EXHIBIT B

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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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

ARGUMENT

I. The Court Lacks Article III Jurisdiction

The Banks concede that the government action they challenge – the use of eminent domain authority – cannot occur unless the Richmond City Council adopts a resolution of necessity. The Banks concede no resolution has been adopted. As such, there is no Article III "case or controversy," so the Court lacks subject matter jurisdiction, so this case must be dismissed. It is that simple.

A. The Bank's Opposition (Doc. 46) ("Opp.") does not squarely address the two central points made in the Motion to Dismiss (Doc. 38) ("Mot."): First, when a plaintiff is challenging government action that would require future legislative authorization, the claim is not "ripe" because it necessarily "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Mot. at 3 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted)). Second, the plaintiff also lacks standing because the threatened harm is necessarily "conjectural" and "hypothetical" in that the legislative authorization may not be provided. Mot. at 6-7 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)).

The Bank's Opposition also does not even discuss the Supreme Court case relied upon in the Motion that is right on point. Like the Banks, the plaintiff in *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471 (1896), alleged that it faced an imminent threat that a city council would adopt an unconstitutional ordinance impairing the plaintiff's contractual rights. 164 U.S. at 479-81. Like the Banks, the plaintiff pointed to the prior actions of the city as evidence the threat was real and imminent. *Id.* at 480. Nonetheless, the Supreme Court held that the federal courts lacked jurisdiction. The Court drew a blindingly bright line: The federal courts may not interfere "by any order, or in any mode" before a city council acts in a legislative capacity, *id.* at 481; they must wait to exercise jurisdiction until "when the city council shall pass an ordinance,"

id. at 482; *see also id.* at 481 ("If an ordinance be passed . . . the jurisdiction of the courts *may then* be invoked." (emphasis supplied)).[1]

B. Not surprisingly, the bright line drawn in *New Orleans* separates all the cases the Banks rely upon in their Opposition from this case, and the Banks are glossing over the distinction. In the cases the Banks cite in which federal courts reviewed government action, the necessary legislative action had occurred, and the federal courts were engaged in their proper role of judicial review. In this case, the necessary legislative authorization has not occurred.

As already demonstrated, in the *Regional Railroad Reorganization Act Cases*, 419 U.S. 102 (1974) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the necessary legislative authorization for the compelled transfer of property already existed, *i.e.* the Rail Act and the Hawaii Land Reform Act of 1967. Mot. at 4-5. The Banks rely on the cases (Opp. at ii, 3-4) but do not address the dispositive distinction between those cases and this one.[2]

Similarly, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Opp. at 9), the Supreme Court considered a challenge to the Coal Industry Retiree Health Benefit Act of 1992. The Coal Act was not just a bill that Congress was contemplating, so that case is not analogous to this one.

In *Chertkof v. Mayor & City Council of Baltimore*, 497 F. Supp. 1252 (D. Md. 1980) (Opp. at 3-4), the city council had passed an ordinance designating the plaintiffs' property as part of the urban renewal zone *and* "direct[ing] the Real Estate Acquisition Division to acquire plaintiff's

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[1] Other cases make the same point. *See, e.g.*, *McChord v. Cincinnati, N.O. & Tex. P. Ry. Co.*, 183 U.S. 483, 496-97 (1902) (federal courts lack jurisdiction before the legislative action has occurred; "[t]he fact that the legislative action threatened may be in disregard of constitutional constraints . . . does not affect the question" (citation, internal quotation marks omitted)); *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 415 (6th Cir. 1999) ("The *New Orleans* Court made clear that the role of the court is to intervene, if at all, only after a legislative enactment has been passed."); *FrontierVision Operating Partners, L.P. v. Town of Naples, Maine*, No. 01-16-P-DMC, 2001 WL 220192, at *7 (D. Me. Mar. 7, 2001) ("Unless and until the defendant enacts an ordinance . . . this court may not consider an application for injunctive relief . . . concerning such an ordinance.").

[2] The Banks quote selectively from the *Regional Railroad Reorganization Cases* to make it appear that further legislative action was necessary to authorize the forced conveyance of property. Opp. at 3. To the contrary, under the Rail Act, a conveyance plan went into effect unless legislative action was taken to reject the plan, 419 U.S. at 112-14 & n.10, so no further legislative action was necessary. *See id.* at 140 ("[T]he implementation of the Rail Act will now lead inexorably to the final conveyance . . . .").

property by having the City Solicitor institute a condemnation suit if plaintiff will not sell." *Id.* at 1256. By contrast, in this case the City Council has not authorized the use of eminent domain authority if negotiations fail. Authority to use eminent domain would require the future adoption of a resolution of necessity.

In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (Opp. at ii, 2-3), the defendant public agency had passed two resolutions of necessity authorizing condemnation of the property, *id.* at 1126-27. The issue in *99 Cents Only* was not ripeness but mootness, because the resolutions were rescinded in response to litigation. *Id.* at 1127. The district court reasoned that a defendant arguing mootness must demonstrate that "the allegedly wrongful behavior cannot reasonably be expected to recur," *id.* (*quoting FTC v. Affordable Media LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999)), and thus repeal of a law does not necessarily render a pending challenge to the law moot, *id.* at 1128. In this case, by contrast, no resolution of necessity ever has been adopted, or may ever be adopted, and thus the question is not whether "allegedly wrongful behavior" will recur because no "allegedly wrongful behavior" occurred in the first place.[3]

Indeed, when the Ninth Circuit reviewed the *99 Cents Only* case on appeal, it recognized that the case was ripe precisely because a resolution of necessity had been passed. 60 Fed. App'x 123, 124 (9th Cir. 2003) ("At the time that [plaintiff] filed its complaint in district court, the controversy was ripe. Once [the agency] passed [its resolution of necessity], [plaintiff] faced 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" (*quoting City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1170 (9th Cir. 2001))). In *99 Cents Only*, moreover, the district court was reviewing an actual condemnation plan – the one initially authorized by the agency – while in this case there is none, because no resolution of necessity has been adopted.

[3] The mootness inquiry is very different from the standing/ripeness inquiry because standing/ripeness are assessed at the outset of the case and, once a court has jurisdiction, a defendant ordinarily cannot moot the case by voluntary cessation of its actions. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982).

C. Although no authority supports the Banks' position, they nonetheless insist that the Court has jurisdiction now because the City has a "pre-determined plan" to proceed with a "Loan Seizure Program" and has taken "substantial steps" to implement this "plan," and "Plaintiffs need not wait until Defendants complete every step in their Loan Seizure Program before seeking injunctive relief in this Court." Opp. at i, 4, 6. This contention is wrong. When one of the necessary "steps" that stands between a plaintiff and alleged harm is future legislative action, there is no such thing as a "pre-determined plan," and the plaintiff does have to wait for that "step" to occur to invoke the federal courts' jurisdiction. The reasons that the plaintiff has to wait are twofold.

First, Article III's limitations on jurisdiction are not based merely on a policy interest in avoiding potentially unnecessary work for the federal courts – such that the courts might make occasional exceptions and review the constitutionality of proposals that seem very likely to become law. Rather, limitations on jurisdiction also "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The federal courts cannot treat the legislative process as a meaningless formality. Rather, the courts must respect the legislative process as likely to separate good proposals from bad proposals and legal proposals from illegal proposals. Judicial review by unelected judges is a last resort that may occur only when a proposal becomes law. Otherwise, "the courts will pass that line which separates judicial from legislative authority." *New Orleans*, 164 U.S. at 481; *see also Flast v. Cohen*, 392 U.S. at 96 (when government action is involved "the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III").

Second, apart from the separation-of-powers issue, the outcome of a legislative process is always "speculative" and "conjectural." In this case, for example, the Banks certainly have not established that the City Council's adoption of a resolution of necessity, by supermajority vote, after a noticed public hearing, is a foregone conclusion.

The only action by the City Council itself that the Banks point to is the City Council's approval of an Advisory Services Agreement. The Agreement does not authorize the use of eminent domain authority, and it requires subsequent City Council approval before mortgage loans can be acquired, whether through eminent domain or otherwise. Declaration of John C. Ertman, Exh. I, Advisory Services Agreement at sec. 2, para. 2 (Doc. 9-9). Authority to use eminent domain might not be given.[4]

The Banks ask the Court to glean from emails and website printouts that an effort is afoot to present a proposed plan to the City Council. Opp. at 4-6. So what? Not every plan presented to a legislative body is approved – or is approved in the same form in which it is presented. The City also has received considerable information since the City Manager's offer letters were sent, in the form of the Banks' own submissions to this Court, and would receive more information at a public hearing. Many plans are revised and refined (or abandoned) in response to criticism.

The Banks point to the City Manager's offer letters (Opp. at 5-6), but those letters, and their accompanying informational pamphlet, are explicit that the decision whether to exercise eminent domain authority has *not* been made. Lindsay Dec., Exh. A (Doc. 33-1). The City Manager also says this under oath in his declaration. Lindsay Dec. ¶23 (Doc. 33).

The Banks are therefore left to rely on the Mayor's recent press statements that *she* favors the use of eminent domain authority and "is not backing down" in the face of Wall Street bullying. Ertman Reply Dec., ¶¶22-28 & Exhs. R-V (Docs. 49, 49-18 to 49-22). But President Obama has said many times that *he* supports immigration reform legislation; he and his Administration are "not backing down" either. The outcome of the legislative debate on that issue is not a foregone conclusion.

[4] At various points in their Opposition, the Banks misleadingly refer to the City Council's approval of the Advisory Services Agreement as if it were a "Plan" that the Banks are challenging. Opp. at 4-5. The Banks' Complaint does not allege that it is illegal for a city council to obtain advice about the potential use of eminent domain authority, or for city staff to prepare a proposal for a city council's agenda, or for a city council to consider and debate the issue of exercising eminent domain authority. Rather, the Banks' Complaint alleges that the exercise of eminent domain authority would be illegal. Complaint ¶¶96-147.

D. There are difficult cases about ripeness/standing when a law exists but it is not clear whether the law ever would be applied to the plaintiff. *See, e.g., Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc) (dismissing case for lack of jurisdiction). Where, as here, the necessary legislative action has not occurred, and therefore cannot possibly be implemented, the issue of subject matter jurisdiction is easy; there is none.

II. The Banks' Claims Do Not Meet Prudential Justiciability Requirements

The Banks also have no persuasive response to defendants' argument that, even if the Court had Article III jurisdiction, the Banks' claims are not "fit for judicial decision," as required to satisfy prudential ripeness concerns. Mot. at 6. The Banks refer to a "Loan Seizure Program," but merely capitalizing the phrase "Loan Seizure Program" and using it repeatedly is not an adequate substitute for an approved resolution of necessity for the Court to review.

The Banks cannot tell the Court what mortgage loans are part of their hypothetical "Seizure Program." They allege in their Complaint that the City made offers to buy both performing and non-performing loans, and that it is "unclear whether Richmond intends to seize the nonperforming loans." Complaint ¶66. They also allege that the City may "attempt to acquire or seize *other* loans." *Id.* (emphasis supplied). The Banks' expert witness declares that the City Manager incorrectly identified many of the loans in his offer letters as "underwater," *see* Burnaman Dec. ¶¶4-5 (Doc. 48), which suggests that those loans may *not* be part of a hypothetical "Seizure Program." The City Manager himself has stated under oath that the City has not decided whether to exercise eminent domain authority or what loans might be included. Lindsay Dec. ¶¶22-23 (Doc. 33). Would the particular loans in which these Banks claim an interest even be part of their hypothetical "Seizure Program"?

The Banks do not explain how this Court would review whether the exercise of eminent domain authority is for public use and would serve legitimate local interests when the City Council never approved the use of eminent domain authority or made any findings on this issue. The Banks refer the Court to – in their attorney's words – a "document entitled 'Public Purpose' that appears to be a draft 'resolution on necessity' for San Bernardino County." Ertman Reply Dec. ¶6 & Exh. D (Docs. 49, 49-4). They also refer the Court to various emails and "marketing materials"

discussing the issue. *Id.* ¶¶5-19. Are these the "Seizure Program" the Court is supposed to review?

The Banks predicate many of their merits arguments on what they contend are problems with the details of their hypothetical "Seizure Program," including how loans would be identified and how investors would be compensated. Complaint ¶¶36-52. Yet the City has not yet determined what loans might be included in an eminent domain plan and is not committed to working with particular investors. Lindsay Dec. ¶¶22-23 (Doc. 33). Might not the legislative process refine the details of any eminent domain plan and might not such a plan be revised in response to exactly this type of criticism? Indeed, might not a deal for the voluntary acquisition of some mortgage loans still be reached, at least for loans that already are "non-performing," and for acquisition of other loans as they go into default?

The Banks do not explain how the trial of the merits of their case will proceed. Will the seven City Council members be called to testify so this Court can make factual findings about what "Seizure Program" (if any) would have been approved by a supermajority of City Council members, after a public hearing, had the Banks' lawsuit not interfered with the legislative process? The absurdity of such a trial makes clear that the Banks' claims are not "fit for judicial decision" on the merits now and, therefore, that their claims are not prudentially ripe.

B. Exercising jurisdiction now also would be contrary to strong policy interest in avoiding unnecessary decisions about federal constitutional issues if a case can be resolved on state-law grounds. "[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine*, 415 U.S. 528, 547 (1974). If a resolution of necessity were adopted (after a noticed public hearing, by supermajority vote), that hypothetical resolution of necessity would in all likelihood be challenged on state-law grounds. Those state-law issues should be resolved first, which is another prudential reason why this case is not ripe.

III. The Banks' Claims Would Not Evade Judicial Review

When a federal court lacks subject matter jurisdiction, it "cannot proceed at all" except for "announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (citations, internal quotation marks omitted). Nonetheless, it seems

necessary to respond to the Banks' hysterical arguments that they need injunctive relief now because, if a resolution of necessity were adopted, it would be too late.

A. The Banks' argue that, if a resolution of necessity were adopted, the property at issue would be taken and destroyed without adequate judicial review. The argument is absurd because the adoption of a resolution of necessity does not result in the taking of property. A resolution of necessity does not regulate primary conduct at all. A resolution of necessity just provides the necessary legislative predicate that permits a public agency to file a subsequent eminent domain lawsuit. Only a court order can compel the transfer of property. The property owner is named as a defendant in an eminent domain lawsuit and gets to litigate every issue regarding the legality of the taking before a court order issues. *See* Defs. Opp. to PI at 4 (Doc. 32) (summary of Eminent Domain Law). Thus, it is not possible that the taking and destruction of property could occur without judicial review because an eminent domain lawsuit is a judicial process.

Nor is it true that there would be no opportunity for *federal* court review if the Banks contend that state court procedures are inadequate. Opp. at ii, 8-9. Even if one imagines the Banks' "nightmare scenario" – the City Council gives (at least 15 days) notice to property owners of a public hearing on a proposed resolution of necessity, holds a public hearing, and adopts a resolution of necessity by supermajority vote, and the City promptly files an eminent domain lawsuit in state court – it still would be at least *several months* before the state court issued an order requiring the transfer of property. Even the procedure for "possession prior to judgment" – the so-called quick-take procedure that the Banks egregiously misrepresent – requires a motion with at least 60 days advance notice to the property owner. Cal. Code Civ. Proc. §1255.410(b); *see also* Defs. Opp. to PI at 4 (Doc. 32).

As such, there would be ample time *after* adoption of a hypothetical resolution of necessity for the Banks to file suit in federal court and to seek injunctive relief before any state court order issued to require the transfer of property. The Banks could argue in that federal lawsuit that the state court procedures are inadequate.[5] If the federal courts decide to abstain – having concluded

[5] The Banks' argument regarding the constitutionality of the California procedure for "possession prior to judgment" appears to be as follows: Although the California law requires the trial court (continued)

that the state courts provide an adequate (and, indeed, superior) forum for resolving all the Banks' arguments – the Banks will have had their federal court review.

What is particularly absurd about the Banks' argument about the need for judicial review now is that there are many situations in which a proposed statute or ordinance *would* directly regulate primary conduct in a way that arguably violates the Constitution. For example, a proposed statute or ordinance might prohibit free speech or restrict abortions. Yet, *even in those cases*, the federal courts have no subject matter jurisdiction to entertain a lawsuit until the statute or ordinance actually passes. If there is no jurisdiction in those cases – in which the statute or ordinance would directly regulate primary conduct – there cannot be jurisdiction in this one.

B. The Banks also contend the Court must act now because the adoption of a resolution of necessity would affect the "value of [the Trust] certificates, traded in federally-regulated national securities markets." Opp. at ii, 9. That argument is absurd because it proves too much. The introduction of a bill in Congress can affect stock prices. Public statements about the possible introduction of a bill in Congress can affect stock prices. Speculators are always speculating about the possible impact of possible future government action on their investments. The federal courts do not have jurisdiction to issue advisory rulings in these circumstances to assist investors.

The salient point here is that a resolution of necessity would not take property. Only a subsequent court order in a subsequent eminent domain lawsuit could take property, and there would be ample opportunity for judicial review – in state and federal court – before such an order issued. If the Banks are correct, moreover, that their legal claims are strong, then presumably speculators already have factored this into their calculations.

(continued)

to balance the hardship caused to the property owner if possession is granted against the hardship caused to the public entity if it is denied, *see* Defs. Opp. to PI at 4 (Doc. 32), the Banks will suffer irreparable harm because the state trial court would improperly balance the hardships, and the state appellate courts and U.S. Supreme Court would not intervene. Moreover, the state courts also would not be competent to consider the Banks' challenge to the constitutionality of this procedure as applied to them. While these arguments appear to be foreclosed by precedent, *see id*. at 13, they are not ripe now, because no resolution of necessity has been adopted, so no eminent domain lawsuit can be filed, so no motion for "possession prior to judgment" can be made.

IV. This Case is a SLAPP Suit

The term Strategic Lawsuit Against Public Participation or "SLAPP" suit is used to describe lawsuits that are filed during the consideration of public issues not because the lawsuit has any likelihood of success but because a well-funded plaintiff can achieve its goals by distracting, intimidating, and wasting the resources of its adversary. *See generally U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970-72 (9th Cir. 1999). This case qualifies as a SLAPP suit. The Banks' argument for subject matter jurisdiction is objectively frivolous. The Banks are unable to offer any authority for the proposition that the federal courts have jurisdiction to review, or to enjoin the implementation of, a legislative decision that has not been made. *See* Fed. R. Civ. P. 11(b)(1), (2). The Court should dismiss the case promptly so it does not further distract City staff or interfere with public debate about an important issue.

CONCLUSION

The Court should dismiss this case for lack of jurisdiction.

Dated: September 4, 2013

Respectfully submitted,

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