EXHIBIT A

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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

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: October 11, 2013
Time: 10:00 a.m.
Judge: Honorable Charles R. Breyer
Courtroom 6, 17th Floor

NOTICE OF MOTION AND MOTION

Please take notice that on October 11, 2013, at 10:00 a.m., or such other date and time as the Court may set, 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 William A. Lindsay, previously filed on August 22, 2013 (Doc. 33), the complete files and records of this action, and such other and further matters as the Court may properly consider.

Dated: August 23, 2013

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND BACKGROUND

The collapse in housing prices brought on by the 2008 financial crisis devastated the City of Richmond (the "City"). Like other cities in a similar position, the City is exploring potential solutions. One potential solution is for the City itself to purchase underwater mortgage loans for their fair market value, using eminent domain powers if necessary, and then reduce the principal balances, keeping the current homeowners in their homes for the benefit of neighborhoods and the City as a whole. Policy experts have been urging this type of "principal reduction" solution for years as the most viable option to save some cities from more years of stagnation and deterioration.

The Richmond City Council has not adopted a resolution of necessity to authorize the use of eminent domain authority to acquire mortgage loans. Lindsay Dec. ¶22 (Doc. 33). The City Manager is still exploring the possibility of acquiring loans through negotiations. *Id.* ¶¶20, 21, 23. "Except as otherwise specifically provided by statute, the power of eminent domain [in California] may be exercised only as provided in [the State's Eminent Domain Law]." Cal. Code Civ. Proc. §1230.020. Under the Eminent Domain Law, "a public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity." *Id.* §1245.220. The adoption of a resolution of necessity requires advance notice to property owners, who have the opportunity to object at a public hearing; specific findings of public interest and necessity; and a two-thirds vote by the governing body. *Id.* §§1245.230,1245.235, 1245.240.

Only after a public entity's governing board has adopted a resolution of necessity may the public entity commence an eminent domain proceeding by filing suit against the property owner. *Id.* §1245.220. The property owner may defend the lawsuit by contesting the public entity's right to take the property on any ground. *Id.* §1250.360(h). The property owner is entitled to receive just compensation in exchange for the property; the Eminent Domain Law provides for a jury trial if there are disputes about the calculation of just compensation; and eminent domain proceedings "take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined." *Id.* §1260.010; *see also id.* at

§1263.010-§1265.420. "Just compensation" is defined generally to mean "the fair market value of the property taken." *Id.* §1263.310.

Nonetheless, Plaintiffs Wells Fargo Bank, National Association; Deutsche Bank National Trust Company; and Deutsche Bank Trust Company Americas (collectively, the "Banks") filed this lawsuit against the City and its advisor, Mortgage Resolution Partners LLC ("MRP"), seeking declaratory and injunctive relief to prevent the City from exercising eminent domain authority to condemn mortgage loans and demanding attorney's fees under 42 U.S.C. §1988. The Banks' complaint (Doc. 1) asserts causes of action based on: (1) the "public use" requirement of the Takings Clauses of the U.S. and California Constitutions, (2) the prohibition against extraterritorial seizures under the Takings Clauses of the U.S. and California Constitutions, (3) the Commerce Clause of the U.S. Constitution, (4) the Contracts Clause of the U.S. Constitution, (5) the "just compensation" requirements of the U.S. and California Constitutions, and (6) the Equal Protection Clause of the U.S. and California Constitutions. The Banks immediately moved for a preliminary injunction (Doc. 8) and refused to take their motion off calendar when the City pointed out that its City Council had not adopted a resolution of necessity or even put one on its agenda. Defendants have filed an opposition to the motion for preliminary injunction, which explains in more detail the issues in this lawsuit. Doc. 32.

This brief is limited to the threshold and dispositive issue that the case should be dismissed for lack of subject matter jurisdiction. The jurisdiction of the federal courts is limited to deciding actual cases and controversies. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). The City Council has not adopted a resolution of necessity and may never do so, so this case is not ripe. The Supreme Court specifically held long ago in *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471 (1896), a case that remains good law, that federal courts may not interfere "by any order, or in any mode" with a city council's authority to exercise its legislative powers *before* those powers have been exercised, *id.* at 481. For similar reasons, the Banks lack standing to pursue their claims. Because the Court lacks subject matter jurisdiction, the case should be dismissed.

ARGUMENT

"Without jurisdiction the court cannot proceed at all . . . [and] the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (citation, internal quotation marks omitted); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). The plaintiff has the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

I. The Banks' Claims Are Not Ripe

A. The jurisdiction of the federal courts under Article III is limited to deciding ripe cases and controversies. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300 (internal quotation marks omitted). The Declaratory Judgment Act is not an exemption from Article III's ripeness limitations. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937).

The Banks' claims are the quintessential example of claims that are not Article III ripe. The Banks ask the Court to decide whether it would be lawful for the City to exercise its eminent domain power to acquire property in which the Banks assert an interest, but the City cannot exercise that power unless its seven-member City Council adopts, by supermajority vote, a resolution of necessity making certain statutorily required findings. *See supra* at 1. A resolution of necessity might never be proposed; or it might not cover the particular loans at issue here; or might be rejected by the City Council; or the City Council might send the whole idea back to staff for further study and it might re-emerge in substantially different form. Therefore, the case is not ripe. *See, e.g., Wendy's Int'l, Inc. v. City of Birmingham*, 868 F.2d 433, 436 (11th Cir. 1989) (no subject matter jurisdiction to issue a declaratory judgment about constitutionality of a taking that might never occur; "appellants' suit necessarily is based upon the possibility of an occurrence which may never come to pass . . . . there is as yet no controversy here ripe for adjudication").

Moreover, under California law, "the resolution of necessity is a legislative act." *Santa Cruz Cnty. Redevelopment Agency v. Izant*, 37 Cal.App.4th 141, 150 (1995). The Supreme Court

held in *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471 (1896), that the federal courts may not interfere "by any order, or in any mode" with a city council's authority to exercise its legislative powers *before* those legislative powers have been exercised, repeating that admonition several times in its decision. *See, e.g., id.* at 481 ("[A] court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character."); *id.* at 482 ("[w]e repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff . . . . it will be time enough for equity to interfere").

B. The facts the Banks rely on in their Complaint do not change the obvious conclusion that the Banks' claims are not ripe. Preliminary steps that *may or may not result* in the City Council deciding to exercise eminent domain authority in the future are not a legal substitute for a resolution of necessity. The City Council would be required to hold a public hearing to consider all viewpoints before voting on a resolution of necessity. An assumption that the process is meaningless would involve a lack of respect for the roles of other government officials.

C. A brief review of the cases the Banks rely on in their opposition to the application to take the preliminary injunction off calendar (Doc. 27) confirms that the cases do not remotely support the proposition that a federal court may consider a challenge to the legality of a taking before the relevant government agency has authorized the taking of the plaintiff's property. Nor do they address the fundamental separation-of-powers problem in a federal court considering the legality of a legislative act before the relevant legislative act has occurred.

In the *Regional Railroad Reorganization Act Cases*, 419 U.S. 102 (1974), Congress had adopted a statute, the Rail Act, that required conveyance of property, and the only uncertainty was when -- not whether, as here -- the challenged conveyance would occur. The Supreme Court emphasized this repeatedly in explaining why the case was ripe. *See id.* at 140 ("implementation of the Rail Act will now lead inexorably to the final conveyance"); *id.* at 141 ("the Special Court is mandated to order the conveyance . . . and is granted no discretion not to order the transfer"); *id.* at 143 ("occurrence of the conveyance . . . is in no way hypothetical or speculative"); *id.* ("injury is certainly impending") (internal quotation marks omitted).

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), Hawaii had passed a statute authorizing the taking at issue, and the public agency "made the statutorily required finding that acquisition of appellees' lands would effectuate the public purposes of the Act" and "subsequently ordered appellees to submit to compulsory arbitration." *Id.* at 234. Here the City Council has not made the "statutorily required finding[s]" necessary to exercise eminent domain authority, and the Banks have not been ordered to do anything.

In *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the plaintiff did not seek an injunction against a condemnation until after the relevant governing board had adopted a resolution of necessity. The plaintiff had already sued the government to challenge a prior land-use permitting decision and amended its complaint after the adoption of the resolution of necessity to challenge the legality of the proposed taking. *See* 218 F. Supp. 2d at 1214-15.

In *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), the plaintiffs alleged that the government's over-enforcement of its housing code, closure of their properties, and revocation of their certificates of occupancy amounted to an unconstitutional taking of their property, so the alleged taking already had occurred.

Finally, *Employers Ins. of Wausau v. Fox Entm't Grp., Inc.*, 522 F.3d 271 (2d Cir. 2008), had nothing to do with eminent domain or a challenge to government action. It involved a dispute about coverage under an insurance policy that already existed. The Second Circuit's reference to the likelihood that certain "contingencies" would occur was not an invitation for the federal courts to make predictions about the likely outcomes of legislative processes and, on that basis, opine on the legality of bills not yet proposed, let alone passed.

D. Even if this case were ripe in the Article III sense (which it obviously is not), the case still would fail the "prudential" component of the ripeness doctrine, which is guided by two overarching considerations: "'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

Part of the very purpose of a formal resolution of necessity is make the issue whether eminent domain is lawful "fit[] for judicial decision," by identifying the exact property at issue, and setting out what the governing body has found to be the "public interest and necessity" for exercising eminent domain authority. *See* Cal. Code Civ. Proc. §1245.255 (resolution of necessity is subject to judicial review). Absent a resolution of necessity, a court could not even determine whether the particular loans in which the Banks assert an interest would be covered by an exercise of eminent domain authority; even if the City decided to exercise such authority, it might proceed in phases, and these loans might not be covered. Nor could a court assess whether the use of eminent domain authority meets the "public use" test without the City Council's own findings as to the purpose of the taking. Hearing a legal challenge now could embroil the federal courts and the City in speculative litigation about the legality of a plan the City Council never adopted, with much of that litigation devoted to disputes about the contents of the unapproved "plan" and the Banks' mischaracterizations of the non-existent "plan."

Likewise, there is no "hardship to the parties of withholding court consideration" because, unless and until a resolution of necessity is adopted, no eminent domain action can be commenced. Judicial review can take place at that point, whether in federal or state court, and all the legal issues can be decided on a full record. *See New Orleans Water Works*, 164 U.S. at 482 ("[w]e repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff . . . . it will be time enough for equity to interfere").

II. The Banks Lack Standing To Bring Their Claims

The fundamental jurisdictional problem with the Banks' lawsuit can also be viewed as a lack of Article III standing. *See Thomas*, 220 F.3d at 1138 (explaining the close relationship between standing and ripeness). To establish standing, the "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *see also Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (at the preliminary injunction stage, a

plaintiff must establish an injury that is "actual or imminent, not conjectural or hypothetical" (citation, internal quotation marks omitted)).

The Banks contend they will be injured because their property will be taken in violation of the Constitution, but no taking can occur unless a resolution of necessity is adopted. Whether to adopt such a resolution would be a legislative decision made by a supermajority of the City Council, following a public hearing. As such, the constitutional injury the Banks claim is "conjectural" and "hypothetical."

The Banks claim that the City has taken "substantial steps" to implement what they call a "Seizure Program." Complaint ¶64. But, by the same logic, the federal government had taken "substantial steps" to implement a national health care "Program" long before Congress eventually passed legislation, including multiple town hall meetings, economic analyses, blue-ribbon commissions, etc., over the course of many years. President Obama had even promised such a "Program" would come to fruition if he were elected. Yet before Congress actually adopted (and the President signed) the necessary legislation, no one would have standing to challenge it because implementation was still "conjectural" and "hypothetical."

To the extent the Banks may be claiming they suffer an "injury in fact" from the City Manager's letter offering to purchase the mortgage loans, the claim is meritless. The Complaint does not – and could not – claim that the City Manager's offer letter required the Banks to take any action or stated that the City has decided to exercise eminent domain authority. *See* Lindsay Dec. Exh. A (Doc. 33-1) (copy of offer letter). The Banks suffer no more harm than any other property owner that receives such an offer letter, and they have no greater right than other property owners to advisory opinions from the federal courts about the legality of hypothetical takings.

CONCLUSION

For the foregoing reasons, this case should be dismissed.

Dated: August 23, 2013

Respectfully submitted,

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