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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

THE BANK OF NEW YORK MELLON (f/k/a The
 Bank of New York) and THE BANK OF NEW
 YORK MELLON TRUST COMPANY, N.A. (f/k/a
 The Bank of New York Trust Company, N.A.), as
 Trustees; U.S. BANK NATIONAL ASSOCIATION,
 as Trustee; and WILMINGTON TRUST COMPANY
 and WILMINGTON TRUST, NATIONAL
 ASSOCIATION, as Trustees,

Plaintiffs,

v.

CITY OF RICHMOND, CALIFORNIA, a
 municipality; RICHMOND CITY COUNCIL;
 MORTGAGE RESOLUTION PARTNERS LLC, a
 Delaware limited liability company; and
 GORDIAN SWORD LLC, a Delaware limited
 liability company,

Defendants.

Case No. CV-13-3664-CRB

**NOTICE OF MOTION AND MOTION
 TO DISMISS FOR LACK OF SUBJECT
 MATTER JURISDICTION**

Date: Friday, November 1, 2013

Time: 10:00 a.m.

Judge: Honorable Charles R. Breyer
 Courtroom 6, 17th Floor

*Ex Parte Motion to Shorten Time and
 Waive Hearing filed contemporaneously*

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NOTICE OF MOTION AND MOTION

Please take notice that on November 1, 2013, at 10:00 a.m., or such other date and time as the Court may set,¹ in Courtroom 6, 17th Floor, before the Honorable Charles R. Breyer, Defendants will move to dismiss Plaintiffs' complaint.

This motion is made pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that Plaintiffs cannot establish that the Court has subject matter jurisdiction.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Eric Brown, the complete files and records of this action, and such other and further matters as the Court may properly consider.

Dated: September 20, 2013

Respectfully submitted,

/s/ Stacey M. Leyton
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¹ Defendants are contemporaneously filing an ex parte motion to shorten time and for the Court to forego oral argument and rule on the papers.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On September 16, 2013, this Court dismissed the companion case to this one, *Wells Fargo*
3 *Bank v. City of Richmond*, Case No. 13-03663-CRB, on the ground that claims challenging the City
4 of Richmond's "Seizure Program" were not ripe for adjudication and so the Court lacked subject
5 matter jurisdiction. Declaration of Eric Brown ("Brown Decl."), Ex. G.² For the same reasons as
6 in *Wells Fargo*, the claims in the instant case are not constitutionally ripe and so this Court lacks
7 subject matter jurisdiction. Defendants have refused voluntarily to dismiss the case, the only
8 purpose of which could be to further chill the political and legislative process. Plaintiffs therefore
9 request that the case be dismissed forthwith and have contemporaneously filed a motion to shorten
10 time and waive hearing on this motion.

11 **BACKGROUND**

12 Plaintiffs challenge on federal and state law grounds the City of Richmond's "Seizure
13 Program," and seek injunctive and declaratory relief. Second Amended Complaint (Dkt. 20-2).
14 Plaintiffs allege that "Defendants have taken substantial steps towards implementing the Seizure
15 Program" including entry of an advisory services agreement, public discussion of the program, and
16 issuance of letters making offers to purchase loans, and that "[i]f the offers are not accepted, the
17 City will attempt to quickly seize possession of the loans" by holding a condemnation hearing,
18 filing an eminent domain lawsuit, and using the expedited "quick take" state court procedure. *Id.*
19 ¶¶53-56. They point to "a high likelihood that Defendants will very soon exercise the City's
20 eminent domain powers to seize possession of mortgage loans under the Seizure Program." *Id.*
21 ¶57.

22 On September 12, 2013, this Court held a hearing on the defendants' motion to dismiss in
23 the related case *Wells Fargo Bank v. City of Richmond*, Case No. 13-3663-CRB, which sought to
24 challenge the very same "substantial steps" taken by Defendants here. At the hearing, the Court
25 noted that "there are a series of steps that are contemplated by the Council to take place before the

26 ² Defendants request judicial notice of exhibits A-H to the Brown Declaration. *See Reyn's Pasta*
27 *Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (court may take judicial
28 notice of court filings and other matters of public record).

1 implementation of a program which would include – or not – eminent domain,” and that “if it did”
2 there is a question “whether it would be the City Council doing so or something called a Joint
3 Powers Authority.” Brown Decl., Ex. D (Transcript) at 6:4-9. With respect to the ripeness issue,
4 the Court therefore asked, “isn’t this – as we say in the trade, a no-brainer?” *Id.* at 7:4-5. After
5 hearing argument from the plaintiffs, the Court then stated its conclusion that the plaintiffs’ claims
6 were not ripe for determination and asked the parties to submit briefing on whether the case should
7 be dismissed or stayed. *Id.* at 25.

8 The next day, the *Wells Fargo* plaintiffs submitted a supplemental brief arguing that the
9 Court’s ripeness concerns “properly fall within the rubric of prudential ripeness rather than Article
10 III standing,” and urged the Court to hold the case in abeyance rather than dismissing it. *Id.*, Ex. E
11 (ECF 75) at 4:8-10, 6:9-10. In the alternative, the plaintiffs asked the Court to grant leave to
12 amend in order to permit them to assert additional facts and legal theories, or to condition dismissal
13 upon a requirement that the defendants provide thirty days’ notice prior to filing any condemnation
14 action. *Id.* at 6:10-7:2 & n.3.

15 On September 16, 2013, the Court issued an order dismissing the case and an
16 accompanying judgment. Brown Decl., Exs. G, H (ECF 78, 79). The Court held that “Plaintiffs’
17 claims are not ripe for adjudication” so that it lacked subject matter jurisdiction, and “further
18 conclude[d] that it must dismiss the case rather than hold it in abeyance.” *Id.*, Ex. G (ECF 78) at
19 1:20-21, 2:9. The Court also denied leave to amend because “no amendment at this point would
20 cure the lack of subject matter jurisdiction,” and held it would not be “appropriate to impose
21 conditions on dismissal” given its lack of jurisdiction. *Id.* at 2 n.3.

22 Based on this dismissal, Defendants in the instant case asked whether Plaintiffs would agree
23 to voluntary dismissal in order to avoid the need for Defendants to file an unnecessary motion to
24 dismiss. Brown Decl. ¶8. Plaintiffs promised an answer by later in the week. *Id.* Defendants
25 responded that, given the absence of any non-frivolous basis to distinguish the ripeness issues in
26 the two cases, there could be no legitimate purpose to keeping the lawsuit on file and so its only
27 point could be to chill the political process. *Id.* ¶9. Therefore, Defendants explained that they
28 would file a motion to dismiss and a motion to shorten time by the end of the week unless Plaintiffs

1 agreed to voluntary dismissal. *Id.* Having received no response, Defendants then proposed a
2 shortened briefing schedule and waiver of hearing on the motion and requested a response to this
3 proposal by Friday, September 20 at 12 p.m. to allow Defendants to file the motion and move to
4 shorten time later the same day. *Id.* ¶10. In response, Plaintiffs informed Defendants that they
5 refuse to voluntarily withdraw their Complaint and that they oppose Defendants’ motion for an
6 expedited briefing schedule and Defendants’ request that the Court forego oral argument. *Id.* ¶11.

7 **ARGUMENT**

8 For the same reasons as in *Wells Fargo*, the instant case is not ripe as a constitutional
9 matter, and this Court therefore lacks subject matter jurisdiction and must dismiss the case.

10 There can be no dispute that, before the City of Richmond (or a Joint Powers Authority)
11 may exercise eminent domain power, the Richmond City Council (or governing body of the Joint
12 Powers Authority) would need to authorize that exercise of power by adopting, by supermajority
13 vote, a resolution of necessity that would both identify the property to be condemned and state the
14 public purpose necessitating the taking. Cal. Code Civ. P. §§1230.020, 1245.220, 1245.230,
15 1245.235, 1245.240. Nor can there be any dispute that the City Council has not yet taken this
16 action.³ Plaintiffs’ own complaint describes the “use of the eminent domain power” as
17 “contemplated” and contends “there is a high likelihood” that Defendants “will very soon exercise
18 the City’s eminent domain powers.” Second Amended Complaint (Dkt. 20-2) ¶¶3, 57.

19 As the Court pointed out at the hearing on the motion to dismiss in *Wells Fargo*, the
20 legislative decision whether to authorize the exercise of eminent domain power is not a
21 “ministerial” act but rather an important part of “the democratic process.” Brown Decl., Ex. D
22 (Transcript) at 13:22-15:6; *see also Santa Cruz Cnty. Redevelopment Agency v. Izant*, 37
23 Cal.App.4th 141, 150 (1995) (“the resolution of necessity is a legislative act”). And the Supreme
24 Court has held that federal courts may not interfere “by any order, or in any mode” with a city

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26 ³ In fact, at its most recent meeting, the City Council “confirm[ed] that no loans will be acquired by
27 the City through eminent domain before coming back to the full City Council for a vote” and
28 directed staff to work to set up a Joint Powers Authority as a next step forward in the
development of the program. Brown Decl., Ex. F (ECF 68) at 1:6-8.

1 council's authority to exercise its legislative power before those legislative powers have been
2 exercised. *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481, 482 (1896);
3 *see also McChord v. Cincinnati, N.O. & Tex. P. Ry. Co.*, 183 U.S. 483, 496-97 (1902); *Associated*
4 *Gen. Contractors of America v. City of Columbus*, 172 F.3d 411, 415 (6th Cir. 1999).

5 Therefore, as this Court explained in its order of dismissal in *Wells Fargo*, “[r]ipeness of
6 these claims does not rest on contingent future events certain to occur, but rather on future events
7 that may never occur.” Brown Decl., Ex. G (ECF 78) at 1:22-23. “A claim is not ripe for
8 adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed
9 may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (cited in order of dismissal
10 at 1 n.1). “The mere possibility that [an official] may act in an arguably unconstitutional manner
11 ... is insufficient to establish the real and substantial controversy required to render a case
12 justiciable under Article III.” *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th
13 Cir. 1996) (cited in order of dismissal at 1 n.1) (bracketed material and ellipses in court order).

14 Although the legal claims asserted in this case may differ in some immaterial respects from
15 those in *Wells Fargo*, the lack of ripeness does not depend on the legal basis for the challenge.
16 Rather, it derives from the fact that the legislative action authorizing eminent domain has not yet
17 occurred. The Court recognized this in *Wells Fargo* when holding that “no amendment at this
18 point would cure the lack of subject matter jurisdiction.” Brown Decl., Ex. G [ECF 78] at 2 n.3.

19 CONCLUSION

20 For the foregoing reasons, this Court should dismiss the action forthwith.

21
22 Dated: September 20, 2013

Respectfully submitted,

23 /s/ Stacey M. Leyton

24 Stacey M. Leyton

25 Stephen P. Berzon

26 Scott A. Kronland

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