

EXHIBIT F

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18
 19 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 20 **SAN FRANCISCO DIVISION**

21 WELLS FARGO BANK, NATIONAL
 ASSOCIATION, as Trustee, *et al.*,
 22
 23 Plaintiffs,
 24 v.
 25 CITY OF RICHMOND, CALIFORNIA, a
 municipality, and MORTGAGE
 26 RESOLUTION PARTNERS LLC,
 27 Defendants.
 28

Case No. CV-13-3663-CRB

**DEFENDANTS' SUPPLEMENTAL
 MEMORANDUM IN SUPPORT OF
 MOTION TO DISMISS FOR LACK OF
 JURISDICTION (DOC. 38)**

Date: Sept. 12, 2013
 Time: 10:00 am
 Place: Courtroom 6, 17th Floor
 The Hon. Charles R. Breyer

1 **DEFENDANTS’ SUPPLEMENTAL MEMORANDUM IN SUPPORT OF**
2 **MOTION TO DISMISS FOR LACK OF JURISDICTION (DOC. 38)**

3 The Court allowed supplemental briefing on two questions: 1) whether the Court has
4 authority to do anything other than dismiss claims over which it lacks subject matter jurisdiction,
5 and 2) whether the Court should grant the Banks leave to amend their Complaint. The answer to
6 both questions is no.

7 **1. The Court Must Dismiss This Case**

8 Defendants have moved to dismiss this case for lack of subject matter jurisdiction. The
9 lack of jurisdiction is obvious. As the Court correctly observed at the September 12, 2013 hearing,
10 the Article III standing/ripeness issue is a “no brainer.” The Court recognized that this case
11 involves legislative action that has not yet occurred. Therefore, the Court must grant the motion to
12 dismiss and does not have discretion to do anything else.

13 “Without jurisdiction the court cannot proceed at all . . . the only function remaining to the
14 court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better*
15 *Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506 (1868)); see also
16 Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter
17 jurisdiction, the court *must* dismiss the action.”) (emphasis supplied); *Herman Family Revocable*
18 *Trust v. Teddy Bear*, 254 F.3d 802, 807 (9th Cir. 2001) (“[o]nce the district court reached the
19 conclusion that it had no underlying original subject matter jurisdiction, there was nothing left to
20 do but to dismiss the case . . . [jurisdiction is not] a matter of equity or discretion”).

21 **2. The Banks Should Not Be Granted Leave to Amend**

22 A Court considering a motion to dismiss for lack of subject matter jurisdiction under Rule
23 12(b)(1) is not limited to reviewing the pleadings. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
24 2000). Defendants presented uncontroverted evidence that the Richmond City Council has not
25 adopted a resolution of necessity to authorize the use of eminent domain authority to condemn
26 mortgage loans, nor is such a resolution even on the City Council’s agenda. Lindsay Decl. ¶22
27 (Doc. 33). The Banks conceded at the hearing that these facts are true. As such, any amendment
28 would be futile because it would not change the conclusion that the Court lacks subject matter

1 jurisdiction.¹ The Court should not grant leave to amend when the amendment would be futile.

2 The Court should also bear in mind that this case is a SLAPP suit. The Banks filed this
3 case even though the lack of subject matter jurisdiction is obvious and the Banks' arguments to the
4 contrary are Rule 11 frivolous. Simply having a lawsuit on file serves the Banks' purpose of
5 chilling the political process. While a lawsuit is pending, financial institutions are reluctant to
6 negotiate in good faith with the City on a principal reduction solution. While a lawsuit is pending,
7 other municipalities are reluctant to join a Joint Powers Authority to consider solutions to the
8 underwater mortgage crisis. Dragging out the dismissal of this SLAPP suit would be an
9 impediment to full consideration of potential solutions to a serious problem adversely affecting
10 numerous Richmond homeowners. These solutions may or may not involve the use of eminent
11 domain authority, and they will be subject to judicial review if and when the time is ripe.

12 CONCLUSION

13 The Court should dismiss this case forthwith for lack of jurisdiction.

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20 ¹ At the hearing, the Banks misrepresented the process for adopting a resolution of necessity as
21 "ministerial." A resolution of necessity is a legislative action that can be taken only after a
22 noticed public hearing, and the point of such a public hearing is to provide the legislative body
23 with information to decide whether, among other things, "public interest and necessity" justify the
24 use of eminent domain authority. See *Santa Cruz Cnty. Redevelopment Agency v. Izant*, 37
25 Cal.App.4th 141, 148-51 (1995) ("the resolution of necessity is a legislative act"); *id.* at 149 (it
26 would be a "gross abuse of discretion" for the legislative body to "irrevocably commit[] itself to
27 the taking of the property regardless of the evidence presented" at the public hearing); *Anaheim
28 Redevelopment Agency v. Dusek*, 193 Cal.App.3d 249, 260 (1987) ("the decision to condemn . . .
property [presents] 'a fundamental political question'"; "[t]hese considerations are inherently
legislative"). As such, there are *no facts* the Banks could allege that would make this case ripe.
Moreover, as the Banks acknowledge, the most recent action by the Richmond City Council was
to "direct staff to . . . work to set up a Joint Powers Authority with other interested
municipalities," so the entity that may or may not be called upon to consider a hypothetical
proposed resolution of necessity may not even exist yet.

1 Dated: September 13, 2013

Respectfully submitted,

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