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 11 THE BANK OF NEW YORK MELLON  
 (f/k/a The Bank of New York) and  
 12 THE BANK OF NEW YORK MELLON TRUST  
 COMPANY, N.A. (f/k/a The Bank of New York Trust  
 13 Company, N.A.) as Trustees for the Trusts listed on  
 Exhibit A to the Second Amended Complaint

14 [Additional counsel listed on signature pages.]

15 **UNITED STATES DISTRICT COURT**  
 16 **NORTHERN DISTRICT OF CALIFORNIA**

17  
 18 THE BANK OF NEW YORK MELLON (f/k/a  
 The Bank of New York) *et al.*

19 Plaintiffs,

20 v.

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

25 Defendants.  
 26

Case No. 3:13-cv-3664-CRB

**JOINT CASE MANAGEMENT  
 STATEMENT**

Date: Nov. 8, 2013  
 Time: 8:30 a.m.  
 Courtroom: 6, 17<sup>th</sup> Floor  
 Judge: Hon. Charles R. Breyer

Complaint filed: August 7, 2013

1 Pursuant to Fed. R. Civ. P. 26(f), Local Rule 16-9, the Standing Order for All Judges of  
2 the Northern District of California—Contents of Joint Case Management Statement, and this  
3 Court’s Order Setting Case Management Conference (Dkt. 21) (the “CMC Order”), Plaintiffs  
4 The Bank of New York Mellon (f/k/a The Bank of New York), as trustee; The Bank of New  
5 York Mellon Trust Company, N.A. (f/k/a The Bank of New York Trust Company, N.A.), as  
6 trustee; U.S. Bank National Association, as trustee; Wilmington Trust Company, as trustee; and  
7 Wilmington Trust Company, National Association, as trustee (collectively, “Trustees”), and  
8 Defendants City of Richmond, California (the “City”); Richmond City Council (the “City  
9 Council”); Mortgage Resolution Partners L.L.C. (“MRP”); and Gordian Sword LLC  
10 (collectively, “Defendants,” collectively referred to with the Trustees as the “Parties”) submit  
11 this Joint Case Management Statement.

12 On October 9, 2013, counsel for the Parties conducted a telephonic meeting of counsel  
13 pursuant to Fed. R. Civ. P. 26(f) and this Court’s CMC Order. The Bank of New York Mellon  
14 (f/k/a The Bank of New York) and The Bank of New York Mellon Trust Company, N.A. (f/k/a  
15 The Bank of New York Trust Company, N.A.) were represented by Bronwyn F. Pollock and  
16 Michael D. Shapiro of Mayer Brown LLP. U.S. Bank National Association was represented by  
17 Brian D. Hershman of Jones Day. Wilmington Trust Company and Wilmington Trust, National  
18 Association were represented by Whitney Chelgren of Alston & Bird LLP. Defendants were  
19 represented by Scott Kronland of Altshuler Berzon LLP. The City and the City Council also  
20 were represented by Carlos Privat of the Richmond City Attorney’s Office.

21 **I. JURISDICTION AND SERVICE**

22 Trustees assert that the Court has jurisdiction over this action pursuant to 28 U.S.C. §§  
23 1331 (federal question jurisdiction) and 1343(a)(3) and (4) (jurisdiction over actions for  
24 violations of constitutional and federal rights secured by 42 U.S.C. § 1983), and over Trustees’  
25 declaratory relief causes of action under 28 U.S.C. §§ 2201 and 2202. Trustees’ state-law claims  
26 form part of the same case or controversy as their federal claims. Accordingly, Trustees assert  
27 that this Court has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C.  
28 § 1367(a).

1 Defendants deny that the Court has subject matter jurisdiction had have moved to dismiss  
2 the case on standing/ripeness ground.

3 No issues exist regarding personal jurisdiction or venue. All parties have been served.

4 **II. FACTS**

5 **A. Trustees' Statement**

6 On April 2, 2013, the City Council approved an Advisory Agreement with MRP. Under  
7 that agreement, MRP identified certain mortgage loans held by private label residential  
8 mortgaged-backed securitization ("RMBS") trusts for the City to seize through eminent domain.  
9 MRP sent letters dated June 28, 2013 to Trustees, among other recipients, stating that  
10 "underwater" mortgage "loans would be acquired as part of a public program." The City  
11 followed by sending letters dated July 31, 2013 to Trustees, trustees of other RMBS trusts, and  
12 mortgage loan servicers, offering to purchase certain loans held in RMBS trusts at prices selected  
13 by Defendants. The City's July 31, 2013 letters included a pamphlet on the eminent domain  
14 process in California.

15 On August 7, 2013, The Bank of New York Mellon, as trustee, sued Defendants,  
16 asserting eight claims for declaratory relief and alleging that the City's seizure plan violated  
17 multiple provisions of the Constitutions of the United States and California, as well as other  
18 provisions of California law. On August 9, 2013, the complaint was amended to add U.S. Bank  
19 National Association, as trustee, as an additional plaintiff. On August 22, 2013, the complaint  
20 was amended to add The Bank of New York Mellon Trust Company, N.A., Wilmington Trust  
21 Company, and Wilmington Trust, National Association, as trustees, as additional plaintiffs.

22 At a September 10, 2013 Richmond City Council meeting, a motion to "direct the city  
23 manager to withdraw any offers made to servicers of mortgage loans to purchase such mortgages  
24 based on fair market value (letters dated July 31, 2013), and to amend the advisory services  
25 agreement with Mortgage Resolution Partners, LLC to eliminate the option of utilizing eminent  
26 domain as an option to acquire mortgages" was rejected by supermajority vote.

27 <http://www.ci.richmond.ca.us/ArchiveCenter/ViewFile/Item/5398> (Item I-1). The Council  
28 passed a motion to work to establish a Joint Powers Authority as an additional avenue to

1 implement Defendants' loan seizure program.

2 **B. Defendants' Statement**

3 The City of Richmond has been considering a public program to address the underwater  
4 mortgage crisis in the City and has made offers to purchase pools of underwater mortgage loans.  
5 The City Council has not adopted a resolution of necessity to authorize the use of eminent  
6 domain authority, and such a resolution could be adopted only after considering the information  
7 presented at a noticed public hearing. At the present time, no hearing has been scheduled. At its  
8 September 10, 2013 meeting, the City Council approved a motion to work on establishing a Joint  
9 Powers Authority with other municipalities to address the underwater mortgage crisis.

10 **III. LEGAL ISSUES**

11 **A. Trustees' Statement**

12 1. Whether Defendants' seizure program violates the "public use" requirements of  
13 the Fifth Amendment to the U.S. Constitution; article I, section 19 of the California Constitution;  
14 and article II, section 19 of the Richmond City Charter.

15 2. Whether Defendants' seizure program violates the prohibitions against  
16 extraterritorial seizures in the Takings, Due Process, and Commerce Clauses of the U.S.  
17 Constitution and section 1240.050 of the California Code of Civil Procedure.

18 3. Whether Defendants' seizure program violates article I, section 8, clause 3 of the  
19 U.S. Constitution (the "Commerce Clause").

20 4. Whether Defendants' seizure program violates article I, section 10 of the U.S.  
21 Constitution (the "Contracts Clause").

22 5. Whether Defendants' seizure program violates the "just compensation"  
23 requirement of the Fifth Amendment to the U.S. Constitution and article I, section 19 of the  
24 California Constitution.

25 6. Whether Defendants' seizure program constitutes tortious interference with  
26 contract.

27 7. Whether Defendants' seizure program meets the requirements for the exercise of  
28 eminent domain in section 1240.030 of the California Code of Civil Procedure, including the

1 requirement that it “planned or located in the manner that will be most compatible with the  
2 greatest public good and the least public injury.”

3 8. Whether Defendants’ seizure program violates article I, section 19(b) of the  
4 California Constitution, which provides that “local governments are prohibited from acquiring by  
5 eminent domain an owner-occupied residence for the purpose of conveying it to a private  
6 person.”

7 **B. Defendants’ Statement**

8 1. Whether a plaintiff that alleges harm that could occur only after formal legislative  
9 action has standing to pursue its claim when that formal legislative action has not occurred and  
10 may never occur.

11 2. Whether a plaintiff that alleges harm that could occur only after formal legislative  
12 action has a ripe claim when that formal legislative action has not occurred and may never occur.

13 **IV. MOTIONS**

14 On September 20, 2013, Defendants filed a motion under Fed. R. Civ. P. 12 (b)(1) (Dkt.  
15 28). Defendants contend that this action is not ripe because the City Council has not passed a  
16 Resolution of Necessity and may never do so. Trustees assert that Defendants’ overt threats to  
17 seize loans through eminent domain present a substantial controversy of sufficient immediacy  
18 and reality to warrant issuance of a declaratory judgment. The hearing on that motion is  
19 scheduled for November 1, 2013.

20 **A. Trustees’ Statement**

21 Trustees anticipate bringing a motion for summary judgment and other pretrial motions  
22 such as motions in limine and discovery motions as necessary or appropriate.

23 **B. Defendants’ Statement**

24 Defendants anticipate that if this action is not dismissed they would bring a motion for a  
25 protective order to preclude discovery that would interfere with the deliberations of the City  
26 Council.

27 **V. AMENDMENT OF PLEADINGS**

28 The Parties propose July 1, 2014 as the deadline for amending pleadings.

1           **A.     Trustees’ Statement**

2           Trustees have requested leave to file an amended complaint in the event the Court grants  
3 Defendants’ motion to dismiss.

4           **B.     Defendants’ Statement**

5           Defendants have argued that leave to amend should be denied for the same reasons that  
6 leave to amend was denied in the related *Wells Fargo v. City of Richmond* case.

7       **VI.   EVIDENCE PRESERVATION**

8           The Parties have reviewed the Guidelines Relating to the Discovery of Electronically  
9 Stored Information. The Parties have not thoroughly discussed preservation of electronically  
10 stored information because Defendants refuse to discuss discovery until after the hearing on their  
11 motion to dismiss.

12       **VII. DISCLOSURES**

13           **A.     Trustees’ Statement**

14           Trustees fully and timely complied with the initial disclosure requirements set forth in  
15 Fed. R. Civ. P. 26(a), notwithstanding Defendants’ unilateral refusal to provide their reciprocal  
16 initial disclosures. Trustees each disclosed (1) the names of individuals likely to have  
17 discoverable information that Trustees may use to support their claims; (2) descriptions of  
18 categories of documents likely to have discoverable information that Trustees may use to support  
19 their claims, and the location of those documents; (3) a statement that that Trustees would  
20 produce documents that establish the attorneys’ fees and costs they seek; and (4) a statement  
21 regarding insurance.

22           **B.     Defendants’ Statement**

23           In light of the Court’s dismissal of the *Wells Fargo* case for lack of jurisdiction,  
24 Defendants object to providing initial disclosures until after their motion to dismiss this action  
25 for lack of subject matter jurisdiction is resolved.

26       **VIII. DISCOVERY**

27           **A.     Trustees’ Statement**

28           Trustees each have served their Rule 26 initial disclosures. They anticipate serving

1 interrogatories, requests for admission, and requests for production of documents. Trustees also  
2 anticipate taking a number of depositions. They do not propose limiting or modifying the  
3 discovery rules.

4 Trustees are unable to submit a proposed joint discovery plan because Defendants  
5 unilaterally refuse to serve their Rule 26(a)(1) initial disclosures, or to even discuss discovery  
6 prior to the hearing on their motion to dismiss.

7 **B. Defendants' Statement**

8 In light of the Court's dismissal of the *Wells Fargo* case for lack of jurisdiction, any  
9 discussion of a discovery plan for this case is premature.

10 **IX. RELATED CASE**

11 On August 26, 2013 (Dkt. 19), the Court deemed this action related to *Wells Fargo,*  
12 *National Association, as Trustee, et al. v. City of Richmond et al.*, case no. 13-cv-03663-CRB.  
13 The *Wells Fargo* case is currently pending before the U.S. Court of Appeals for the Ninth  
14 Circuit, case no. 13-17080. The Parties are not aware of any other related cases or proceedings  
15 pending before another judge of this Court, or another court or administrative body.

16 **X. RELIEF**

17 **A. Trustees' Statement**

18 Trustees' respectfully request that the Court:

19 1. Declare that Defendants' implementation their loan seizure program violates the  
20 Takings Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States;

21 2. Declare that Defendants' implementation of their loan seizure program violates  
22 the Commerce Clause of the Constitution of the United States;

23 3. Declare that Defendants' implementation of their loan seizure program violates  
24 the Contracts Clause of the Constitution of the United States;

25 4. Declare that Defendants' implementation of their loan seizure program violates  
26 Article I, section 19(a) of the Constitution of the State of California;

27 5. Alternatively, declare that Defendants' implementation of their loan seizure  
28 program violates Article I, section 19(b) of the California Constitution;

1           6.       Declare that Defendants’ implementation of their loan seizure program violates  
2 Article II, section 19 of the Richmond City Charter;

3           7.       Declare that Defendants’ implementation of their loan seizure program violates  
4 section 1263.320 of the California Code of Civil Procedure;

5           8.       Declare that Defendants’ implementation of their loan seizure program violates  
6 section 1240.050 of the California Code of Civil Procedure;

7           9.       Declare that Defendants’ implementation of their loan seizure program violates  
8 section 1240.030 of the California Code of Civil Procedure;

9           10.      Declare that Defendants’ implementation of their loan seizure program constitutes  
10 tortious interference with contract;

11          11.      Declare that Defendants’ implementation of their loan seizure program constitutes  
12 a violation of 42 U.S.C. § 1983;

13          12.      Grant preliminary relief enjoining Defendants, their officers, employees, agents,  
14 successors, and assigns from implementing their loan seizure program;

15          13.      Issue a permanent injunction restraining Defendants, their officers, employees,  
16 agents, successors, and assigns from implementing their loan seizure program;

17          14.      Award to Trustees their attorneys’ fees and costs pursuant to 42 U.S.C. § 1988;  
18 and

19          15.      Award to Trustees such other and further relief as this Court may deem just and  
20 proper.

21           **B.       Defendants’ Statement**

22           Defendants request that this case be dismissed for lack of jurisdiction.

23           **XI.     SETTLEMENT AND ADR**

24           Currently, there is no prospect for settlement. The Parties agree that ADR procedures are  
25 impractical given the nature of this declaratory judgment action. ADR Local Rule 3-5 is  
26 inapplicable because the case has not been assigned to the ADR Multi-Option Program.

27           **XII.    CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

28           All parties do not consent to have a magistrate judge conduct all further proceedings



1 including trial and entry of judgment.

2 **XIII. OTHER REFERENCES**

3 The Parties agree that this case is not suitable for reference to binding arbitration, a  
4 special master, or, at this time, the Judicial Panel on Multidistrict Litigation.

5 **XIV. NARROWING OF ISSUES**

6 **A. Trustees' Statement**

7 The issues could be narrowed through summaries of stipulated facts and through trying  
8 the threshold legal issue of the location of the loans first. In addition, if Defendants would  
9 stipulate to providing Trustees sufficient notice before filing a condemnation action, it would  
10 eliminate the need for Trustees to seek a temporary restraining order from the Court.

11 **B. Defendants' Statement**

12 The issues would be narrowed by the dismissal of this case for lack of jurisdiction.

13 **XV. EXPEDITED TRIAL PROCEDURE**

14 The Parties agree that this is not the type of case that can be handled under the Expedited  
15 Trial Procedure of General Order No. 64 Attachment A.

16 **XVI. SCHEDULING**

17 **A. Trustees' Statement**

18 Trustees are unable to submit jointly proposed scheduling dates because Defendants  
19 unilaterally refuse to discuss scheduling until after the hearing on their motion to dismiss.

20 **B. Defendants' Statement**

21 Defendants submit that scheduling should await a ruling on Defendants' pending motion  
22 to dismiss this case for lack of jurisdiction.

23 **XVII. TRIAL**

24 **A. Trustees' Statement**

25 Trustees expect to try this case to the Court and anticipate the trial taking 10-20 days.

26 **B. Defendants' Statement**

27 Defendants are unable to estimate how long it would take to conduct a trial when, at the  
28 present time, there is nothing to have a trial about.

1 **XVIII. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

2 **A. Trustees' Statement**

3 Trustees each have filed the "Certification of Interested Entities or Persons" required by  
4 Civil Local Rule 3-16. The following persons, firms, partnerships, corporations (including  
5 parent corporations) or other entities are known by the Parties to have either (i) a financial  
6 interest in the subject matter in controversy or in a Party to the proceeding; or (ii) any other kind  
7 of interest that could be substantially affected by the outcome of the proceeding: Plaintiffs The  
8 Bank of New York Mellon (f/k/a The Bank of New York) and The Bank of New York Mellon  
9 Trust Company, N.A. (f/k/a The Bank of New York Trust Company, N.A.), as Trustees for the  
10 Trusts listed in Exhibit A to the Second Amended Complaint; The Bank of New York Mellon  
11 Corporation, parent corporation of Plaintiffs The Bank of New York Mellon (f/k/a The Bank of  
12 New York) and The Bank of New York Mellon Trust Company, N.A. (f/k/a The Bank of New  
13 York Trust Company, N.A.); Plaintiff U.S. Bank National Association, as Trustee for the Trusts  
14 listed in Exhibit B to the Second Amended Complaint; U.S. Bancorp, parent corporation of  
15 Plaintiff U.S. Bank National Association; M&T Bank (a/k/a Manufacturers and Traders Trust  
16 Company), parent of Plaintiff Wilmington Trust Company; Wilmington Trust Corporation,  
17 parent of Plaintiff Wilmington Trust, National Association, and of M&T Bank; M&T Bank  
18 Corporation, parent of Wilmington Trust Corporation; any person or entity holding an interest in  
19 the loans listed in Exhibits D, E, and F to the Second Amended Complaint; any person or entity  
20 providing funding for Defendants' seizure program.

21 Defendants MRP and Gordian Sword LLC have failed to comply with Civil Local Rule  
22 3-16. Rule 3-16 requires disclosure of any person with a financial interest in the subject matter  
23 in controversy or in a party to the proceeding. "Financial interest" means, in part, "ownership of  
24 a legal or equitable interest, however small." 28 U.S.C. § 455(d)(4)(i). MRP and Gordian  
25 Sword LLC disclose that "together [they] have about 60 members" (Dkt. 44), yet they do not  
26 identify those members nor any of the investors who have provided the \$46 million to effectuate  
27 Defendants' loan seizure program (Dkt. 34-7 at 34), nor anyone else with a financial interest. At  
28 a minimum, their members have an ownership interest in the LLC and must be disclosed. L.R.

1 3-16(b); 28 U.S.C. § 455(d)(4); Del. Code Ann. tit. 6, § 18-701.

2 Contrary to Defendants' assertions, the Trustees are not required to disclose the identity  
3 of the certificateholders of the trusts because ownership in a common investment vehicle is  
4 expressly excluded from the definition of "financial interest." 28 U.S.C. 455(d)(4)(i); L.R. 3-  
5 16(b).

6 **B. Defendants' Statement**

7 Defendants have filed the "Certification of Interested Entities or Persons" identifying  
8 Mortgage Resolution Partners LLC and Gordian Sword LLC.

9 Defendants submit that if the Trustees were correct about the obligation to identify  
10 investors, then the Trustees should have disclosed the investors in the trusts whose financial  
11 interests the Trustees allege would be impacted by this action. According to media reports, this  
12 action is being brought at the behest of such investors but the Trustees have not disclosed the  
13 parties actually behind this action. The Trustees are misreading 28 U.S.C. 455(d)(4)(1), which  
14 says only that "[o]wnership in a mutual or common investment fund that holds securities is not a  
15 'financial interest' in such securities."

16 Dated: November 1, 2013

Respectfully submitted,

17 MAYER BROWN LLP  
18 DONALD M. FALK  
19 BRONWYN F. POLLOCK  
20 NOAH B. STEINSAPIR  
21 MICHAEL D. SHAPIRO

By: /s/ Bronwyn F. Pollock  
Bronwyn F. Pollock

22 Attorneys for Plaintiffs  
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25 THE BANK OF NEW YORK MELLON TRUST  
COMPANY, N.A.(f/k/a The Bank of New York  
Trust Company, N.A.), as Trustees for the trusts  
listed on Exhibit A of the Second Amended  
Complaint

26 Dated: November 1, 2013

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By: /s/ Brian D. Hershman  
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Dated: November 1, 2013

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WILMINGTON TRUST, NATIONAL  
ASSOCIATION, as Trustees

Dated: November 1, 2013

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CITY OF RICHMOND, RICHMOND CITY  
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PARTNERS L.L.C. and GORDIAN SWORD  
LLC

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**SIGNATURE ATTESTATION**

I, Bronwyn F. Pollock, attest that the concurrence in the filing of this Joint Case Management Statement has been obtained from Brian D. Hershman, Kurt Osenbaugh, and Scott A. Kronland.

By: /s/ Bronwyn F. Pollock  
Bronwyn F. Pollock  
Attorneys for Plaintiffs  
THE BANK OF NEW YORK MELLON  
(f/k/a The Bank of New York) and THE BANK  
OF NEW YORK MELLON TRUST  
COMPANY, N.A. (f/k/a The Bank of New York  
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