond will receive a flat  
15 payment of 5% of the refinancing price per loan, and MRP and its investors will receive the remainder,  
16 including a flat per-loan fee paid to MRP itself of \$4,500. *See, e.g.*, Ertman Decl. Ex. J at 17-18.

17 **C. The Richmond Loans and the RMBS Trusts**

18 The Richmond Loans targeted by the Program are the collateral backing for what are known as  
19 “private-label” RMBS trusts, meaning that they were pooled into securitizations by private sponsors,  
20 rather than by government-sponsored enterprises (“GSE”) such as Fannie Mae or Freddie Mac (and  
21 thus do not have any government guarantee of repayment to investors). WF Decl. ¶ 5; DB Decl. ¶ 6.

22 RMBS trusts are a critical component of the national mortgage and housing markets. There are  
23 tens of thousands of private-label RMBS trusts in existence. Such trusts typically acquire 1,000 to  
24 3,000 residential mortgage loans at their inception, purchased with funds raised through the offering of  
25 certificates in the trusts to investors, known as certificateholders. RMBS trusts typically hold these  
26 loans through maturity, unless the loans are paid off early or go into default.<sup>1</sup> The trusts are structured

27 \_\_\_\_\_  
28 <sup>1</sup> No Trust exclusively holds Richmond loans (or even California loans). Instead, the Trusts hold geographically diverse portfolios of loans. DB Decl. ¶ 7; WF Decl. ¶ 7.

1 under federal tax laws as “real estate mortgage investment conduits,” or “REMICs,” and, as such, are  
2 prohibited from selling performing loans. WF Decl. ¶ 8; Burnaman Decl. ¶ 37.

3 The Richmond Loans are comprised of approximately 1,700 or more loans held by  
4 approximately 1,100 RMBS trusts. Burnaman Decl. ¶ 40. All or substantially all of the RMBS trusts  
5 are administered by one of the following seven trustee entities or their affiliates: Wells Fargo Bank,  
6 N.A.; Deutsche Bank Trust Company Americas (“DBTCA”); Deutsche Bank National Trust  
7 Company; Bank of New York Mellon, N.A.; Citibank, N.A.; U.S. Bank National Association; and  
8 HSBC Bank USA, N.A. None of the Plaintiffs have any corporate trust office or employees in  
9 Richmond (and Wells Fargo and DBTCA do not have their principal corporate trust office in  
10 California). WF Decl. ¶¶ 11-12; DB Decl. ¶¶ 10, 12. Moreover, the physical notes evidencing the  
11 targeted mortgage loans held by the Trusts all are located outside of Richmond, and in many cases, are  
12 located outside of California. WF Decl. ¶ 12; DB Decl. ¶ 12.

13 **D. California Eminent Domain Law**

14 Under California eminent domain law, before Richmond can seize the Richmond Loans, it  
15 must first make offers to acquire the loans from their owners. Richmond initiated that process on or  
16 about July 31, 2013, by sending letters to the trustees, including Plaintiffs, and servicers for RMBS  
17 trusts, that identified approximately 624 mortgage loans collateralized by homes in Richmond, which  
18 it was “interested in acquiring.” It offered to buy certain loans held in each Trust for a fraction of their  
19 remaining principal balance, while indicating that it might “decide[] to proceed with the acquisition of  
20 the loans through eminent domain” if its offer is not accepted by August 13, 2013. DB Decl. Ex. 1;  
21 WF Decl. Ex. B. Because the Trusts are REMICs, they are legally prohibited from voluntarily selling  
22 any performing loans to MRP. Moreover, because they consist primarily of performing loans of  
23 borrowers with good credit ratings, the value of the Richmond Loans is approximately the loan’s  
24 unpaid principal balance (and for some loans would be higher than that). Accordingly, Richmond’s  
25 stated target price of 80% of the value of the underlying home vastly understates the value of the loans,  
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1 and their seizure for that price would be highly damaging to the Trusts and their beneficiaries.<sup>2</sup> See,  
2 e.g., Burnaman Decl. ¶¶ 40-44; WF Decl. ¶¶ 14-15.

3 Second, the Richmond City Council must hold a hearing and reach a determination that, among  
4 other things, the seizure of the loans is necessary for a legitimate public purpose (the “Necessity  
5 Hearing”). Third, after conducting the Necessity Hearing, Richmond must file an eminent domain  
6 lawsuit in California state court. California statutory law provides for a procedure known as a “Quick  
7 Take,” under which Richmond could obtain an expedited court order giving Richmond possession of  
8 the targeted loans prior to a final adjudication of the eminent domain action, provided that Richmond  
9 pays into the court the amount of its proposed seizure price, and subject to having to give the loans  
10 back – which, as discussed *infra*, it would not be able to do – if the state court ultimately determines  
11 that the taking is illegal. MRP has indicated that the Quick Take “will be a necessary component” of  
12 its Program. See Ertman Decl. Ex. D at 3. Thus, under this procedure, Richmond would be given  
13 possession of any targeted Richmond Loans at the outset of a state court suit, and would have the  
14 opportunity to extinguish and refinance those loans while any challenges raised by the Plaintiffs in the  
15 state court suit were being litigated.

16 **E. The Immediate and Irreparable Harm Caused by the Richmond Seizure Program**

17 If allowed to proceed, the Program would cause immediate irreparable harm to the Trusts and  
18 their beneficiaries, along with numerous other constituencies nationwide, which could not be  
19 compensated by Richmond or MRP. A more detailed discussion of that harm is set forth in the  
20 supporting Declarations of Phillip Burnaman and David Stevens, and is incorporated herein.

21 By contrast, the issuance of a preliminary injunction will maintain the status quo while causing  
22 no significant harm to Richmond or MRP whatsoever because the Program’s stated purpose is to assist  
23 a small, select group of homeowners in Richmond, the vast majority of whom are currently paying  
24 their mortgage loans and are in no imminent danger of losing their homes at all. Moreover, as

25 <sup>2</sup> It appears that approximately two-thirds of the 624 loans included in this first wave of loans for  
26 which MRP has made purchase offers are performing loans. To the best Plaintiffs can determine, the  
27 remaining loans in this initial wave are not current, but it is unclear whether Defendants plan to seize  
28 those loans or whether they have other plans for such loans. It is also unclear how those loans relate to  
MRP’s stated Program of seizing performing loans. The inclusion of this relatively small number of  
delinquent loans in the first wave of Defendants’ seizure plan confirms that the Program is proceeding  
as planned – i.e., it is primarily targeting performing loans. See, e.g., WF Decl. ¶ 14.



1 described in the accompanying declarations, the Program is not designed to, or likely to, achieve any  
2 of the public benefits that Richmond and MRP claim, including avoiding foreclosures and home  
3 abandonment, and their attendant effects of blight and economic depression. First, as the first wave of  
4 offer letters confirms, Richmond is primarily targeting performing loans of homeowners with good  
5 credit ratings that are unlikely to default. The property securing these loans is not at imminent risk of  
6 being abandoned or foreclosed upon. Burnaman Decl. ¶ 53. Second, contrary to the dire picture  
7 painted by Richmond and MRP, even if the small minority of the targeted loans were to go into  
8 default, servicers of RMBS trusts today routinely grant modifications or other forms of work-outs in  
9 Richmond and elsewhere to allow distressed homeowners to have more affordable mortgage payments  
10 and to stay in their homes. Indeed, many of the loans targeted by Richmond have already received  
11 such modifications. Burnaman Decl. ¶¶ 26-27; 59-61. Thus, contrary to Richmond and MRP’s claims,  
12 the Program is not the only means for underwater borrowers of “private label” loans to obtain  
13 “mortgage relief.” Third, home prices in Richmond rose in the last year by more than 20% and are  
14 forecasted to rise further in the coming year. Burnaman Decl. ¶ 58, App. D. As a result, there is no  
15 credible basis for Richmond and MRP to contend that the homeowners of the performing, underwater  
16 loans the Program is targeting are in imminent danger of walking away from or being removed from  
17 their homes. At best, the Richmond Seizure Program provides a windfall for a small, select group of  
18 Richmond homeowners, while negatively impacting Richmond’s housing market across the board.

## 19 **II. ARGUMENT**

20 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the  
21 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance  
22 of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S.  
23 7, 20 (2008). The Ninth Circuit utilizes a “sliding scale” approach as part of this four-factor test  
24 whereby a stronger showing of one element can sometimes offset a weaker showing on another.  
25 Under this analysis, a preliminary injunction can issue “when a plaintiff demonstrates . . . that serious  
26 questions going to the merits were raised and the balance of hardships tips sharply in the plaintiffs’  
27 favor” as long as the other two *Winter* factors have been met. *Alliance for the Wild Rockies v. Cottrell*,  
28 632 F.3d 1127, 1134-35 (9th Cir. 2011). All of the factors are satisfied here.

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**A. Plaintiffs Are Highly Likely to Prevail on Their Claims**

**1. Richmond Cannot Take Extraterritorial Property**

The Program proposes to seize intangible property located outside of Richmond – and, for the most part, outside of California – thereby violating both California’s own eminent domain statute, and the limitations placed on the exercise of eminent domain by the state and federal constitutions.<sup>3</sup>

**a. Under the U.S. Constitution, Richmond Cannot Seize Loans of Out-of-State Trusts**

Because “[a] state’s power of eminent domain is, by its very nature, exclusive of another state’s power to condemn the same property, . . . only one state may condemn a particular piece of property, whether tangible or intangible.” *Mayor & City Council of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 284 (D. Md. 1985). In cases involving intangible property such as a debt, the Supreme Court has established a “simple and easy to resolve” rule: “a debt is property of the creditor, not of the debtor,” and is accordingly located in the creditor’s home state. *Texas v. New Jersey*, 379 U.S. 674, 680-81 (1965). *See also Delaware v. New York*, 507 U.S. 490, 499-500 (1993) (same). The Supreme Court’s ruling, which involved escheat, applies with equal force in the eminent domain context, because eminent domain, like escheat, turns upon a state’s exercise of exclusive jurisdiction over property within its boundaries, whether tangible or intangible. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (“Pennsylvania does not and could not claim that the same debts or demands could be escheated by two States.”); *Balt. Football Club, Inc.*, 624 F. Supp. at 286 (“[T]he [*Western Union*] Court was recognizing the *exclusive* nature of escheat – and by analogy, condemnation – proceedings.”).

In the analogous context involving a state’s ability to tax loan assets and proceeds, the Supreme Court has likewise held that loans – including mortgage loans, secured by an interest in real property – are located in the home state of the creditor, and not in the state where the debtor resides or the property is located:

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<sup>3</sup> The due process demands of the Fourteenth Amendment prohibit a state exercising eminent domain over property located in another state. *Cf. W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (“[W]hen a state court’s jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction....”)

1 Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by  
2 mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt,  
3 and, . . . the right of the creditor to ‘proceed against the property mortgaged, upon a given  
4 contingency, to enforce by its sale the payment of his demand, . . . has no locality  
5 independent of the party in whom it resides.  
6 *Baldwin v. Missouri*, 281 U.S. 586, 592 (1930)<sup>4</sup> (quoting *Kirtland v. Hotchkiss*, 100 U.S. 491, 498-99  
7 (1879) (“[D]ebt, although a species of intangible property, may, for purposes of taxation, if not for all  
8 others, be regarded as situated at the domicile of the creditor.”)).

9 The Supreme Court’s “simple and easy to resolve rule,” turns on the premise that “the debt was  
10 an asset of the creditor,” *Texas*, 379 U.S. at 681, which applies with equal force in the context of  
11 eminent domain. After all, only the creditor, not the debtor, could ever sell, transfer, profit from, or  
12 modify the terms of a loan. It is the creditor’s property, and the U.S. Constitution only permits the  
13 creditor’s home state to seize it. Richmond therefore cannot seize loans held by Trusts located outside  
14 of California, including the vast majority of those at issue here. *See Balt. Football Club, Inc.*, 624 F.  
15 Supp. at 284.

#### 16 **b. California Law Prohibits the Seizures of Loans Outside of Richmond**

17 California law applies these same principles of exclusive jurisdiction as between public entities  
18 within the state, generally prohibiting a public entity from seizing property located outside of its  
19 territorial boundaries.<sup>5</sup> California courts have followed the Supreme Court’s “simple and easy to  
20 resolve rule” in cases involving exclusive jurisdiction over property, ruling that loans are located  
21 where the creditor is domiciled, since they are necessarily the property of the creditor, even if secured  
22 by property in another location. *See San Francisco v. Lux*, 64 Cal. 481, 484 (1884) (“[A]n assessment  
23 of a debt secured by mortgage should be made where the creditor resides, and not in the county where  
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25 <sup>4</sup> Although the main holding of *Baldwin* – that the Fourteenth Amendment prohibits two states from  
26 taxing the same assets – has been subsequently abrogated by the Supreme Court, its reasoning  
27 regarding the situs of a debt remains valid, as is shown by the Supreme Court’s more recent escheat  
28 opinions in *Texas* and *Delaware*.

<sup>5</sup> California’s eminent domain laws state that “[a] local public entity may acquire by eminent domain  
only property within its territorial limits except where the power to acquire by eminent domain  
property outside its limits is expressly granted by statute or necessarily implied as an incident of one of  
its other statutory powers.” Cal. Code Civ. Proc. § 1240.050. Another statute identifies the express  
authority for extraterritorial takings, allowing them “for water, gas, or electric supply purposes or for  
airports, drainage or sewer purposes.” Cal. Code Civ. Proc. § 1240.125. The Richmond Program is  
not for any of these expressly authorized purposes; nor is there another statutory power for which the  
authority to take mortgages held outside of Richmond is “necessarily implied.”

1 the mortgaged premises are situated.”); *see also In re Mercantile Guar. Co.*, 238 Cal. App. 2d 426, 437  
2 (1965) (holding that under *Texas v. New Jersey*, “the right and power to escheat intangible property is  
3 accorded to the state of the creditor’s last known address. . . .”). California’s eminent domain law thus  
4 forecloses Richmond’s ability to seize any of the loans held in the Trusts, as none of the creditors who  
5 own the loans are located in Richmond.

## 6 **2. Defendants Are Prohibited from Seizing Property for Private Use**

7 Under the Fifth Amendment to the U.S. Constitution, any taking of private property must be  
8 for a legitimate public use, pursuant to the Public Use Clause. U.S. Const. Amend. V. (“[N]or shall  
9 private property be taken for public use, without just compensation.”). In *Kelo v. City of New London*,  
10 545 U.S. 469, 490 (2005), the Supreme Court’s most recent case addressing the legitimate public  
11 purpose requirement, the Court made clear that property “transfers intended to confer benefits on  
12 particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden  
13 by the Public Use Clause.”<sup>6</sup> (Kennedy, J., concurring); *see also id.* at 478 (Stevens, J.) (Fifth  
14 Amendment forbids “tak[ing] property under the mere pretext of a public purpose, when its actual  
15 purpose was to bestow a private benefit.”). While the Court confirmed that a relatively deferential  
16 rational basis test applies to whether a local government has a legitimate public purpose for the  
17 property seizure, the Court made clear – both in its majority opinion, and as further articulated by  
18 Justice Kennedy in his concurrence – that:

19 A court applying rational-basis review under the Public Use Clause should strike down a  
20 taking that, by a clear showing, is intended to favor a particular private party, with only  
21 incidental or pretextual public benefits. . .

22 *Id.* at 491 (Kennedy, J., concurring); *id.* at 488 (Stevens, J.) (Public Use Clause requires that  
23 government’s “purpose is legitimate and its means are not irrational.”). The California Constitution  
24 also has a public use requirement for takings that has been similarly interpreted. *See, e.g., City of*  
25 *Stockton v. Marina Towers LLC*, 171 Cal. App. 4th 93, 104 (2009) (“It is a cardinal principle of . . .

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28 <sup>6</sup> Justice Kennedy’s fifth vote was essential to the five-Justice majority in *Kelo*, and his opinion gives further context to Justice Stevens’s opinion for the Court. Plaintiffs cite to both opinions.

1 constitutional law that private property may only be taken for a *public* use.”) (internal citations  
2 omitted).<sup>7</sup>

3 The Program fails under the Public Use Clause at each turn: it is primarily “intended to favor  
4 a particular private party”; its proffered public benefits are incidental and pretextual; and its “means”  
5 are “irrational.” Indeed, by its own terms, the Program is self-evidently intended to benefit particular  
6 private parties, going well beyond anything permitted under *Kelo*. MRP hand selects the loans to be  
7 seized, MRP acquires the loans with private investor money, and MRP and its financial backers  
8 pocket most of the profits after quickly flipping the loans. The Program would take the private  
9 property (including expected profits) of mostly out-of-state Trust beneficiaries and turn it over to a  
10 California private investment fund favored by Richmond. Richmond, in effect, has rented out its  
11 eminent domain powers to carry out a private money-making scheme. These facts confirm the  
12 Program’s principally private purpose in violation of the Public Use Clause.<sup>8</sup> *Kelo* does not authorize  
13 the Defendants’ proposal to rob Peter to pay Paul (with Paul’s help). *See also, Mo. Pac. Ry. Co. v.*  
14 *Nebraska*, 164 U.S. 403, 416 (1896) (invalidating compelled transfer of private property from one  
15 private party to another for its private benefit).

16 Not only would Richmond be taking the property of one private party for the sole purpose of  
17 putting it under the control of another private party (MRP), but MRP will “screen” and select the loans  
18 that the City will purport to seize, will fund the entire Program, and will stand to make a handsome  
19 profit from the transaction itself. Ertman Decl. Ex. C at 9; Ex. J at 10, 17-18. This reflects a marked  
20 distinction from *Kelo*, where the Court specifically noted that the identities of the private parties who  
21 would benefit from the takings were not even known when the plan was adopted. 545 U.S. at 478 n.6  
22 (citing the trial court’s finding that “[i]t is, of course, difficult to accuse the government of having  
23 taken A’s property to benefit the private interests of B when the identity of B was unknown), *and id.* at

24 <sup>7</sup> California’s statutory Eminent Domain law imposes even stricter ‘public use’ requirements. Eminent  
25 domain may only be exercised where [t]he public interest and necessity require the project,” “[t]he  
26 project is planned or located in the manner that will be most compatible with the greatest public good  
and the least private injury,” and the property “is necessary for the project.” Cal. Code Civ. Proc.  
§ 1240.030.

27 <sup>8</sup> Justice Kennedy indicated in his *Kelo* concurrence that takings that are blatant private transfers  
28 should not even benefit from rational basis review, and instead should be deemed presumptively  
invalid. *See* 545 U.S. at 493. The Program here rises to that level.

1 493 (“The identities of most of the private beneficiaries were unknown at the time the city formulated  
2 its plans.”) (Kennedy, J., concurring). Here, not only is the identity of the major private party to be  
3 benefitted known, but that private party actually devised and agreed to fund the Program, *and it will*  
4 *hand-select the very assets to be seized*, all in order to maximize its own private gains.

5 In *Kelo*, the Court relied heavily on the comprehensive nature of the economic development  
6 program behind the property takings to determine that the takings were not intended to “confer benefits  
7 on particular, favored private entities . . . with only incidental or pretextual public benefits.” *Id.* at 490  
8 (Kennedy, J. concurring); *id.* at 483, 474-475, 478 n.6. (noting that the challenged takings were just  
9 one part of a “comprehensive” and “integrated development plan” that was designed to create jobs,  
10 generate tax revenues, encourage spin-off economic activities, and create recreational opportunities on  
11 the waterfront”). The Program here is nothing close to a “comprehensive” or “integrated” economic  
12 development program: it will only serve to provide a small number of selected homeowners in no  
13 imminent danger of losing their homes with a cash windfall without focusing on the underwater  
14 homeowners in Richmond who have long been in default and whose loans might actually be  
15 foreclosed upon, since targeting those homeowners would not provide MRP its desired profit. Under  
16 *Kelo*, this type of property transfer “executed outside the confines of an integrated development plan,”  
17 “would certainly raise a suspicion that a private purpose was afoot.” *Id.* at 487.

18 The Program’s “means” are “irrational,” the “primary benefit” of the plan is to MRP and its  
19 investors, and any public benefit is incidental at best. *See id.* at 490-92 (stating that even under  
20 rational-basis review, transfers intended to “confer benefits on particular, favored private entities” with  
21 only incidental public benefits are prohibited, and noting that the trial court found the “primary  
22 motivation” was public, not private) (Kennedy, J. concurring). The Program as envisioned by MRP  
23 would only affect about 1,500 homeowners in Richmond. Ertman Decl. Ex. J at 2. Most critically, the  
24 Program does not focus on distressed loans likely to cause economic dislocation, but rather the small  
25 subset of loans that will be most profitable to MRP and its investors: those that are “relatively current  
26 (not in default)” from “borrowers who appear likely to repay their loans.” Ertman Decl. Ex. C at 9.  
27 These loans are highly unlikely to default, as the borrowers have continued to make their payments,  
28 even during times of economic turmoil, and many have already been modified by the loan servicers.

1 Burnaman Decl. ¶¶ 53; 59-61. MRP’s focus on the more valuable loans to mortgagees who are most  
2 likely to continue paying shows that the primary purpose of the scheme is to benefit MRP and its  
3 investors, that the Program’s means are not rationally tailored to meet its alleged public purpose, and  
4 that any benefit to Richmond is purely incidental (which is not surprising, since it was designed for  
5 MRP’s benefit, not the City’s).

6         Allowing private investment companies to rent out a city’s eminent domain power for their  
7 own private profit because it could provide tangential public benefits would eviscerate the legitimate  
8 public use requirement of the U.S. and California Constitutions. In *99 Cents Only Stores v. Lancaster*  
9 *Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), for example, a case cited favorably by the  
10 Supreme Court in *Kelo*, the public redevelopment agency defendant argued that preventing “future  
11 blight” was a sufficient public use within the meaning of the Fifth Amendment. 237 F. Supp. 2d at  
12 1130. The Court rejected this argument, noting that this rationale would permit a government to  
13 condemn any property because “no redevelopment site can ever be truly free from blight because  
14 blight remains ever latent, ready to surface at any time.” *Id.* at 1131. *See also Cottonwood Christian*  
15 *Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (Courts must examine the  
16 “government’s purported public use to determine whether that is the genuine reason or if it is merely  
17 pretext.”). Richmond’s purported justification is just as nebulous; that some currently performing  
18 loans *could theoretically* default in the future is not sufficient justification for a taking.<sup>9</sup>

19                   **3. The Program Violates the Dormant Commerce Clause’s Ban on Direct Regulation**  
20                   **of Interstate Commerce**

21         The Commerce Clause of the U.S. Constitution, U.S. Const. art. I, § 8, has long been  
22 interpreted under the so-called “Dormant Commerce Clause” doctrine as prohibiting state action that  
23 “1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors

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25 <sup>9</sup> Defendants are not seeking a preliminary injunction based on the Fifth Amendment’s Just  
26 Compensation Clause (requiring in any legal taking “just compensation” for the property taken). *See,*  
27 *e.g., Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195  
28 (1985) (“[I]f a State provides an adequate procedure for seeking just compensation, the property owner  
cannot claim a violation of the Just Compensation Clause until it has used the procedure and been  
denied just compensation.”). As noted above, while the Program by definition is designed to extract  
the loans at steeply discounted prices, the Program is unconstitutional and illegal even assuming for  
the sake of argument Richmond and MRP were offering fair value.

1 in-state economic interests over out-of-state interests.” *Nat’l Collegiate Athletic Ass’n v. Miller*, 10  
2 F.3d 633, 638 (9th Cir. 1993) (citing *Healy v. Beer Inst.*, 491 U.S. 324, 337 n.14 (1989)). *See also*  
3 *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (citing *Gibbons v. Ogden*, 22 U.S. 1, 9  
4 (1824) (Marshall, C. J.)); *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982). Under this standard, a  
5 municipality is barred from “control[ing] conduct beyond the boundaries of the state.” *Edgar*, 457  
6 U.S. at 642. However, the Richmond Seizure Program would do just that.

7         Richmond has adopted the Program in order to redress what Richmond perceives as a market  
8 inefficiency in the national housing and mortgage finance markets. RMBS trusts and the widespread  
9 housing finance that they enabled are a major segment of the U.S. economy: they increased available  
10 credit, which in turn increased home ownership, housing demand, and housing prices throughout the  
11 country before being significantly impacted by the country’s major economic downturn in 2007 and  
12 2008. Ertman Decl. Ex. E at 4-11. Even though home prices have begun to rebound and foreclosure  
13 rates have significantly decreased five years on from the 2008 economic crisis, suggesting that the  
14 housing and mortgage markets have begun to stabilize, MRP and Richmond claim that underwater  
15 homeowners present a continuing drag on the national housing market. They argue that lenders and  
16 borrowers should agree to permanently reduce the outstanding principal on loans when homeowners  
17 are underwater, but that restrictions in the documents governing RMBS trusts often make this outcome  
18 impossible. Ertman Decl. Ex. C at 8. The Program identifies the unwillingness or inability of the loan  
19 servicers for RMBS trusts to agree to permanent reductions in borrowers’ principal balances as a key  
20 cause for what it terms “systemic problems in the housing and mortgage industries,” including excess  
21 housing stock nationwide. Ertman Decl. Ex. C at 8.

22         To address this alleged intractable problem, Richmond proposes to coercively obtain these  
23 loans, and for MRP then to underwrite new loans. Richmond’s proposed “solution” to this supposed  
24 problem in the interstate mortgage-backed securities sector will directly impact interstate commerce,  
25 and MRP openly admits as much: it says that its “primary motivate is to help this intractable problem  
26 that drags down the whole economy.” Ertman Decl. Ex. F at 3. And in response to arguments that the  
27 Program will negatively impact the interstate mortgage market, Richmond and MRP argue that it will  
28 instead “promote[]” interstate commerce by purportedly “rendering marketable what are currently



1 unmarketable . . . underwater loans.” Ertman Decl. Ex. G at 2. This assessment is factually incorrect,  
2 because the Program will in fact be extraordinarily disruptive to interstate commerce. But that factual  
3 issue is beside the point: the Commerce Clause prohibits states from directly regulating interstate  
4 commerce at all, placing that exclusive authority with the federal government.

5 The Program’s direct impact on a substantial part of the national economy and on transactions  
6 transpiring across state lines violates the Dormant Commerce Clause by itself, even taking at face  
7 value Richmond’s faulty logic about the supposed benefits to the national economy. In *Edgar v. MITE*  
8 *Corp.* 457 U.S. at 641-43, the U.S. Supreme Court invalidated a far less intrusive Illinois statute that  
9 regulated tender offers for securities of public companies with certain connections to the state of  
10 Illinois. The *Edgar* Court noted that in contrast to the regulation of purely intrastate transactions, the  
11 statute necessarily impacted securities “transactions occurring across state lines,” and accordingly  
12 invalidated it because of its “direct restraint on interstate commerce and . . . sweeping extraterritorial  
13 effect.” *Id.* The Program goes much further than the statute in *Edgar*: It would not merely regulate  
14 interstate transactions, it would seize and rewrite the contractual terms of loans held in RMBS trusts  
15 organized outside of California, to the detriment of vast numbers of certificateholders nationwide.  
16 Richmond and MRP would then remake the mortgages according to Richmond’s preferred economic  
17 policy and resell them into interstate commerce. Richmond could not directly order the reformation of  
18 these loans held in interstate commerce. And it cannot do so through eminent domain.

19 California courts have invalidated local exercise of the eminent domain power where it reflects  
20 “the precise brand of parochial meddling with the national economy that the commerce clause was  
21 designed to prohibit.” *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 421 (1985). The  
22 *Oakland Raiders* case specifically held that the City of Oakland’s attempt to seize the Raiders  
23 franchise by eminent domain violated the Commerce Clause, and would “more than indirectly or  
24 incidentally regulate interstate commerce,” by preventing the Raiders from moving out of Oakland,  
25 thereby impacting the nationwide professional football industry (i.e. the National Football League). *Id.*

26 The Program here reflects a much more direct form of “parochial meddling with the national  
27 economy” than the state conduct at issue in *Edgar* or *Oakland Raiders*. The Program would coerce the  
28 transfer of thousands of loans across state lines – causing substantial losses in those transactions and in

1 the Trusts’ remaining portfolios, which would be depleted of their most valuable assets – and then  
2 resell the loans back into interstate commerce. Richmond would inflict these losses in interstate  
3 commerce in order to benefit a local investment firm. This is precisely the type of local favoritism the  
4 Commerce Clause prohibits. And on top of that, it would directly threaten the interstate mortgage  
5 financing market with substantial upheaval and uncertainty by reducing the value of Trust assets and  
6 consequently the value of Trust certificates, disrupting the structure that defines the risk to RMBS  
7 certificateholders, and introducing a previously unforeseen threat of impairment across the entire  
8 market.<sup>10</sup> Stevens Decl. ¶¶ 11-25; Burnaman Decl. ¶¶ 47-52; 62-67. Its impact on the national  
9 housing, mortgage, and investment markets would dwarf the local regulations at issue in *Edgar* or  
10 *Oakland Raiders*, in clear violation of the Commerce Clause.

#### 11 **4. The Program Cannot Satisfy the Dormant Commerce Clause’s Balancing Test**

12 Even if for the sake of argument the Program could be seen as only having an “indirect” impact  
13 on interstate commerce, it would still violate the Dormant Commerce Clause, because the Supreme  
14 Court has long held that local government action that only has indirect effects on interstate commerce  
15 must still be struck down if “the burden imposed on [interstate] commerce is clearly excessive in  
16 relation to the putative local benefits.” *Edgar*, 457 U.S. at 640 (quoting *Pike v. Bruce Church, Inc.*,  
17 397 U.S. 137, 142 (1970)). The Richmond Seizure Program clearly fails this balancing test. Initially,  
18 with respect to the “local benefits” prong of the balancing test, the Program is not even tailored to  
19 remedy the local concerns of foreclosures and blight that the Defendants claim it is intended to  
20 mitigate. The Program focuses on performing loans for seizure by eminent domain rather than the  
21 Richmond properties that are most at risk for foreclosure. Instead, the Program is tailored to benefit the  
22 private interests of MRP by allowing it to obtain and profit from these relatively valuable loans. The  
23 proffered “local benefits” are accordingly pretextual and negligible.

24 The Program fares no better under the second prong of the balancing test, which focuses on the  
25 burden it imposes upon interstate commerce, since it is expected to have a profoundly disruptive

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26  
27 <sup>10</sup> If, as predicted, other jurisdictions follow Richmond’s lead and also attempt to seize loans from out-  
28 of-state trusts, the market segmentation and upheaval will increase exponentially, contrary to “strong  
federal interests in preventing economic Balkanization” that are advanced by the Commerce  
Clause. *Bacchus Imps. v. Dias*, 468 U.S. 263, 276 (U.S. 1984).

1 impact on the national markets for mortgage-backed securities, mortgage lending to homeowners, and  
2 housing sales. Initially, it is expected to substantially impair the value of hundreds of existing RMBS  
3 trusts outside of California, by removing loans from those trusts. That immediate impact will also in  
4 turn diminish the value of the certificates in those RMBS trusts, which are held by an untold number of  
5 investors across the country and the world and trade on the secondary market. Stevens Decl. ¶¶ 18-24;  
6 Burnaman Decl. ¶¶ 62-67. As explained in the accompanying Stevens and Burnaman Declarations, if  
7 a local government has the authority to reach outside its geographic borders to seize performing  
8 mortgage loans partway through the life of the mortgage, thereby imposing unforeseeable losses to the  
9 portfolio in which the loan was held, lenders and investors will face dramatically higher risks, setting  
10 off a chain of negative market events across the country: the increased investment risk will depress the  
11 demand for mortgage-backed securities; credit for new homebuyers will either disappear or become  
12 more costly to account for the risk of eminent domain seizures; and the shrinking universe of potential  
13 buyers will in turn decrease demand and housing prices, ultimately harming homeowners and creating  
14 even more underwater mortgages nationwide. Stevens Decl. ¶¶ 18-24; Burnaman Decl. ¶¶ 62-67.

15 This major market disruption is expected to be most profound in Richmond, where the market  
16 would naturally price the lending and investment risk the highest. Every Richmond homeowner who  
17 is not blessed by MRP for inclusion in its program could be harmed by diminishing and more  
18 expensive credit for home loans, thereby depressing the local housing market and turning the proffered  
19 local benefit on its head. Stevens Decl. ¶¶ 11-17. Because the Program will likely impose substantial  
20 commercial harm upon lenders, investors, and homeowners across the country – starting with  
21 Richmond homeowners themselves, but spreading much further to all participants in the housing and  
22 mortgage-backed securities markets – and would only benefit MRP and a small, select group of  
23 Richmond homeowners, it far exceeds the limitations of the Commerce Clause.

#### 24 **5. The Program Violates the Contracts Clause of the United States Constitution**

25 The Program would also violate the Contracts Clause of the U.S. Constitution, which prohibits  
26 states from passing any law “impairing the Obligations of Contracts.”<sup>11</sup> The Supreme Court’s

27 \_\_\_\_\_  
28 <sup>11</sup> While the Supreme Court has previously observed that the normal operation of a state or local government’s eminent domain power does not implicate the Contracts Clause, *see Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 243, n. 6 (1984), the Program goes much further than the typically targeted

1 explanation of the Founders’ rationale for the Contracts Clause makes clear that it was intended to  
2 prevent exactly the type of local interference with interstate commerce under the guise of debt relief  
3 that Richmond and MRP threaten to implement:

4           The widespread distress following the revolutionary period, and the plight of debtors, had  
5 called forth in the States an ignoble array of legislative schemes for the defeat of creditors  
6 and the invasion of contractual obligations. Legislative interferences had been so numerous  
7 and extreme that the confidence essential to prosperous trade had been undermined and the  
8 utter destruction of credit was threatened.

9 *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 427 (1934) (quoting *The Federalist*, No. 44)

10           The Supreme Court has held that state impairment of contractual rights can only be justified  
11 where the proposed “adjustment of the rights and responsibilities of contracting parties is based upon  
12 reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s  
13 adoption.” *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412-13 (1983)  
14 (internal quotation omitted). As with the exercise of eminent domain, a state’s impairment of  
15 contractual rights must be based upon a “legitimate public purpose . . . rather than providing a benefit  
16 to special interests.” *Id.* at 412. The Program fails this balancing test for the same reasons that it is  
17 invalid under the Commerce and Takings Clauses: its actual purpose is to “benefit special interests,”  
18 its supposed public purpose is unfounded, and it cannot justify the substantial impairment of private  
19 contractual rights that it would impose.

20           **6. Defendants Threaten to Violate the Constitutional Rights of the Trusts and Their**  
21 **Beneficiaries Acting Under Color of State and Local Law**

22           The Trusts also have a high likelihood of success on the merits of their Section 1983 claims  
23 against MRP and Richmond. 42 U.S.C. § 1983. Section 1983 requires the Trusts to show “(1) that the  
24 defendants acted under color of state law; and (2) that the defendants caused them to be deprived of a

25 seizure of real property, and would perpetrate the very problem of arbitrary abrogation of the rights of  
26 creditors that the Contracts Clause was intended to avoid. For example, while the Hawaiian  
27 government was specifically barred from making a profit on the transactions at issue in *Midkiff, id.* at  
28 234, Richmond (along with MRP) both profit handsomely from their decision to implement the  
Program. Moreover, the Supreme Court has previously invalidated sweeping state action that would  
retroactively impair the existing rights of creditors, just as the Program proposes to do. *See Kener v.*  
*La Grange Mills*, 231 U.S. 215, 217-18 (1913) (Contracts Clause prevents state from retroactively  
exempting property from existing liens); *Sturges v. Crowninshield*, 17 U.S. 122, 196-97 (1819)  
(invalidating application of state bankruptcy law that would retroactively discharge existing debts).

1 right secured by the constitution and laws of the United States,” elements that are easily met here.  
2 *Howerton v. Gabica*, 708 F.2d 380, 382 (9th Cir. 1983) (internal citations omitted). Indeed, as  
3 discussed above, the Program would deprive the Trusts and their beneficiaries of their rights under the  
4 Takings Clause, the Contracts Clause, and the Dormant Commerce Clause of the U.S. Constitution.  
5 Because the City’s threatened actions would, by definition, be undertaken under color of law, the  
6 Trusts will prevail on their Section 1983 claim against the City, in addition to their claims for  
7 declaratory and injunctive relief based on the Program’s unconstitutionality. And since “[a]ction taken  
8 by private individuals may be ‘under color of state law’ where there is ‘significant’ state involvement  
9 in the action,” the same is true of MRP’s threatened actions. *Id.* (internal citations omitted). While  
10 MRP is motivated by the private financial gain it anticipates for itself and its investors, by taking an  
11 active role in the Program, MRP is acting under the color of state law for purposes of Section 1983.

12 MRP has openly conspired with the City to unconstitutionally seize Trust assets through an  
13 illegal use of the City’s eminent domain power. MRP describes its “Program” as a “public/private  
14 venture” and a “partnership” between it and local governments – and Defendants have memorialized  
15 their joint venture in a written advisory agreement. Ertman Decl. Ex. K. Pursuant to that joint venture,  
16 MRP is intricately involved in the City’s exercise of its eminent domain rights: MRP will identify the  
17 mortgages that it would like the City to seize for its benefit; will “screen” the loans to ensure that only  
18 those most likely to repay are seized; and will fund the City’s obligation to compensate the Trusts and  
19 other creditors, Ertman Decl. Ex. C at 9; Ex. J at 10, 17-18, thereby standing in the City’s shoes to  
20 fulfill its constitutional obligation to compensate the Trusts (albeit pursuant to a facially inadequate  
21 compensation formula). Backed with the threat of that power, MRP has attempted to coerce the Trusts  
22 and many others like them around the country to sell performing loans at fire sale prices. MRP’s  
23 attempt to make the Trusts “an offer they can’t refuse” – because of the coercive consequences of  
24 refusal – violates the constitutional rights of the Trusts and their beneficiaries under color of law, as  
25 would the eminent domain proceedings that MRP threatens to initiate. MRP’s integral role in  
26 prosecuting the Program with Richmond meets the color of law requirement. *See Adickes v. S.H.*

1 *Kress & Co.*, 398 U.S. 144, 152 (1970) (“It is enough that [the private party] is a willful participant in  
2 joint activity with the State or its agents.”).<sup>12</sup>

3 **B. Plaintiffs Will Be Irreparably Harmed Absent an Injunction**

4 In order to obtain a preliminary injunction, a plaintiff must demonstrate that it is likely to suffer  
5 irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 20. If the Program is not  
6 enjoined, Plaintiffs would likely be deprived of any meaningful relief. It is MRP’s and Richmond’s  
7 intent, as expressed by MRP in its marketing materials, to use California’s “Quick Take” procedure to  
8 take possession of the mortgage loans in question on an expedited basis, rather than waiting for a Court  
9 to determine the constitutionality of the Program. *See Ertman Decl. Ex. D* at 3; Cal Const. Art 1. § 19  
10 and Cal. Code Civ. Proc. § 1255.410 (providing for quick-take of property in question).<sup>13</sup> Under this  
11 procedure, MRP and Richmond could seize Trust property even if litigation concerning the legality of  
12 such a taking were still ongoing. While MRP would be obligated to deposit “fair value” for any  
13 property it seized, MRP could, and by definition for their Program to work must, repackage the seized  
14 loans and sell them to new investors before court proceedings even finished. Without a preliminary  
15 injunction, therefore, MRP and Richmond could implement their unconstitutional Program without  
16 any substantial Court review.

17 The harm caused by such a “Quick Take” of the Trusts’ loans would be irreparable. First, as  
18 shown above, the constitutional rights of the Trusts and their beneficiaries would be violated by the  
19 Program in multiple ways, without any opportunity for the Trusts and their beneficiaries to challenge  
20 the illegal takings before they occur. *Cf. Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1218 (entering  
21 preliminary injunction against state eminent domain action to vindicate party’s constitutional rights).

22 \_\_\_\_\_  
23 <sup>12</sup> If not enjoined by this Court, MRP would commandeer the City’s inherently public function by  
24 choosing and screening the precise mortgage loans that it seeks to take by eminent domain, and by  
25 compensating the owners of those loans, thereby acting under color of state law pursuant to the “public  
26 function” test. *See West v. Atkins*, 487 U.S. 42, 56 (1988) (private doctor acting under color of law  
27 when delegated state function of providing medical care to prisoners). MRP’s “entwinement” with the  
28 exclusively governmental process of eminent domain also meets the “under color of law” standard.  
*See Evans v. Newton*, 382 U.S. 296, 299 (1966) (“Conduct that is formally ‘private’ may become so  
entwined with governmental policies or so impregnated with a governmental character as to become  
subject to the constitutional limitations placed upon state action.”).

<sup>13</sup> *See also, Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 40 Cal. 4<sup>th</sup> 648, 653-55 (2007)  
(outlining “Quick Take” procedure).

1 “It is well established that the deprivation of constitutional rights unquestionably constitutes  
2 irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also*, *Am. Trucking*  
3 *Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (“constitutional violations  
4 cannot be adequately remedied through damages and therefore generally constitute irreparable harm.”).

5 Second, once MRP and Richmond seize the Trusts’ property, there will be no way to restore  
6 the status quo. After seizing the mortgage loans, MRP has stated that it plans to extinguish them, issue  
7 new loans, and sell them to new securitized mortgage pools. This series of transactions will be  
8 impossible to unwind, since there will be no practical (or legal) means to restore the original debt  
9 obligations on the affected homeowners, or to claw back the new loans from newly issued securities.  
10 Burnaman Decl. ¶ 45; WF Decl. ¶¶ 16-17. In *Taylor v. Westley*, 488 F.3d 1197, 1201 (9th Cir. 2007),  
11 the Ninth Circuit found irreparable harm under similar facts. In that case, plaintiffs’ securities were  
12 allegedly at risk of being lost to escheat without adequate notice in violation of due process. The Ninth  
13 Circuit found that the Plaintiffs demonstrated a possibility of irreparable harm because “California will  
14 permanently deprive them of their property pursuant to its policy of immediately selling property upon  
15 escheat. Once the property is sold, it may be impossible for plaintiffs to reacquire it, thus creating the  
16 requisite ‘irreparable harm.’” *Id.* at 1202;<sup>14</sup> *see also*, *EIG Global Energy Partners, LLC v. TCW Asset*  
17 *Mgmt. Co.*, No. CV 12-7173, 2012 WL 5990113, at \*9 (C.D. Cal. Nov. 30, 2012) (finding irreparable  
18 harm because “complex business transactions cannot be simply unwound”).

19 Monetary damages are also inadequate since the damages to remaining assets of the Trusts and  
20 to certificateholders are not easily quantified or compensated. For example, the Program cherry-picks  
21 certain loans, disrupting the risk diversification of the remaining assets of the Trusts. Similarly,  
22 certificateholders and other investors would be faced with uncertainty as to how to value the Trusts’  
23 loans after some have been seized. *See, e.g.*, Burnaman Decl. ¶¶ 19, 45; *Dealer Computer Serv., Inc.*

24  
25 <sup>14</sup> The Ninth Circuit decided *Westly* under the “possibility” of irreparable injury standard that was  
26 utilized by the Ninth Circuit at the time. 488 F.3d 1197 at 1200. The Supreme Court later held in  
27 *Winter* that a plaintiff must show a “likelihood” of irreparable injury. 555 U.S. at 21. Given that the  
28 Ninth Circuit found that it was “almost impossible” for plaintiffs to recover their property, it is likely  
the Court would have held the same way regardless of the standard used. *Westly*, 488 F.3d 1197 at  
1202; *see also* *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011) (“Of course,  
while ‘likely’ is a higher threshold than ‘possible,’ [a plaintiff] need not prove that irreparable harm is  
certain or even nearly certain.”)

1 *v. Ford*, No. CV 12-1970, 2012 WL 6054846, at \*3 (E.D. Cal. Dec. 5, 2012) (noting that when  
2 damages are “not accurately measurable or adequately compensable by money damages” “irreparable  
3 harm is a natural sequel”) (quoting *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18  
4 (1st Cir. 1996)). Richmond’s and MRP’s proposed seizures would also inject substantial uncertainty  
5 into the larger RMBS market, devaluing both the assets of the Trusts and securities held by a vast  
6 number of certificateholders nationwide in some unquantifiable amount. Stevens Decl. ¶ 25; *see, e.g.*,  
7 *Am. Trucking Ass’ns*, 559 F.3d at 1058 (noting that conditions that would “disrupt and change the  
8 whole nature of [plaintiff’s] business” most likely could not be compensated with damages alone).

9 Moreover, as noted above, the immediate losses to the trusts holding Richmond loans – more  
10 than \$200 million, including \$65 million or more in losses just to the Trusts for which Plaintiffs serve  
11 as trustees – could not be compensated by Richmond or MRP. *See, e.g.*, Burnaman Decl. ¶¶ 40-44;  
12 WF Decl. ¶¶ 14-15. In 2011–2012, Richmond had revenues of \$332,819,656 and expenditures of  
13 \$379,481,479, Ertman Decl. Ex. M, and MRP is an LLC set up solely to carry out eminent domain  
14 programs and has no other operations.

### 15 **C. The Balance of Equities Tips Sharply in Plaintiffs’ Favor**

16 A preliminary injunction is also required because the when the Court “balance[s] the interests  
17 of all parties and weigh[s] the damage to each,” the balance of equities tips heavily in favor of the  
18 Plaintiffs, and the Trusts and certificateholders whose interests they represent. *See Stormans, Inc. v.*  
19 *Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). If the Program is allowed to go forward, the Trusts and  
20 their beneficiaries will be harmed by the unconstitutional seizure of hundreds of their performing  
21 loans, as detailed above. By contrast, any delay to the implementation of the Program will cause no  
22 significant harm to Richmond or MRP, because the Program’s stated purpose is to assist a small, select  
23 group of homeowners in Richmond who are currently paying their mortgages, and the targeted  
24 homeowners are in no imminent danger of losing their homes at all.

### 25 **D. The Public Interest Favors an Injunction**

26 Public interest favors a preliminary injunction. First, the Ninth Circuit has held that it is  
27 “always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres*,  
28 695 F.3d at 1002. Second, granting preliminary injunctions against the illegal taking of private



1 property by the government is itself a public interest. *See, e.g., Cottonwood Christian Ctr.*, 218 F.  
2 Supp. 2d at 1231 (C.D. Cal. 2002) (“The public interest also favors moving very cautiously in  
3 condemning private property for uses that are only questionably public.”). Finally, a preliminary  
4 injunction is necessary to prevent the likely catastrophic effects on both the Richmond and national  
5 housing markets. As explained in more detail above, the Program is expected to lead to a large  
6 decrease or absolute reduction of lenders willing to lend money to Richmond residents. Stevens Decl.  
7 ¶¶ 11-17. The collateral damage to the national market would be even more devastating. And since  
8 the proposed preliminary injunction would primarily stop the City from seizing *performing* loans that  
9 are not likely to be foreclosed upon in the immediate future – for the benefit of a select group of  
10 private parties – the public interest would only be advanced by the granting of the injunction.

11 **III. CONCLUSION**

12 For the foregoing reasons, the Trusts respectfully request that this Court grant their motion for  
13 a preliminary injunction.

1 DATED: August 8, 2013

2 Respectfully submitted,

3 By: /s/ Rocky C. Tsai

4  
5 Thomas O. Jacob (SBN 125665)  
6 tojacob@wellsfargo.com  
7 **WELLS FARGO & COMPANY**  
8 Office of General Counsel  
9 45 Fremont Street, Twenty-Sixth Floor  
10 MAC A0194-266  
11 San Francisco, CA 94105  
12 Telephone: (415) 396-4425  
13 Facsimile: (415) 975-7864

14 *Attorney for Wells Fargo Bank*

ROPE & GRAY LLP

*Attorneys for Plaintiffs*

Rocky C. Tsai (SBN 221452)  
(rocky.tsai@ropesgray.com)  
ROPE & GRAY LLP  
Three Embarcadero Center  
San Francisco, CA 94111-4006  
Telephone: (415) 315-6300  
Facsimile: (415) 315-6350

John C. Ertman  
(john.ertman@ropesgray.com)  
(Pro hac vice applications pending)  
Lee S. Gayer  
(lee.gayer@ropesgray.com)  
Evan P. Lestelle  
(evan.lestelle@ropesgray.com)  
ROPE & GRAY LLP  
1211 Avenue of the Americas  
New York, NY 10036-8704  
Telephone: (212) 596-9000  
Facsimile: (212) 596-9090

Douglas H. Hallward-Driemeier  
(douglas.hallward-driemeier@ropesgray.com)  
(Pro hac vice application pending)  
ROPE & GRAY LLP  
One Metro Center  
700 12th Street, NW  
Suite 900  
Washington, DC 20005-3948  
Phone: 202-508-4600

Daniel V. McCaughey  
(daniel.mccaughey@ropesgray.com)  
Nick W. Rose  
(nick.rose@ropesgray.com)  
ROPE & GRAY LLP  
800 Boylston St.  
Boston, MA  
Phone: 617-951-7000