

# **EXHIBIT D**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

WELLS FARGO BANK, N.A.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. C 13-3663 CRB
CITY OF RICHMOND, CALIFORNIA,	)	San Francisco, California
Defendant.	)	Thursday
	)	September 12, 2013
	)	10:07 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:	ROPES & GRAY LLC
	1211 Avenue of the Americas
	New York City, New York 10037
BY:	JOHN C. ERTMAN, ESQ.
	and
	ROPES & GRAY LLC
	One Metro Center
	700 12th Street, N.W.
	Suite 900
	Washington, D.C. 20005-3948
BY:	DOUGLAS HALLWARD-DRIEMEIER, ESQ.
	and
	ROPES & GRAY LLP
	Three Embarcadero Center
	San Francisco, California 94111-4006
BY:	ROCKY C. TSAI, ESQ.
	and
	WELLS FARGO LAW DEPARTMENT
	45 Fremont Street
	26th Floor
	San Francisco, California 94105
BY:	THOMAS O. JACOB, ESQ.

(Appearances continued, next page)

APPEARANCES, CONTINUED:

For Defendant City of Richmond:

ALTSHULER BERZON LLP  
177 Post Street  
Suite 300  
San Francisco, California 94108

BY: SCOTT A. KRONLAND, ESQ.  
STACEY M. LEYTON, ESQ.  
ERIC P. BROWN, ESQ.  
STEPHEN P. BERZON, ESQ.

and

CITY OF RICHMOND  
City Attorney's Office  
450 Civic Center Plaza  
Post Office box 4046  
Richmond, California 94804-1630

BY: CARLOS A. PRIVAT, ESQ.

For Defendants City of Richmond and Mortgage Resolution  
Partners LLC:

LAW OFFICES OF WILLIAM A. FALIK  
100 Tunnel Road  
Berkeley, California 94705

BY: WILLIAM A. FALIK, ESQ.

For Law Foundation of Silicon Valley, Bay Area Legal Aid,  
California Reinvestment Coalition, Housing and Economic Rights  
Advocates, and National Housing Law Project:

NATIONAL HOUSING LAW PROJECT  
703 Market Street  
Suite 2000  
San Francisco, California 94103

BY: KENT KANG QIAN, ESQ.

For Securities Industry and Financial Markets Association  
and Chamber of Commerce of the United States of America:

SIDLEY & AUSTIN LLP  
555 California Street  
San Francisco, California 94104

BY: SARA B. BRODY, ESQ.

(Appearances continued, next page)

APPEARANCES, CONTINUED:

For Amicus Curiae Applicants California Bankers Association,  
American Bankers Association, California Mortgage Bankers  
Association, and California Credit Union League:

DLA PIPER LLP  
555 Mission Street  
Suite 2400  
San Francisco, California 94105

BY: PAUL J. HALL, ESQ.  
ISABELLE ORD, ESQ.

Reported By:

BELLE BALL, CSR, CRR, RDR  
Official Reporter, U.S. District Court

1 **THURSDAY, SEPTEMBER 12, 2013**

10:07 A.M.

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Case C-13-3663, Wells Fargo  
4 versus City of Richmond, California. Appearances, counsel?

5 Pleas approach the podium and make your appearances,  
6 counsel.

7 **MR. PRIVAT:** Good morning, Your Honor. Carlos Privat  
8 with the City of Richmond.

9 **MR. ERTMAN:** Good morning, Your Honor. John Ertman  
10 for the Plaintiff Trusts.

11 **MR. KRONLAND:** Good morning, Your Honor. Scott  
12 Kronland for the City of Richmond and Mortgage Resolution  
13 Partners.

14 **MR. HALLWARD-DRIEMEIER:** Good morning, Your Honor.  
15 Doug Hallward-Driemeier with Plaintiff Trusts.

16 **MR. FALIK:** Good morning, Your Honor. Bill Falik for  
17 Mortgage Resolution Partners.

18 **MR. TSAI:** Good morning, Your Honor. Rocky Tsai for  
19 the Plaintiff Trusts.

20 **MR. BERZON:** Good morning, Your Honor. Stephen  
21 Berzon for all Defendants.

22 **THE COURT:** Good morning.

23 **MR. JACOB:** Good morning, Your Honor. Tom Jacob for  
24 Wells Fargo Bank.

25 **MR. QIAN:** Good morning, Your Honor. Kent Qian for

1 Defendants National Housing Law Project, Bay Area Legal Aid,  
2 California Reinvestment Coalition and Law Foundation of  
3 Silicon Valley and Housing and Economic Rights Advocates.

4 **MR. BROWN:** Good morning, Your Honor. Eric Brown for  
5 all Defendants.

6 **MS. LEYTON:** Good morning, Your Honor. Stacey Leyton  
7 for all Defendants.

8 **MS. BRODY:** Good morning, Your Honor. Sara Brody on  
9 behalf of the Chamber of Commerce and SIFMA.

10 **MR. HALL:** Good morning, Your Honor. Paul Hall for  
11 the proposed Amicus Curiae applicants, California Bankers  
12 Association, American Bankers Association, California Mortgage  
13 Bankers Association, and California Credit Union League.

14 **THE COURT:** Okay. Good morning, everybody.

15 I have read the papers that have been submitted. In  
16 particular, a -- a submission came from the Defendants  
17 entitled "Defendants' Supplemental Memorandum," dated today --  
18 yesterday, pardon me, yesterday -- giving me an update of what  
19 happened at the Council meeting on -- on September 10th.  
20 Okay.

21 So, it appears -- this is a motion for preliminary  
22 injunction. Also a motion in connection with amicus wanting  
23 permission to file briefs. And I -- I think I would like to  
24 address that after I -- the amicus issue after I address the  
25 other issue, because of what my thinking is on the other

1 issue, which is, there seems to be a substantial question as  
2 to whether or not this motion is ripe for determination.

3 Even in light of -- or maybe in particular in light of the  
4 Council meeting on September 10th, it appears that there are a  
5 series of steps that are contemplated by the Council to take  
6 place before the implementation of a program which would  
7 include -- or not -- eminent domain. And if it did, what that  
8 would look like, and whether it would be the City Council  
9 doing so or something called a Joint Powers Authority.

10 And therefore, it appears to me that there are a number of  
11 steps that can or cannot take place. And if they do take  
12 place, then the question is -- and implement a -- implement  
13 the program or attempt to implement the program, which would  
14 include eminent domain, then that's the time that the Court  
15 ought to take a look at it, I think.

16 There is no question in the Court's mind that there are  
17 serious questions raised here. And, so, it's not the  
18 intention of the Court by saying that I don't think the matter  
19 is ripe for determination, to make any finding as to whether  
20 or not an injunction would be issued, whether there are --  
21 though it seems at first blush to be serious issues, the Court  
22 would have to have a hearing on that, in order to determine  
23 the propriety of granting an injunction.

24 I'm not offering an opinion as to whether or not if the  
25 program went through as contemplated, I would or would not

1 issue an injunction because I think when you say something is  
2 not ripe for determination, you don't turn around and  
3 determine it.

4 Okay. So -- isn't that right? I mean, isn't this a --  
5 isn't this, as we say in the trade, a no-brainer? I mean,  
6 really? I mean -- what happens if the -- if the Council never  
7 passes this thing? What am I supposed to do?

8 **MR. ERTMAN:** Your Honor --

9 **THE COURT:** Spend months of -- of difficult  
10 constitutional searching to try to get the right answer? I  
11 don't think so.

12 So, go ahead. Tell me about it.

13 **MR. ERTMAN:** Yes.

14 **THE COURT:** Anybody who opposes -- anybody who says  
15 it's ripe for determination, stand up now, and I'll hear you.

16 **MR. ERTMAN:** Yes, Your Honor. John Ertman from Ropes  
17 & Gray for the Plaintiff Trusts.

18 Your Honor, the matter is more than ripe. There's more  
19 information that Your Honor doesn't have, because Tuesday  
20 night was a significant development in this case. And, the  
21 Defendant submission doesn't fully explain what happened at  
22 the City Council at all, at the City Council meeting.

23 At the session last Tuesday night, the Council addressed  
24 eminent domain at length. And, and a motion was presented to  
25 the City Council to rescind the loan offers in this case and



1 abandon the loan seizure program with MRP.

2 Okay, this motion was defeated, five to two.

3 Now, the minutes of that hearing aren't available yet, but  
4 I am prepared to hand up to the Court a summary of what was  
5 voted on at the hearing. I can hand up to the Court two  
6 copies of that.

7 (Document handed up to the Court)

8 **THE COURT:** Has opposing counsel received a copy of  
9 this?

10 **MR. ERTMAN:** Yes.

11 **MR. KRONLAND:** Well, not yet.

12 (Counsel distributes a copy of document to Defense Table)

13 **THE COURT:** Not yet. Okay, well, here it is.

14 **MR. ERTMAN:** Yeah. This will be very familiar to  
15 them, Your Honor.

16 Okay. What was voted on, Agenda Item 1, okay, where the  
17 proposal was to direct the city manager to withdraw any offers  
18 made to trustees and servicers of mortgage loans.

19 I won't repeat the whole thing for the record, Your Honor.

20 **THE COURT:** Well, I think we should make this part of  
21 the record.

22 **MR. ERTMAN:** Okay, then I'll continue on.

23 **THE COURT:** No, you don't have to continue on, just  
24 mark it as an exhibit and it will be part of the record.

25 **MR. ERTMAN:** Okay.

1           **THE COURT:** You can say whatever you want to say, but  
2 it should be part -- anything that I look at I think should be  
3 part of the record.

4           (List of Agenda Items made a part of the Record)

5           **MR. ERTMAN:** Right. Okay. This proposal to end the  
6 eminent domain program was voted down, five to two. The  
7 Defendants don't even mention this five-to-two vote in their  
8 submission to the Court from yesterday.

9           And it was clear at the hearing, Your Honor, that there is  
10 a passion in Richmond for carrying out this program. You  
11 could see that all --

12           **THE COURT:** Sorry, there's a what?

13           **MR. ERTMAN:** There is a passion in Richmond --

14           **THE COURT:** Passion.

15           **MR. ERTMAN:** This is no ordinary government program.  
16 There is a passion for --

17           **THE COURT:** Didn't look like an ordinary government  
18 program to me.

19           **MR. ERTMAN:** No.

20           **THE COURT:** And I'm sure there's passion. I'm sure  
21 that people care a great deal about their houses, as they  
22 should. And their -- and their -- their basic security. As  
23 they should.

24           But, passion.

25           **MR. ERTMAN:** Yes.

1           **THE COURT:** Basic constitutional liberties.  
2 Constitutional rights. All of that is significant and  
3 important.

4           The question is, if you were -- if you were to say to me,  
5 "Look, the program is, as constituted, and as -- as voted on  
6 by the -- by the Council, is -- is constitutionally infirm,  
7 and therefore an injunction is necessary to stop it in its  
8 present form because in its present form, it is being  
9 implemented, or there's an immediate threat to its  
10 implementation," I would say, "Okay, I guess it's ripe for  
11 determination."

12           **MR. ERTMAN:** Right.

13           **THE COURT:** And that's not -- when I read what --  
14 unless I read something incorrectly, it said -- and I think I  
15 should read this -- it said that the local -- that the Council  
16 voted to direct the staff to work up a set -- to (As read):

17           "...to work to set up a Joint Powers Authority  
18 together with other interested municipalities, as the  
19 next step forward in the development of this program;  
20 to confirm that no loans will be acquired by the City  
21 through eminent domain before coming back to a full  
22 City Council for a vote; and to continue working with  
23 MRP to resolve any remaining legal issues."

24           There are quite a few remaining legal issues, I would  
25 suggest.

1 But in any event, isn't -- isn't the present status of  
2 this matter going to require further action on the part of the  
3 City Council? That is my question.

4 **MR. ERTMAN:** Yeah. Not -- not material action,  
5 Your Honor. They have a program, they have a plan --

6 **THE COURT:** Do they have a supermajority who voted in  
7 favor of this?

8 **MR. ERTMAN:** Yes. Five -- five to two, six -- five  
9 to two on Tuesday night. But, it originated back in April.  
10 In April, the City Council voted six-nothing to proceed with  
11 MRP, and MRP's loan seizure program.

12 At the time, the City Council was presented with the  
13 purported public use of the MRP program. And that's submitted  
14 in the Ertman Reply Declaration, Exhibit 8. I could read that  
15 to you.

16 So, there's no dispute here over what the proposed --

17 **THE COURT:** No, I'm not arguing, or I'm not asking  
18 you questions about the history of this matter --

19 **MR. ERTMAN:** Right.

20 **THE COURT:** -- at this point. What I'm -- what I'm  
21 looking at is: Where do we go from here? What is exactly the  
22 next step?

23 **MR. ERTMAN:** Right.

24 **THE COURT:** If you are saying to me the next step  
25 will be the institution of eminent domain, then that's, number

1 one, not my understanding.

2 But, if my understanding is in error, I should take a look  
3 at it. Because if that's the next step, then the Court should  
4 -- should review the situation, and perhaps, if appropriate,  
5 intervene by way of a -- by way of an injunction.

6 Are you saying to me that's actually the next step?

7 **MR. ERTMAN:** Yes. That is what I'm saying. That is  
8 exactly the next step.

9 **THE COURT:** Okay.

10 **MR. ERTMAN:** They have a preexisting plan. They have  
11 -- they have a timeline that they have been following since  
12 they voted six-nothing back in April for this program.

13 The timeline is Ertman Reply Declaration H, but I would  
14 hand up a copy for the Court.

15 **THE COURT:** Is this the Gantt chart?

16 **MR. ERTMAN:** Yes. Yes, it is, Your Honor.

17 **THE COURT:** Okay. And now, here I am, I'm looking at  
18 this thing. And just tell me when the eminent domain --

19 **MR. ERTMAN:** Yes.

20 **THE COURT:** Looking at the chart, tell me, when does  
21 eminent domain begin? The eminent domain proceeding.

22 **MR. ERTMAN:** Right. So, the next step, now that  
23 they've made loan offers on 624 loans and those offers have  
24 all been rejected, the next step, if you look down to the  
25 chart, it says -- you know, and this was generated a few days

1 after -- or it was provided to Richmond a few days after the  
2 six-nothing vote in April. Okay.

3 "JPA approves RON."

4 That's the resolution on necessity. And then immediately  
5 afterwards:

6 "JPA files motion."

7 And if you look on that chart, these are the next steps,  
8 Your Honor. They pass a resolution of necessity, and the next  
9 day, they file a state eminent domain action where they seek  
10 the quick take. To irreversibly take possession of these  
11 loans, extinguish them, and flip them.

12 This is the whole strategy here. And, since April --

13 **THE COURT:** Well, then, explain to me, in the  
14 opposition, the opponents say the following thing. They say  
15 (As read):

16 "The City Council has not adopted a resolution of  
17 necessity to authorize the use of eminent domain  
18 authority, or even held a public hearing on whether  
19 to adopt a proposed resolution of necessity, or even  
20 given notice of such a public hearing."

21 Now, my question to you is: Is that true?

22 **MR. ERTMAN:** That is true. But, given their  
23 commitment to going ahead with the program, that -- that  
24 issuance of the resolution of necessity is just, at this  
25 point, a ministerial act.

1           **THE COURT:** Oh. Now, let's talk about ministerial  
2 acts. I'm always interested in them. Because, the only  
3 ministerial act of which I'm absolutely aware of is the one  
4 after the Senate of the United States confirms a nominee to be  
5 a federal judge, and the President hasn't made the  
6 appointment.

7           It was held in *Marbury versus Madison* that that act of the  
8 President appointing a federal judge is a ministerial act.  
9 That's actually the only one that I'm really -- that is up in  
10 my mind right now.

11          Now, putting that aside, if you were to say to me that  
12 this is just like nominating -- appointing a federal judge,  
13 this is -- this is just the same thing, which means that any  
14 -- you know, the clerk can issue the notice, and if a clerk  
15 didn't issue the notice, a -- a writ of mandamus would come in  
16 or whatever it is, requiring the clerk to do so, that there's  
17 nothing left other than that, I'll listen.

18          On the other hand, if what you are saying to me is it's a  
19 foregone conclusion in light of the history of what this  
20 program -- of the -- of the -- of this -- you know, of the  
21 history of this program, of the discussion and the other acts  
22 of the board and so forth and so on, that it will go through,  
23 to that I would say, Okay, you might be absolutely right. But  
24 it's not a ministerial act. It still is subject to all sorts  
25 of things. Including, including, the -- the voice of the --

1 the public and the affected people lobbying members of the  
2 Council in an effort to persuade them to their particular  
3 point of view.

4 That's called the democratic process. And I wouldn't at  
5 all take the position that the democratic process is really  
6 just a ministerial act.

7 **MR. ERTMAN:** No, Your Honor. We're not seeking to  
8 enjoin meetings of the Richmond City Council -- deliberations  
9 of the Richmond City Council. It's -- at this point, they've  
10 already voted on this twice. They voted six-nothing to go  
11 ahead in April. They voted five-two last Tuesday night, to  
12 keep going, notwithstanding all of the many negative concerns  
13 about this program that were raised in the seven-hour hearing  
14 on Tuesday night. So, there's now been two votes over this.

15 Okay. At this point, okay, what they're arguing to this  
16 Court is that at the resolution of necessity, there is some  
17 hypothetical possibility the City Council may change their  
18 mind. And, given the commitment and the history of the  
19 Council and all the deliberations been done, and the two votes  
20 have been taken, okay, that is just pure speculation at this  
21 point.

22 **THE COURT:** How many members are there of the  
23 Council?

24 **MR. ERTMAN:** There are seven.

25 **THE COURT:** Okay. And so, a supermajority is



1 necessary. Is that correct?

2 **MR. ERTMAN:** Yes.

3 **THE COURT:** And that would be five.

4 **MR. ERTMAN:** Yes.

5 **THE COURT:** Is it five out of seven present? Or five  
6 simply -- is it -- is it two-thirds-present vote? That's the  
7 old sort of test for filibuster.

8 Is it the -- is it the -- is it they need five votes to  
9 pass it, even if only six people show up? Or, if six people  
10 show up, they only need four votes to pass it? Or, you don't  
11 know.

12 **MR. ERTMAN:** That, I don't know the answer to. I've  
13 always assumed it was five.

14 **THE COURT:** Well, somebody thinks they know the  
15 answer.

16 Yes.

17 **MR. PRIVAT:** Good morning, Your Honor. We would need  
18 five votes to pass that.

19 **THE COURT:** Okay. So, five votes to pass it. Okay.

20 (Reporter interruption)

21 **THE COURT:** Sorry. And it's your -- yeah, you have  
22 to speak slowly. You have to speak slowly.

23 **MR. ERTMAN:** (Nods head)

24 **THE COURT:** Go ahead. I interrupted you once again,  
25 so go ahead.

1           **MR. ERTMAN:** Sure.

2           So, Your Honor, given the actual facts of what is  
3           happening here, you know, if they're right that ripeness  
4           doesn't occur until this resolution of necessity is issued, it  
5           would mean that for any unlawful government program, the  
6           government could always try to avoid judicial review by  
7           claiming they might change their mind at some point and  
8           reverse course at some point. But here --

9           **THE COURT:** Isn't that a good idea, by the way, just  
10          as matter of public policy? Isn't it a good idea to have  
11          legislative bodies act lawfully in -- in -- you know, that is,  
12          act with a real sensitivity towards constitutional issues?

13          And if they come to their -- to this conclusion, even  
14          though their 'druthers might be to do X, Y or Z, they are  
15          finally persuaded that they shouldn't do X, Y or Z, and they  
16          don't have some court ordering them not to do X, Y and Z,  
17          isn't that a better way of resolving -- isn't that a better  
18          way of governance? Isn't that a better way, under our  
19          constitutional system?

20          If you could be successful persuading the Council not to  
21          go forward on this, even at the last minute, isn't that a  
22          better way than having the Court jump in, into basically a  
23          somewhat-novel -- and I'm not -- I'm not belittling the  
24          seriousness of your motion.

25          **MR. ERTMAN:** Right.

1           **THE COURT:** I'm just saying that it's an area that I  
2 haven't seen before in this context. And I think -- I would  
3 certainly think that it's just better for a court not to rule,  
4 unless a court should rule. And I don't see why a court  
5 should rule, unless it appears that this eminent domain  
6 process is essentially imminent.

7           I will tell you, I will tell you, the Court can act very,  
8 very quickly in this matter, within 24 hours, there's no  
9 question in my mind, were I to grant the Defendant's motion to  
10 dismiss.

11           And I -- you know, all you would have to do if it became  
12 imminent is simply notify the Court of that fact. You might  
13 have to file a notice of related case, if that happens. I  
14 would certainly accept the case. And I would -- I would  
15 address it immediately.

16           **MR. ERTMAN:** Yes, so --

17           **THE COURT:** So, I don't -- yeah, I appreciate, when  
18 people's houses are on the line, I appreciate the fact that --  
19 that there is a need for expeditious, immediate response by a  
20 court. You know, it's not the sort of thing that goes to  
21 court and just sort of sits there.

22           I don't have a problem with your argument about the  
23 immediacy or necessity of relief. However, that's once it  
24 becomes clear that immediate relief is necessary.

25           And that's one of the -- the criteria for a -- for a

1 preliminary injunction or a temporary restraining order, you  
2 have to show some immediacy which would justify what is an  
3 extraordinary -- relief of an extraordinary nature.

4 **MR. ERTMAN:** Right. I think Your Honor identified  
5 the concern here, because --

6 (Reporter interruption)

7 **MR. ERTMAN:** If they're right that this doesn't  
8 become ripe until they issue a resolution on necessity -- and  
9 again, Your Honor, our position is that that's just a one-page  
10 piece of paper that just tells what the loans are to be taken,  
11 we already know that; tells the public purpose, we already  
12 know what that is. They already approved that six-nothing  
13 back in April, and they've repeated that public purposes  
14 multiple times. So, there's no mystery as to what the public  
15 purpose is. There's nothing new coming from this resolution  
16 on necessity.

17 But, the critical issue is that the plan all along, you  
18 can see from the timeline, is they issue the resolution on  
19 necessity at the end of a council hearing. The next day, they  
20 file in state court. And they've made clear in their papers,  
21 they don't want to be here in Federal Court.

22 Okay, and if they're right --

23 **THE COURT:** They -- they like it here.

24 **MR. ERTMAN:** Not -- not -- not what they say, right?  
25 That if -- if they're right that this doesn't become ripe

1 until the resolution on necessity issues, the way their plan  
2 works is we likely could never be in a federal district court  
3 to protect our constitutional rights. Because then, if this  
4 case gets dismissed, they follow their plan, they issue the  
5 resolution on necessity. The next day, they're in state  
6 court. We come back here, then they argue younger abstention.  
7 Right? They say that we're the second-filed case, we don't  
8 belong here.

9 And that can't be the right outcome, Your Honor, because  
10 we are entitled to be in federal district court on an  
11 eminent-domain-taking case to seek resolution of our  
12 constitutional --

13 **THE COURT:** Let me ask your worthy opponents there to  
14 respond to that particular argument, and only that particular  
15 argument.

16 (Reporter interruption)

17 **THE COURT:** You have to identify yourself, so there's  
18 at least an outside chance that --

19 **MR. KRONLAND:** Good morning, Your Honor. Scott  
20 Kronland on behalf of the Defendants.

21 As I understand the argument, it's that if a resolution of  
22 necessity were adopted, after noticed public hearing, a  
23 supermajority vote, the City could then file a lawsuit  
24 promptly in state court, and the Defendants would then be able  
25 to raise all of their arguments in the state court action, and

1 they would be able to come here and seek an injunction in  
2 federal court.

3 But at that point, the Court might decide to abstain  
4 because the state court was an adequate forum. And,  
5 therefore, the Court might decide to abstain.

6 And then, having had this Court determine that the state  
7 court was an adequate forum, and therefore, that the Court  
8 should abstain, the Defendants would then be suffering  
9 irreparable harm because, like most Defendants, they have to  
10 raise their constitutional defenses in a state court action.

11 It -- it doesn't make a lot of sense. People raise  
12 defenses in state court actions all the time. And if the  
13 Court decided to abstain, it would be making the determination  
14 that the action was appropriately heard in state court. And  
15 if the Court decided not to abstain, it would be hearing the  
16 action in federal court.

17 But, there's no rush. It's not as if someone files a  
18 lawsuit in state court, and the next day the state court holds  
19 a trial and issues a judgment. Even the quick-take procedure  
20 that they have referred to in their papers is a motion on  
21 sixty days' notice. There would be plenty of time for this  
22 Court to decide what to do.

23 **THE COURT:** Let me ask you a question. One option  
24 the Court may have -- though I'm not sure I do, and that's why  
25 I'm asking the question -- would be to -- not to dismiss it,

1 but simply to -- to stay it, or to otherwise continue it. Not  
2 issue any type of extraordinary relief at this point. And  
3 some -- and either if the program is implemented or attempted  
4 to be implemented, or whatever that piece of paper is, the  
5 necessity and so forth, so arguably it's ripe, I mean, even  
6 more arguably than it is today, but truly ripe for  
7 determination, then this Court could examine the issues.

8 So my question to you is: Would that be a satisfactory  
9 resolution of the problem today?

10 **MR. KRONLAND:** No, Your Honor. Let me give you  
11 several reasons. I mean, first of all, it's not a legal  
12 option. There's a motion to dismiss for lack of subject  
13 matter jurisdiction that's been made.

14 Your Honor is right that it's a no-brainer. It's like  
15 challenging the immigration reform legislation before Congress  
16 adopted it. The Supreme Court's been very clear that the duty  
17 of the Court is to announce it lacks jurisdiction, dismiss the  
18 case.

19 But as a practical matter, I never want to tell the  
20 Federal Court it couldn't do something. Having the case out  
21 there is --

22 **THE COURT:** My wife doesn't seem to have that  
23 problem.

24 (Laughter)

25 **MR. KRONLAND:** Well, I've had -- bad experiences.

1           **THE COURT:** You haven't met my wife. Okay.

2           **MR. KRONLAND:** As a practical matter, having the case  
3 out there is an interference with the political process.

4 Other cities are reluctant to join in a --

5           **THE COURT:** Well, I think that as a matter of  
6 jurisprudence, I think you're right. I mean, I don't think I  
7 have that option. I think that I'd either -- would proceed  
8 with this on their -- their argument.

9           I don't think -- the question of -- an issue has to be  
10 ripe for determination for standing purposes, as I understand  
11 it. And, if it's not ripe for determination, there is no  
12 standing, it's not a case in controversy in front of me, and I  
13 can't just say, "Oh, I think I'll hold onto this until it  
14 becomes a case or controversy, because it's so interesting."

15           I can't do that, in my view. I mean, I think that --

16           **MR. ERTMAN:** You're --

17           **MR. KRONLAND:** That's correct, Your Honor.

18           **MR. ERTMAN:** I don't think he's right, Your Honor.

19           **THE COURT:** Okay, all right. Wait a minute. Let me  
20 just -- is that --

21           **MR. KRONLAND:** That's the law, Your Honor.

22           **THE COURT:** Have I got your argument correct?

23           **MR. KRONLAND:** That is correct.

24           **THE COURT:** Okay. Yes, sir.

25           **MR. ERTMAN:** We're happy to make a supplemental



1 submission on this. You -- there is precedent. You could  
2 hold the case in abeyance. Okay.

3 Our position here is that it's a factual matter. It is  
4 ripe. Their next step is to do the resolution on necessity,  
5 and start seizing loans. It's going to happen imminently.  
6 And --

7 **THE COURT:** When do you actually think it's going to  
8 happen?

9 **MR. ERTMAN:** Well, from -- if you watched the hearing  
10 on Tuesday night, you can see -- we'll submit it's any day,  
11 very soon. Because that is the next step. They've made the  
12 offers. The offers have been rejected.

13 **THE COURT:** Well, but they're talking about creating  
14 a joint powers -- what is it called? I mean, that's not a --  
15 that's not a five-minute turnaround, is it? I mean --

16 **MR. ERTMAN:** That's a red herring, Your Honor.  
17 They've been talking about that for months. It's just to try  
18 to bring in other cities, into this.

19 It doesn't change the fact that they've committed to go  
20 forward with this program.

21 **THE COURT:** Okay.

22 **MR. ERTMAN:** So, that's not new news. And, yes,  
23 Your Honor. So, if we have the ability to do a brief  
24 supplemental submission, because there is precedent to hold  
25 this in abeyance, if that's what the Court was so inclined to

1 do.

2           **THE COURT:** Okay. Let's end the suspense. I don't  
3 believe it's ripe for determination, for the reasons that I've  
4 stated.

5           While it raises serious issues, and I'm sympathetic to the  
6 fact that it is raising certain issues, I -- I do not believe  
7 it's ripe at this point. And the question then becomes: Do I  
8 dismiss it? Or do I somehow stay it?

9           I believe Defense Counsel's correct that -- that I must  
10 dismiss it.

11           On the other hand, I'll give you the opportunity -- I'll  
12 give both sides the opportunity to submit a supplemental  
13 statement. I don't need a -- you know, a *magnum opus* on this  
14 subject. I would prefer -- I'll let you -- you write what you  
15 want to write. But I would like it by 5:00 p.m. tomorrow.  
16 And, I will rule on Monday.

17           **MR. KRONLAND:** Your Honor, I -- I'm not -- I  
18 understand Your Honor's --

19           **THE COURT:** Both sides, both sides can do it.

20           **MR. KRONLAND:** -- supplemental briefing, but I would  
21 just direct the Court to Federal Rule of Civil Procedure  
22 12(h).

23           **THE COURT:** Well, your *magnum opus* will be very  
24 short.

25           **MR. KRONLAND:** Per the Supreme Court's decision in --

1 in *Steel Co* where the --

2 **THE COURT:** All I want you to do is to do it. Okay?

3 **MR. KRONLAND:** Okay.

4 **THE COURT:** All right, thank you very much.

5 **MR. ERTMAN:** And alternatively, Your Honor, if  
6 Your Honor --

7 **THE COURT:** You have an alternative.

8 **MR. ERTMAN:** Yes. If Your Honor is inclined to grant  
9 a motion to dismiss, we would like leave to amend the  
10 complaint to address all the new facts about ripeness that  
11 have come out.

12 **THE COURT:** Well, that's another -- that's another  
13 consideration. I don't know. You can put that in your --  
14 then now, you have something to right about. You can put that  
15 in that brief that I'm going to get tomorrow. My guess is  
16 that you have to make a motion and so forth to amend.

17 But, I don't know where we are at this point. These are  
18 ideas that I haven't considered. If you -- if you -- you can  
19 submit what you want to submit by 5:00 p.m. tomorrow, and I'll  
20 rule on Monday on whatever you've submitted. Okay?

21 But, with the understanding that I do not -- that I so  
22 find that it's not ripe for determination -- that I do find  
23 that it's not ripe for determination. Because, I don't want  
24 to mislead anybody into believing that they should make some  
25 other argument about why it's ripe. I don't believe it's

1 ripe. And I've tried to say why I think it is not ripe.

2 But, then the question is: What remedy does -- what  
3 procedure, what appropriate procedure does the Court follow.

4 Okay?

5 All right. Thank you very much. Thank you for coming in.

6 **MR. KRONLAND:** Thank you.

7 (Applause)

8 (Conclusion of Proceedings)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

E X H I B I T S

**DOCUMENTS**

**PAGE**    **VOL.**

List of Agenda Items

9            1

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball 

Thursday, September 12, 2013

Belle Ball, CSR 8785, CRR, RDR