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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), *et al.*

Plaintiffs,

v.

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

Defendants.

Case No. 13-cv-3664-CRB

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Date: November 1, 2013
Time: 10:00 a.m.
Ctrm: 6, 17th Floor
Judge: Honorable Charles R. Breyer

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INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Richmond has issued a concrete threat to exercise eminent domain to seize hundreds of mortgage loans from several residential mortgage-backed securities trusts for which the plaintiffs here are trustees (the "Trusts" and "Trustees," respectively). Acting in concert with Mortgage Resolution Partners LLC ("MRP"), a private investment firm that stands to make a windfall profit, the City currently is using the threat of this facially unconstitutional taking to pressure the Trustees to accept low-ball offers for the loans. And the City's words and conduct make clear that, if the Trustees do not accept the offers, it will seize the loans by exercise of eminent domain. The City is moving forward with its plan, for which MRP has already raised $46 million in private financing. This is not a seizure program that may never occur, but one that is in progress and having current effects.

We recognize that this Court dismissed as unripe a complaint filed by Wells Fargo Bank and other trustees in an action challenging the same seizure program. But the factual allegations and legal claims in this lawsuit, however, are not identical to those in *Wells Fargo*. More important, neither the briefing nor the Court's opinion in the *Wells Fargo* case addressed the standards for ripeness applicable to a claim for a declaratory judgment. And neither addressed the need for prompt adjudication because of the City's current and continuing effort to use the threat of an unlawful takings program as leverage to induce the Trustees to negotiate the sale of performing mortgage loans below face value. When measured against the proper standards, the complaint here is ripe both under Article III and as a prudential matter. The constitutional challenge presented here should proceed toward disposition in the normal course.

A complaint for declaratory judgment is ripe for adjudication under Article III if "the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Under that standard, the Trustees have presented a ripe challenge to Defendants' seizure program on the ground that it exceeds constitutional and statutory restrictions forbidding the seizure of extraterritorial property and seizure for a private rather than a public purpose.

Seeking to coerce the Trustees to sell mortgage loans to Defendants at bargain-basement prices, Defendants are openly threatening to seize trust property if the Trustees do not accede to Defendants' demands. Under Article III, that present threat is sufficient to trigger the Court's subject matter jurisdiction. That the City must decide to sue before eminent domain litigation actually begins does not distinguish this case from any other claim for declaratory relief in the face of a letter threatening litigation and making commercial demands. That is especially apparent because, in its September 10, 2013 city council meeting, the City decided *not* to withdraw its offers or its open threats. In short, the parties are adverse, their dispute is real, and the City's and MRP's continuing conduct confirms that there is a live controversy meeting Article III standards.

Defendants' motion to dismiss primarily rests on an overextension of the prudential principle that "[a] claim is not ripe for adjudication if it rests upon contingent future events." *Texas v. United States*, 523 U.S. 296, 300 (1998). Defendants contend that, because the City has not issued a resolution of necessity, this Court lacks subject matter jurisdiction. On the contrary, declaratory judgments routinely address open or tacit threats of litigation precisely "to relieve potential defendants from the 'Damoclean threat' of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never." *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990). If Defendants were correct that the presence of any contingent future event between a concrete threat and the commencement of litigation defeats subject matter jurisdiction, the Declaratory Judgment Act would be a dead letter. But it is not, and this controversy is sufficiently definite and concrete for resolution by declaration.

As the Ninth Circuit has explained, the presence of "contingent future events," standing alone, is relevant to prudential rather than Article III ripeness. *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 662 (9th Cir. 2002). But prudential considerations as well point toward prompt resolution of the Trustees' challenge to Defendants' seizure program. Waiting for the City to pass a resolution of necessity will not sharpen the concrete legal issues here. The pertinent facts and legal principles are known and not subject to change, even if some minor particulars were altered. In contrast, there are very powerful reasons to maintain jurisdiction and proceed toward a declaration in due course. If on prudential grounds the Court rejects jurisdiction until after the City issues a resolution of necessity,

Defendants are certain to file an eminent domain action and then contend that it is too late for this Court to issue a declaration. Defendants are likely to sue immediately after a resolution of necessity—before this Court would have the opportunity to pass on the constitutionality of the takings in a newly filed case—using California's prejudgment "quick take" procedure that could permit the City to take the target loans before judgment. Against this backdrop, it comes as no surprise that the only appellate court to address the issue has held that a legal challenge to a taking under California eminent domain law is ripe before a resolution of necessity issues. *See Rolfe v. California Transportation Comm'n*, 104 Cal. App. 4th 239 (2002).

Having loaded and leveled the eminent domain weapon at these loans, Defendants claim that jurisdiction is lacking until they pull the trigger. This Court need not and should not wait so long to adjudicate this dispute. The motion to dismiss should be denied.

STATEMENT OF ISSUE TO BE DECIDED

Whether the complaint presents a controversy that is ripe for declaratory relief.

STATEMENT OF FACTS

The City's charter provides it with the power to use "eminent domain" to acquire "real and personal property" for any "public use." Richmond City Charter, art. II, § 1, cl. 19. The City has entered into an agreement with MRP under which MRP will identify the loans for seizure and advise the City on exercising its eminent domain power to seize residential mortgage loans. Declaration of Bronwyn Pollock ("Pollock Decl.") ¶¶ 2-3, Ex. 1 at 7-8, Ex. 2. MRP is a private, for-profit organization that engages in just one kind of investment: municipal mortgage seizure programs. *Id.* ¶ 11, Ex. 8 at 27 ("MRP clients are state, county, and city governments that purchase underwater PLS mortgages," "MRP Receives Fee of $4,500," MRP "[a]dvise[s] community in filing eminent domain motion"). On its website, MRP describes itself as "a community advisory firm that will assist communities that choose to use eminent domain to purchase underwater mortgages." *Id.* ¶ 4, Ex. 3 at 3. MRP acknowledges that it "earn[s] a government approved flat fee [for each] mortgage" that its municipal partners seize and that the fee is paid by the funder that provides the government with financing to seize the loans. *Id*. ¶¶ 4-5, Ex. 3 at 3, Ex. 4 at 3.

While the loans are secured by property within the City, the loans themselves are held outside of the City in out-of-state trusts. *E.g.*, Declaration of Loretta A. Lundberg ("Lundberg Decl.") ¶¶ 7-8. The City plans to resell the loans at a substantial mark-up, splitting the profit with MRP. Pollock Decl. ¶ 11, Ex. 8 at 26. The detailed acquisition program approved by the City targets a specific borrower and loan profile; the City has identified over 600 loans to include in the program. *See id.* ¶ 6, Ex. 5 at 9 (loan profile); Lundberg Decl. ¶ 10, Ex. C (trustee exhibit C, identifying all loans).

MRP has indicated that California's "quick take" procedure is an essential component of its scheme. Pollock Decl. ¶ 7, Ex. 6 at 3. At the outset of the condemnation action, the City can move (on 60 days' notice) for immediate, prejudgment possession of the target property in a procedure known as a "quick take." *See* Cal. Code Civ. Proc. § 1255.410. To secure the quick take, the government must deposit the property's appraised value with the state treasury. *Id*. MRP boasts that it has $46 million of

financing on hand to implement the seizure program and has assured the City that more funds are forthcoming. Pollock Decl. ¶ 12, Ex. 9 at 2.

In approving the agreement with MRP, the city council (in the city manager's words) "gave approval for the program to start." *Id.* ¶ 13, Ex. 10 at 2. And it has started. Defendant MRP took the first step in a June 28, 2013 warning letter sent to every major financial institution in the country, stating that "underwater" mortgage "loans would be acquired as part of a public program." *E.g.*, Lundberg Decl. ¶ 9, Ex. B; Declaration of Brian D. Hershman ("Hershman Decl.") ¶ 2, Ex. A.

The City quickly followed by making its intentions unmistakably clear. In letters dated July 31, 2013, the City (through its city manager) offered to purchase specifically identified target loans, held in specifically identified trusts, at specifically identified prices, including trusts administered by the plaintiff Trustees here.[1] Lundberg Decl. ¶ 10, Ex C ("By way of this letter, the City hereby offers to acquire all rights to the mortgage loans listed in Attachment A."); Declaration of Joseph L. Nardi ("Nardi Decl.") ¶¶ 4-5, Ex. B; Hershman Decl. ¶¶ 4-7, Exs. C, F. The letters informed the Trustees that the City had hired a third party to appraise the loans and that the offers were based on the fair market value as determined in the appraisals. *E.g.*, Lundberg Decl. ¶ 10, Ex C. The letters demanded a response by August 13, 2013 and warned that, if the Trustees refused the offers, the City could "proceed with the acquisition of the Loans through eminent domain." *Id.* As MRP and the City well knew, that next step was largely foreordained, as the "[s]ecuritization agreements and tax laws prohibit the sale of PLS mortgages." Pollock Decl. ¶ 11, Ex. 8 at 22.

In compliance with section 7267.2(a)(2) of the California Government Code, the letters contained an informative pamphlet about the eminent domain process in California. *E.g.*, Lundberg Decl. ¶ 10, Ex C. The pamphlet observed that if the City and Trustees were unable to negotiate a mutually acceptable sale, the City would "either file an eminent domain action in a court" or "promptly notify" the Trustees of its intent to "abandon its intention to acquire the property." *Id.* The Trustees did not accept the offers. Pollock Decl. ¶ 15, Ex. 12; Hershman Decl. ¶ 6, Ex. E; Nardi Decl. ¶ 6, Ex. C.

[1] The Trustees are The Bank of New York Mellon (f/k/a The Bank of New York), The Bank of New York Mellon Trust Co., N.A. (f/k/a The Bank of New York Trust Co., N.A.), U.S. Bank National Association, Wilmington Trust Co., and Wilmington Trust, National Association.

The City has not advised the Trustees that the City is abandoning its intention to acquire the loans. Lundberg Decl. ¶ 13; Hershman Decl. ¶ 8. On the contrary, on September 10, 2013, the city council—by supermajority vote—decided not to withdraw the city manager's offer letter, leaving intact the City's open expression of intent to use eminent domain to seize the loans. Pollock Decl. ¶¶ 16-17. Defendants failed to disclose this fact in their Supplemental Memorandum in the *Wells Fargo* case filed the day before the September 12 hearing, and instead mischaracterized the impact of a resolution to seek to enter into Joint Powers Authority ("JPA") as somehow shutting off the City's own loan seizure program. Declaration of Eric Brown ("Brown Decl.") Ex. C, at 1, ECF No. 29-4, Sept. 20, 2013. The potential JPA would provide an additional tool available to the City, but the resolution does not limit the City's ability to exercise eminent domain on its own. *See* Pollock Decl. ¶¶ 16-17, Ex. 13 at 7-9.

ARGUMENT

The well-developed factual setting here—pleaded and otherwise—should foreclose dismissal. "With a 12(b)(1) motion" to dismiss for want of jurisdiction, "a court may weigh the evidence to determine whether it has jurisdiction." *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005). When it takes evidence on the jurisdictional question, "the district court should employ the standard applicable to a motion for summary judgment and grant the motion to dismiss for lack of jurisdiction only if the material jurisdictional facts are not in dispute." *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987).

Here, the complaint itself—together with uncontested evidence concerning events that have occurred since this action began—make clear that this Court has subject matter jurisdiction. It can, and should, adjudicate this case.

I. THE TRUSTEES HAVE PRESENTED RIPE CLAIMS.

Defendants contend that the request for declaratory judgment is not yet ripe. Before the City "may exercise eminent domain power," they explain, the city council must "authorize that exercise of power by adopting, by supermajority vote, a resolution of necessity." Mot. at 3. And because "the City Council has not yet taken this action," Defendants observe, the request for declaratory judgment "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Mot. at 3, 4 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1999)). That is not enough to preclude subject matter

jurisdiction here. This case is ripe under Article III for the declarations that the Trustees seek, and it is prudentially ripe for decision as well.

A. The Trustees' Claims Are Ripe Under Article III.

In declaratory judgment cases like this one, the Article III ripeness inquiry asks "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). "The issues presented must be 'definite and concrete, not hypothetical or abstract.'" *Coleman*, 560 F.3d at 1004 (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). No showing of irreparable harm is necessary, however. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). As a consequence, that a current threat of future litigation may be contingent on the declaratory-judgment defendants' later decision to sue does not foreclose jurisdiction. On the contrary, the entire purpose of the Declaratory Judgment Act is "to relieve potential defendants from the 'Damoclean threat' of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never." *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990). Here, an active controversy has arisen from Defendants' active threat of an unconstitutional exercise of the City's eminent domain power, and the City's recent decision to maintain the threat and keep the seizure program in place.

1. Defendants contend that the dispute between the parties here is indefinite and hypothetical because "the legislative action authorizing eminent domain has not yet occurred." Mot. at 4. But Defendants have presented no evidence that the same supermajority that voted against withdrawing the letters with their active threat of eminent domain will suddenly change course and decide to abandon the program they have repeatedly approved. Rather, Defendants—who try to incorporate 15 or more pages of their briefing in *Wells Fargo* through an improper request for judicial notice—proceed as if the judgment in *Wells Fargo* collaterally estopped the Trustees here.[2] But it does not. *See Littlejohn v. United States*,

[2] The Trustees object in part to Defendants' request for judicial notice of Exhibits A through H to the Declaration of Eric P. Brown, ECF No. 29. While the Court may properly take judicial notice of the existence of these documents and of the representations made in them, Defendants improperly offer them for the truth of the matters asserted and ask the Court to rely on the legal arguments made in those documents. Both uses are improper under Federal Rule of Evidence 201 and have been squarely rejected

321 F.3d 915, 920 (9th Cir. 2003) (claim preclusion requires both "the same parties" and "the same cause[s] of action").

In this case, Defendants' actions have made the dispute definite, concrete, and ripe for a declaration. Through its conduct, the city council has repeatedly confirmed its clear and present intent to seize the mortgage loans in accord with its seizure program. In connection with a well-documented scheme to use the City's eminent domain power, the council voted to enter into an agreement with MRP and thus "gave approval for the program to start." Pollock Decl. ¶ 13, Ex. 10 at 2. The City then sent offer letters expressly stating its intent to seize the targeted loans by eminent domain unless the Trustees accepted the offers or the City gave notice of its intention to abandon the scheme, neither of which has occurred. *E.g.*, Lundberg Decl. ¶¶ 10, 13, Ex C. Closing the loop, the council—by the same supermajority needed to enact a resolution of necessity—voted against withdrawing the letters and abandoning the City's efforts to acquire the loans. Pollock Decl. ¶¶ 16-17. And MRP, knowing that voluntary purchases were unlikely, has raised a $46 million war chest to finance the first quick take seizures. *Id.* ¶ 12, Ex. 9 at 2.

This factual backdrop makes the dispute far from hypothetical. It presents "definite and concrete" (*Coleman*, 560 F.3d at 1005) questions whether the federal and state constitutional and statutory provisions would permit the City to seize the loans in the first place, and thus whether the seizure (or its threat) tortiously interferes with the loan agreements at issue. The question is especially concrete because the City's active and continuing threat to exercise eminent domain is being used—actually and presently—to exert improper pressure to induce the Trustees to accede to the City's demands. By premising that pressure on the expectation that eminent domain will be exercised, Defendants have placed squarely at issue whether the City can use its eminent domain power to seize mortgage loans located outside of its jurisdiction and then refinance the properties at reduced loan values to benefit a private investment firm and select private individual homeowners.

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by numerous courts. *See e.g.*, *Weizmann Institute of Science v. Neschis*, 229 F. Supp. 2d 234, 246, 247 n.21(S.D.N.Y. 2002) (stating that a court may not consider court records for "the truth of the matters asserted in the other litigation" and rejecting an "attempt to introduce evidence or legal arguments presented to the courts in the prior related actions").

This declaratory judgment action is therefore ripe under Article III. The parties unquestionably are adverse, and the controversy between them unquestionably is real and immediate. And it is precisely this sort of circumstance—when a party "is challenged, threatened, or endangered in the enjoyment of what he claims to be his rights"—in which Article III and the Declaratory Judgment Act authorize the aggrieved party "to initiate . . . proceedings against his tormentor and [obtain] an authoritative determination of [his] legal right . . . and the defendant's absence of right." *Sturge v. Diversified Transport Corp*., 772 F. Supp. 183, 186 (S.D.N.Y. 1991) (citing BORCHARD, DECLARATORY JUDGMENTS 280 (2nd ed. 1941)).

2. To deflect attention from the definite controversy at issue here, Defendants trot out a series of "what ifs" to suggest that this matter is not ripe. They say that a resolution of necessity may "never be proposed," may "be rejected," or may be presented "in substantially different form." Brown Decl. Ex. A, at 3:15-27, ECF No. 29-2, Sept. 20, 2013. None of these conjectures—which lack evidentiary support—changes the City's concrete threat to use an unconstitutional exercise of eminent domain; its express agreement with MRP to pursue the MRP scheme; its open explanation of the nature of the scheme; or its recent decision to continue with its seizure program. Defendants are using the threat of an unlawful exercise of eminent domain right now to try to bully the Trustees into selling performing loans at a discount, which would allow Defendants to avoid the risk that an eminent domain court would ultimately value the loans at face value or otherwise too high for Defendants to profit from their scheme. And the threat to seize the loans through unlawful means amounts to tortious interference by making "enjoyment" of the loan contracts more "burdensome" right now. *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 51 (1994). Moreover, the Richmond Mayor's office already is communicating with homeowners who seek to have their loans included in the seizure program. Pollock Decl. ¶ 14, Ex. 11. That further demonstrates that the program—including its interference aspect—is under way rather than in limbo. Even if Defendants made some cosmetic changes to the seizure program, it still would entail seizure of mortgage loans located outside the territory of Richmond, for the purely private use and private benefit of a private investment firm and select private individual homeowners.

Nor does the City's expressed interest in expanding the scope of the seizure program by pursuing a JPA with other municipalities make this dispute any less concrete and immediate. The city council

resolution authorizing negotiations for a JPA did not withdraw the existing authorization to go forward with the seizure plan; indeed, a supermajority declined to withdraw the offer letters and their open threats of eminent domain by the City and the City alone. Pollock Decl., ¶¶ 16-17. Whether the City enters into a JPA has no bearing on the merits of the Trustees' constitutional and statutory challenges to the City's program as reflected in the City's current actions and its current threats.

To be sure, Defendants are correct that the City cannot exercise eminent domain until it passes a resolution of necessity. But they are wrong that this Court lacks jurisdiction simply because the council has yet to take the final step of authorizing a lawsuit. On the contrary, it is well settled that "a single factual contingency" does not render a claim for declaratory judgment "'impermissibly speculative.'" *Coleman*, 560 F.3d at 1005 (citing *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1273-74 (9th Cir. 1981)). *See, e.g*., *Maryland Casualty Co. v. Pacific Coal & Oil Co*., 312 U.S. 270, 273 (1941) (insurance company could seek declaration that it need not pay claim against insured automobile driver who was in an accident even though the driver had not yet been found liable for the accident); *Aetna Life*, 300 U.S. at 239-244 (insurance company could seek declaration that it need not pay plaintiff for disability although plaintiff had not yet sought disability payments).

In *Coleman*, for example—a bankruptcy case in which the individual debtor sought a declaration that her student loan debt was dischargeable—the Ninth Circuit held that the "controversy" was sufficiently "definite and concrete" for Article III purposes, even though it was uncertain whether the debtor would meet the prerequisites for discharge in the first place. 560 F.3d at 1005. The suit for a declaratory judgment was ripe, the Ninth Circuit held, because the parties were presently and concretely adverse: the plaintiff sought "discharge of her student loans," which the defendant sought "to prevent." *Id*. Similarly, in *Yahoo! v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006), the Ninth Circuit "concluded that a challenge to the enforceability of a French court injunction was constitutionally ripe even though enforcement of that injunction had yet to be sought." *Coleman*, 560 F.3d at 1005 (discussing *Yahoo!*).

Coleman and *Yahoo!* leave no doubt that the mere presence of a future contingency does not defeat Article III jurisdiction. "Just as Coleman could [have failed] to complete" the prerequisites for discharge, and the "parties to the *Yahoo!* dispute . . . could have decided not to seek the enforcement of its

injunction in the United States" (*id.*), the city council here could change the course it has adopted and recently confirmed, and decline to pass a resolution of necessity. But that single factual contingency does not mean that the dispute here is impermissibly "hypothetical or abstract." *Id*.

In the face of an active and confirmed threat of an unconstitutional exercise of eminent domain, the fact that a lawsuit has not yet been initiated no more deprives this action of ripeness for declaratory relief than the lack of a pending prosecution precludes declaratory relief against a particular application of a statute. *See Steffel v. Thompson*, 415 U.S. 452, 475 (1974) ("[R]egardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied."). There is as much a "genuine threat" here as there was in *Steffel*, *id*. *See also Hunt v. Anderson*, 794 F. Supp. 1551, 1554 (M.D. Ala. 1991) (adjudicating declaratory relief action against probable-cause finding of state ethics commission despite contention that "case involves merely the possibility of a factual situation that may never develop, because the Attorney General may never present the case to a grand jury and an indictment may never be returned").

That is why, applying principles of mootness that parallel the ripeness analysis for the present case, *see McInnis-Misenor v. Maine Medical Center*, 319 F.3d 63, 69–70 (1st Cir. 2003) (ripeness and mootness address similar issues at different times), a court addressing a nearly identical effort to treat a resolution of necessity as a jurisdictional prerequisite held that the rescission of a resolution of necessity did not deprive the court of jurisdiction over a challenge to an exercise of eminent domain. *See 99 Cents Only Stores v Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1128 (C.D. Cal. 2001), *appeal dismissed on different mootness grounds due to changed facts*, 60 Fed. Appx. 123 (9th Cir. 2003).

Facing the City's offers to purchase mortgage loans—backed by threats to seize them—at prices that would inflict significant losses on the Trusts' beneficiaries, the Trustees seek to clear the real and immediate "cloud" of the City's threat to use eminent domain to seize the mortgage loans (*Sturge*, 772 F. Supp. at 186), and Defendants "seek[] to prevent this" (*Coleman*, 560 F.3d at 1005). In short, the parties are adverse, and their dispute is real. The request for a declaratory judgment is therefore constitutionally ripe.

3. We acknowledge that, in dismissing the *Wells Fargo* case challenging the City's seizure program, this Court's September 16 order cites *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996), for the proposition that the "mere possibility that [an official] may act in an arguably unconstitutional manner . . . is insufficient to establish the real and substantial controversy required to render a case justiciable under Article III." *Id*. at 1441. But *Freedom to Travel*—which, we submit, in fact applied a prudential ripeness analysis addressing fitness and hardship, *see id.* at 1434-35 & n.3, 1441—involved a vague statute that had never been applied and gave officials great discretion in how it would be applied. By contrast, this case presents no "mere possibility" of "arguably unconstitutional" action. In concert with MRP, the City has embarked on a specific and concrete plan to pursue facially unconstitutional exercises of its eminent domain power and is openly and directly using the present threat of that adopted plan to intimidate the Trustees into relinquishing the mortgage loans for the commercial advantage of MRP and the private benefit of selected borrowers. Defendants have identified the specific property they intend to seize, the value they ascribe to each loan to be seized, and the purported public use grounds for the seizure. The concrete and uncontested factual setting here presents "pure questions of law that require no factual development" and therefore are ripe for review. *Id*. at 1435.

4. Defendants raise a red herring by citing *New Orleans Co. v. City of New Orleans*, 164 U.S. 471 (1896), *McChord v. Cincinnati*, 183 U.S. 483 (1902), and *Associated General Contractors of America v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999), for the proposition that this Court cannot interfere with the city council's exercise of its legislative power. *See* Mot. at 3-4. This action seeks nothing of the sort. A declaration in favor of the Trustees would not prevent the council from voting on and approving a resolution of necessity. Rather, the Trustees seek a declaration clarifying their rights in connection with the threatened exercise of eminent domain power against the mortgage loans that Defendants have identified for seizure. If a declaration were issued, the City would remain free to engage in unenforceable legislative conduct (much like the many foreign policy pronouncements by California localities). The declaration as a practical matter would prevent implementation of the program, however, and would remove the threat of seizure as a source of leverage in negotiations.

5. So far as we are aware, only one appellate court has considered whether a challenge to a specific, expressly contemplated exercise of eminent domain under California law is ripe for review

before the government adopts a resolution of necessity. That court held that the challenge was ripe. *Rolfe v. California Transportation Comm'n*, 104 Cal. App. 4th 239 (2002). The plaintiff in *Rolfe* sought to enjoin Caltrans from taking a strip of state park land for a toll road, asserting that Caltrans had to obtain legislative approval first. Even though Caltrans had not adopted a resolution of necessity in connection with the toll road, the court reached the merits of the plaintiff's challenge. Applying standards similar to those of Article III, *see id.* at 245-46, the court rejected the defendant's contention that the questions presented were not "ripe" for decision in the absence of a resolution of necessity invoking it. *Id*. at 246. "[A]n actual controversy exists between the parties," the court explained, and "whether [the government] has adopted a resolution [of necessity] at this point is [simply] immaterial." *Id*.

That is the case here. Defendants have revealed the structure and purpose of the seizure plan, identified the loans to be seized and the legal prerequisites for seizure—valuation and the supposed public use rationale. And they have taken all material steps to pursue the seizure apart from the resolution of necessity—the formal decision to sue—and the lawsuit that will immediately follow. That is enough under Article III.

B. The Trustees' Principal Claims Are Prudentially Ripe.

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Oklevueha Native Am. Church of Hawaii v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). Thus "[r]ipeness has two components: constitutional ripeness and prudential ripeness." *Coleman*, 560 F.3d at 1004 (citing *Thomas*, 220 F.3d at 1138). And whereas Article III ripeness is jurisdictional, prudential ripeness is not. *See Horne v. Dep't of Ag.*, 133 S. Ct. 2053, 2062 (2013). This Court's decision in the *Wells Fargo* case—which, like the briefing, did not squarely address the unique declaratory judgment setting—found a lack of subject matter jurisdiction. We have explained above why the Court has subject matter jurisdiction over the declaratory judgment claims when the question is properly viewed through the lens of Article III analysis in light of the Declaratory Judgment Act.

Prudential ripeness concerns "the fitness of the issues for judicial review" and "the hardship to the parties of withholding court consideration." *Oklevueha*, 679 F.3d at 837. Defendants' briefing in *Wells*

Fargo and this case focuses on their assertion that the case is not yet "fit" for review (the prudential question). Indeed, Defendants' motion here relies entirely on a principle of prudential standing: "[a] claim is not ripe for adjudication if it rests upon future events." Mot. at 4:5-13 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)).[3] As the Ninth Circuit has explained, it is a "matter" of "prudential" standing that a claim may not "be ripe for judicial resolution 'if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (quoting *Texas*, 523 U.S. at 300). Pointing again to the fact that the city council has not yet passed a resolution of necessity, Defendants say the case is not yet fit for immediate adjudication. But prudential considerations weigh strongly in favor of, not against, reaching the merits of the Trustees' claims.

The fitness question asks whether awaiting further factual development will "aid resolution" of the plaintiff's challenge by resolving uncertainties that would have a bearing on the legality of the challenged conduct, or instead whether "the legal arguments are [already] as clear as they are likely to become." *Nat'l Audubon Soc. v. Davis*, 307 F.3d 835, 850 (9th Cir. 2002). And the hardship question asks whether, without the benefit of a declaratory judgment, the plaintiff will suffer an avoidable injury. *Id*. These two prongs are "not . . . independent requirement[s]," however. *City of Houston, Tex. v. Dep't of Housing and Urban Dev*., 24 F.3d 1421, 1430 n.9 (D.C. Cir. 1994). "Thus, where there are no institutional interests favoring postponement of review, a petitioner need not satisfy the hardship prong." *Id*. Rather, when "there are strong interests militating in favor of postponement," the "potential hardship of delay" may nevertheless overcome those interests to justify immediate review. *Id*. Here, both the fitness and hardship factors weigh decisively in favor of the Trustees.

[3] This case is a far cry from *Texas v. United States*, where Texas—the declaratory judgment plaintiff—would have had to take several specific actions with respect to a school district in order to present the legal question (about the preclearance provisions of the Voting Rights Act) on which it sought a declaratory judgment. *See* 523 U.S. at 300. None of the necessary steps had occurred, and Texas could not identify a school district in which they were "currently foreseen or even likely" to occur. *Id.* In contrast, the City and MRP have identified particular loans, sent out offers backed by threats to seize the loans if the offers are not accepted (they have not been), sought to expand and further the seizure program to include other California municipalities through their JPA effort, and approved the course of action leading to seizure.

To begin with, passage of a resolution of necessity would not shed any new light on the question whether the proposed takings at issue here are constitutionally permissible. The City already has identified the precise loans it intends to take, and there is no question that the loans are held outside Richmond. *E.g.* Lundberg Decl. ¶¶ 7-8. There also is no question concerning the supposed "public use" for the taking, which the City identified in its July 31 letter as allowing private individuals with underwater loans to "modify" their loans for personal financial benefit—namely, to "reduce principal and avoid foreclosure[]." *Id.* ¶ 10, Ex. C; *see also* Pollock Decl. ¶ 4, Ex. 3. And the transfer of the loans to the City has the additional purpose of permitting the City and MRP to profit directly at the expense of the Trusts' beneficiaries. A resolution of necessity will not further focus this well-defined dispute.

Without specifically explaining what might change, Defendants maintain (without evidentiary support) that, "[a]bsent a resolution of necessity," it would be impossible to determine with certainty *how* the takings will be executed, and what specific "public use" the City will expressly cite for the takings. Brown Dec. Ex. A, at 6, ECF No. 29-2, Sept. 20, 2013. On the contrary, the contemplated takings and their private beneficiaries "are as clear as they are likely to become" (*Nat'l Audubon Soc.*, 307 F.3d at 850), however, and Defendants' insistence on perfect certainty proves too much. If courts applied that approach in every case, the Declaratory Judgment Act would be a dead letter. Declaratory judgments necessarily address contingencies and uncertainties, because the Declaratory Judgment Act "allow[s] potential defendants to resolve a dispute without waiting to be sued." *Sherwin Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 397 (5th Cir. 2003).

It is settled, therefore, that "[t]he mere fact that a declaratory judgment action is brought in anticipation of other suits does not require dismissal of the declaratory judgment action by the federal court." *Id*. Courts routinely apply that rationale to intellectual property cases, where the settled rule is that a demand letter that threatens an intellectual property holder's legal interest, and nothing more, creates a prudentially ripe controversy for declaratory judgment purposes.[4] That the City is a public body

[4] *E.g.*, *Hewlett-Packard Co. v. Acceleron LLC*, 587 F.3d 1358 (Fed. Cir. 2009) (jurisdiction over declaratory claim based on defendant sending two letters to plaintiff seeking "to discuss" a patent); *Fina Research, S.A. v. Baroid Ltd.*, 141 F.3d 1479 (Fed. Cir. 1998) (jurisdiction over declaratory claim based on two letters giving manufacturer a reasonable apprehension that it would be sued for inducing infringement); *Neil Bros. Ltd. v. World Wide Lines*, 396 F. Supp. 2d 340 (E.D.N.Y. 2005) (jurisdiction over declaratory claim based on letter to the manufacturer threatening to use "every resource available" to stop the manufacturer's "wrongdoing"); *Electronics for Imaging v. Coyle*, 394 F.3d 1341 (Fed. Cir. 2005)

that has to vote to continue a course it already has endorsed changes nothing in the ripeness analysis. A public university that sends a letter threatening to enforce a patent could not avoid a declaratory judgment action merely because the university's governing body has to vote before suing.

Even if awaiting a resolution of necessity might make the issues marginally more fit for review, the hardship resulting from postponement outweighs those gains. The pressure exerted on the Trustees is a current and continuing harm. The loans in the Trusts remain in jeopardy after the city council reaffirmed its offers to buy at deep discounts (coupled with explicit threats of eminent domain if the Trustees refuse). Dismissal of this action would leave the Trustees without any guidance as to the whether the City's threats are real. If the Court waits for the city council to pass a resolution of necessity, moreover, the chance for declaratory relief may well be irretrievably lost. A condemnation action almost certainly would follow immediately after the council adopted a resolution, and the City-MRP plan calls for use of the "quick take" procedure that would allow the City to seize the loans before judgment (but after 60 days' notice) by depositing collateral in escrow. *See* Pollock Decl., ¶ 7 Ex. 6 at 3. Indeed, MRP has raised $46 million for this purpose. *Id.* ¶ 12, Ex. 9 at 2.

The upshot is that, without a prompt declaratory judgment from this Court, the condemnation actions will commence (and trust property will be taken) before this Court has a chance to pass on the very serious federal constitutional challenges at issue here. Treating the resolution of necessity as a precondition also would encourage gamesmanship on the part of Defendants, who acknowledged at the *Wells Fargo* hearing that they would make every effort to use parallel state-court litigation to prevent the Trustees from obtaining relief from this Court. Brown Decl. Ex. D, at 20-21, ECF No. 29-5, Sept. 20, 2013. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Prudential considerations thus weigh strongly in favor of ripeness and a decision on the merits.

This case could be positioned for a declaration after relatively limited briefing; the factual issues are not complex, and the Court (if satisfied of its jurisdiction and prudential ripeness) could issue a declaration at whatever time the Court found appropriate. That would most effectively accommodate any lingering prudential concerns.

(that the patentee had stated a deadline for the conclusion of negotiations, and the deadline had not yet passed, did not render the plaintiff's declaratory claim unripe).

C. If The Court Finds That The Trustees' Claims Are Not Prudentially Ripe For An Immediate Declaration, It Should Defer Decision Or Hold The Case In Abeyance.

At a minimum, the Court should hold the case in abeyance—or simply defer decision— pending the city council's adoption of a resolution of necessity. "Prudential ripeness is discretionary, not jurisdictional." *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *abrogated on other grounds*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *see also Thomas*, 220 F.3d at 1142. Thus, to the extent that the Court determines as a discretionary matter not to proceed with the case at this time, it may simply hold this action in abeyance. *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) (holding a challenge to an EPA rule prudentially unripe because EPA subsequently issued notice of a proposed rule change, but holding case in abeyance subject to regular status reports by EPA).

If the Court is inclined to hold the case in abeyance, it could proceed with briefing on the merits of the declaration. Because the City would act almost immediately after adoption of a resolution of necessity, timely judicial intervention by this Court would be materially assisted by completion of briefing now, with the decision alone held in abeyance.

II. IF THE COMPLAINT IS DISMISSED, THE TRUSTEES SHOULD BE GRANTED LEAVE TO AMEND.

If the Court nonetheless dismisses the complaint, it should do so without prejudice and with leave to amend. "A district court abuses its discretion by denying leave to amend unless amendment would be futile or the plaintiff has failed to cure the complaint's deficiencies despite repeated opportunities." *AE v. Cnty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012). The Trustees have not yet substantively amended the Complaint;[5] leave to amend is routinely granted in such circumstances, as is leave to amend unripe claims. *See*, *e.g.*, *Franczak v. Suntrust Mortg., Inc.*, No. 5:12-cv-01453 EJD, 2013 WL 843912, at *4 (N.D. Cal. Mar. 6, 2013) (granting leave to amend unripe wrongful foreclosure claim). And amendment would not be futile. The Trustees will address any perceived ripeness deficiencies by alleging facts

[5] The previous two amended complaints merely named additional trustees as plaintiffs and updated certain factual allegations to account for events occurring after the filing of the previous complaints. Compare Docket No. 1 with Docket No. 6; see also Docket No. 17 at 1 (stipulation between the parties stating that Second Amended Complaint added additional trustees as plaintiffs "and contains other minor revisions").

establishing additional effects of Defendants' activities, including the persisting and confirmed threat of eminent domain, while the authorizing legislation remains in force and the City and MRP take further steps to institute the seizure program.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

Dated: October 8, 2013

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SIGNATURE ATTESTATION

I, Bronwyn F. Pollock, attest that the concurrence in the filing of this Plaintiff's Opposition to Motion to Dismiss has been obtained from Kurt Osenbaugh and Brian D. Hershman.

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