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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) and THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. (f/k/a The Bank of New York Trust Company, N.A.), as Trustees; U.S. BANK NATIONAL ASSOCIATION, as Trustee; and WILMINGTON TRUST COMPANY and WILMINGTON TRUST, NATIONAL ASSOCIATION, as Trustees,

Plaintiffs,

v.

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

Defendants.

Case No. CV-13-3664-CRB

NOTICE OF MOTION AND MOTION FOR RULE 11 SANCTIONS

Date: December 13, 2013
Time: 10:00 a.m.
Judge: Honorable Charles R. Breyer
Courtroom 6, 17th Floor

NOTICE OF MOTION AND MOTION

Please take notice that on December 13, 2013 at 10:00 a.m., or such other date and time as the Court may set, in Courtroom 6, 17th Floor, before the Honorable Charles R. Breyer, Defendants will move for sanctions under Federal Rule of Civil Procedure 11 on the grounds that Plaintiffs' counsel have filed and refused to withdraw their Second Amended Complaint, which a reasonable and competent inquiry would have revealed to be legally baseless in that the claims asserted are constitutionally unripe. Further, Plaintiffs' continuation of this lawsuit, over which the Court plainly lacks subject matter jurisdiction, can only be for an improper purpose.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Stacey Leyton, the complete files and records of this action, and such other and further matters as the Court may properly consider.

Dated: November 8, 2013

Respectfully submitted,

/s/ Stacey M. Leyton
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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs filed this case, and specifically the Second Amended Complaint, to challenge the City of Richmond's "substantial steps" toward the exercise of eminent domain authority, even though it is undisputed that the City's legislative body has not adopted the resolution that would be required to authorize the use of eminent domain authority. On September 16, 2013, after calling the ripeness issue a "no-brainer" (Doc. 29-5 at 7:4-5), this Court dismissed the companion case to this one, *Wells Fargo Bank v. City of Richmond*, Case No. 13-03663-CRB, without leave to amend, on the ground that claims challenging the City's steps toward eminent domain were not ripe for adjudication and so the Court lacked subject matter jurisdiction. Doc. 29-8. Even if there could have been any reasonable doubt as to the ripeness of Plaintiffs' claims at the time Plaintiffs filed their Second Amended Complaint (and there should not have been), this Court's ruling resolved any such doubt and Plaintiffs should have dismissed their case.

Accordingly, after this Court's dismissal of *Wells Fargo*, Defendants invited Plaintiffs to dismiss their case voluntarily and pointed out there could be no non-frivolous basis to distinguish the ripeness issues in the two cases. Plaintiffs have nonetheless refused to dismiss their case, the only purpose of which could be to further chill the political and legislative process. Defendants therefore filed a motion to dismiss (Doc. 28) and now hereby seek sanctions pursuant to Federal Rule of Civil Procedure 11. Plaintiffs' counsel have violated Rule 11 by filing and refusing to dismiss voluntarily the Second Amended Complaint, which is being presented for an improper purpose and lacks any factual or legal basis because it is clear that the claims asserted therein are constitutionally unripe. Sanctions should be awarded for this Rule 11 violation.[1]

BACKGROUND

Plaintiffs purport to challenge on federal and state law grounds the City of Richmond's

[1] Defendants have complied with Rule 11's "safe harbor," which requires that the moving party serve a Rule 11 motion at least 21 days prior to filing with the Court. Fed. R. Civ. P. 11(c)(1)(A). Defendants served this motion on Plaintiffs on September 24 and 25, 2013. Declaration of Stacey Leyton, filed herewith, ¶¶2-3. Because Plaintiffs have failed to withdraw the challenged pleading within 21 days after being served with the present motion, Defendants may now file this motion with the Court. Fed. R. Civ. P. 11(c)(1)(A); *see Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1150-51 (9th Cir. 2003).

"Seizure Program," and seek injunctive and declaratory relief. Doc. 20-2. The Second Amended Complaint alleges that "Defendants have taken substantial steps towards implementing the Seizure Program" including entry of an advisory services agreement, public discussion of the program, and issuance of letters making offers to purchase loans, and that "[i]f the offers are not accepted, the City will attempt to quickly seize possession of the loans" by holding a condemnation hearing, filing an eminent domain lawsuit, and using the expedited "quick take" state court procedure. *Id.* ¶¶53-56. They point to "a high likelihood that Defendants will very soon exercise the City's eminent domain powers to seize possession of mortgage loans under the Seizure Program." *Id.* ¶57.

On September 12, 2013, this Court held a hearing on the defendants' motion to dismiss in the related case *Wells Fargo Bank v. City of Richmond*, Case No. 13-3663-CRB, which sought to challenge the very same "substantial steps" taken by Defendants here. At the hearing, the Court noted that "there are a series of steps that are contemplated by the Council to take place before the implementation of a program which would include – or not – eminent domain," and that "if it did" there is a question "whether it would be the City Council doing so or something called a Joint Powers Authority." Doc. 29-5 at 6:4-9. With respect to the ripeness issue, the Court therefore asked, "isn't this – as we say in the trade, a no-brainer?" *Id.* at 7:4-5. After hearing argument from the plaintiffs, the Court then stated its conclusion that the plaintiffs' claims were not ripe for determination and asked the parties to submit briefing on whether the case should be dismissed or stayed. *Id.* at 25.

The next day, the *Wells Fargo* plaintiffs submitted a supplemental brief arguing that the Court's ripeness concerns "properly fall within the rubric of prudential ripeness rather than Article III standing," and urged the Court to hold the case in abeyance rather than dismissing it. Doc. 29-6 at 4:8-10, 6:9-10. In the alternative, the plaintiffs asked the Court to grant leave to amend in order to permit them to assert additional facts and legal theories, or to condition dismissal upon a requirement that the defendants provide thirty days' notice prior to filing any condemnation action. *Id.* at 6:10-7:2 & n.3.

On September 16, 2013, the Court issued an order dismissing the case and an

accompanying judgment. Doc. 29-8, 29-9. The Court held that "Plaintiffs' claims are not ripe for adjudication" so that it lacked subject matter jurisdiction, and "further conclude[d] that it must dismiss the case rather than hold it in abeyance." Doc. 29-8 at 1:20-21, 2:9. The Court also denied leave to amend because "no amendment at this point would cure the lack of subject matter jurisdiction," and held it would not be "appropriate to impose conditions on dismissal" given its lack of jurisdiction. *Id.* at 2 n.3.

Based on this dismissal, Defendants in the instant case asked whether Plaintiffs would agree to voluntary dismissal in order to avoid the need for Defendants to file an unnecessary motion to dismiss. Doc. 29-1 ¶8. Defendants explained that, given the absence of any non-frivolous basis to distinguish the ripeness issues in the two cases, there could be no legitimate purpose to keeping the lawsuit on file and so its only point could be to chill the political process. *Id.* ¶9. Plaintiffs nonetheless informed Defendants that they refuse to voluntarily withdraw their Complaint and that they oppose Defendants' motion for an expedited briefing schedule as well as the request to forego oral argument. *Id.* ¶11. Defendants then filed the motion to dismiss and an *ex parte* motion for an order shortening time and waiving hearing on the motion. Doc. 28, 29.

ARGUMENT

A. Rule 11 Standard

By presenting a pleading to the Court, an attorney certifies, among other things, that "to the best of [his or her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). An attorney also certifies that the pleading "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." *Id.*, 11(b)(1).

Rule 11 is intended "to deter baseless filings in district court." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S. Ct. 2447, 2454, 110 L. Ed. 2d 359 (1990). "'[T]he purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility . . . to validate the truth and legal reasonableness of the papers filed.'" *Bus. Guides,*

Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 547 (1991) (quoting *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989)) (emphasis added); *Stewart v. RCA Corp.*, 790 F.2d 624, 633 (7th Cir. 1986) ("Rule 11 requires lawyers to think first and file later, on pain of personal liability.").

Accordingly, under Rule 11(b)(2), sanctions may be imposed if a pleading is frivolous – that is, if it is "both baseless and made without a reasonable and competent inquiry." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc). "When, as here, a complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it." *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (internal quotation marks omitted). "The reasonable inquiry test is meant to assist courts in discovering whether an attorney, after conducting an objectively reasonable inquiry into the facts and law, would have found the complaint to be well-founded." *Id.* at 677 ((citation omitted). A complaint is legally frivolous if "no reasonable lawyer would have certified that the claims raised in Plaintiff's complaint were 'warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.'" *Truesdell v. S. Cal. Permanente Med. Group*, 293 F.3d 1146, 1153 (9th Cir. 2002) (quoting Federal Rule of Civil Procedure 11(b)(2)).

Similarly, under Rule 11(b)(1), sanctions may be imposed where a filing is made for an "improper purpose." An improper purpose may be a purpose to "harass, cause unnecessary delay, or needlessly increase the cost of litigation," Rule 11(b)(1), and is measured by an objective standard, *Newton v. Thomason*, 22 F.3d 1455, 1464 (9th Cir. 1994) ("Harassment under Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent." (quoting *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986))). The Ninth Circuit has explained that "[w]ithout question, successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11." *G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1110 (9th Cir. 2003) (quoting *Zaldivar*, 780 F.2d at 832) (internal quotation marks omitted). This Court has

previously imposed Rule 11 sanctions where a plaintiff "refused to withdraw his complaint . . . [after] it was objectively apparent that the complaint would fail since his two other nearly identical complaints had failed." *Welbon v. Burnett*, Nos. C 07-4248 CRB, C 07-2992 CRB, C 08-123 CRB, 2008 WL 789896, at *4 (N.D. Cal. Mar. 24, 2008) (Breyer, J.); *see also Wells Fargo Nat'l Bank Ass'n v. Vann*, No. C 12-05725 CRB, 2013 WL 791474, at *2 (N.D. Cal. Mar. 4, 2013) (Breyer, J.) (warning defendant that court could initiate Rule 11 proceedings after party removed case to federal court after it had become clear that there was no basis for subject matter jurisdiction).

As this authority demonstrates, courts are to evaluate the reasonableness of an attorney's conduct from an objective, not a subjective, perspective. *See Holgate*, 425 F.3d at 677; *G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th Cir. 2003) ("The standard governing both the 'improper purpose' and 'frivolous' inquiries is objective."); *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1016 (9th Cir. 1997) ("Counsel . . . may not avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart but an empty head") (quotation marks and citations omitted).

B. Plaintiffs' Counsel Filed a Legally Baseless Complaint for an Improper Purpose

For the same reasons as in *Wells Fargo*, binding authority establishes that the instant case is not ripe as a constitutional matter, and this Court therefore lacks subject matter jurisdiction and must dismiss the case. There can be no dispute that, before the City of Richmond (or a Joint Powers Authority) may exercise eminent domain power, the Richmond City Council (or governing body of the Joint Powers Authority) would need to authorize that exercise of power by adopting, by supermajority vote, a resolution of necessity that would both identify the property to be condemned and state the public purpose necessitating the taking. Cal. Code Civ. P. §§1230.020, 1245.220, 1245.230, 1245.235, 1245.240. Nor can there be any dispute that the City Council has not yet taken this action.[2] Plaintiffs' own complaint describes the "use of the eminent domain

[2] In fact, at its most recent meeting, the City Council "confirm[ed] that no loans will be acquired by the City through eminent domain before coming back to the full City Council for a vote" and directed staff to work to set up a Joint Powers Authority as a next step forward in the development of the program. Doc. 29-7 at 1:6-8.

power" as "contemplated" and contends "there is a high likelihood" that Defendants "will very soon exercise the City's eminent domain powers." Second Amended Complaint (Dkt. 20-2) ¶¶3, 57.

As the Court pointed out at the hearing on the motion to dismiss in *Wells Fargo*, the legislative decision whether to authorize the exercise of eminent domain power is not a "ministerial" act but rather an important part of "the democratic process." Doc. 29-5 at 13:22-15:6; *see also Santa Cruz Cnty. Redevelopment Agency v. Izant*, 37 Cal.App.4th 141, 150 (1995) ("the resolution of necessity is a legislative act"). And the Supreme Court has squarely held that federal courts may not interfere "by any order, or in any mode" with a city council's authority to exercise its legislative power before those legislative powers have been exercised. *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481, 482 (1896); *see also McChord v. Cincinnati, N.O. & Tex. P. Ry. Co.*, 183 U.S. 483, 496-97 (1902); *Associated Gen. Contractors of America v. City of Columbus*, 172 F.3d 411, 415 (6th Cir. 1999).

Therefore, as this Court explained in its order of dismissal in *Wells Fargo*, "[r]ipeness of these claims does not rest on contingent future events certain to occur, but rather on future events that may never occur." Doc. 29-8 at 1:22-23. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cited in order of dismissal at 1 n.1). "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." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir. 1996) (cited in order of dismissal at 1 n.1) (bracketed material and ellipses in court order).

Although the legal claims asserted in this case may differ in some immaterial respects from those in *Wells Fargo*, the lack of ripeness does not depend on the legal basis for the challenge. Rather, it derives from the fact that the legislative action authorizing eminent domain has not yet occurred. The Court recognized this in *Wells Fargo* when holding that "no amendment at this point would cure the lack of subject matter jurisdiction." Doc. 29-8 at 2 n.3.

Plaintiffs can point to no non-frivolous basis for the position that a challenge to a legislative

act that has not yet occurred is constitutionally ripe. To the extent there could be any reasonable doubt, this Court's September 16, 2013 order should have resolved it. Plaintiffs' refusal to dismiss their complaint in light of this authority demonstrates that the purpose of the Second Amended Complaint is improper and warrants Rule 11 sanctions.

C. The Court Should Award Appropriate Sanctions

When imposing Rule 11 sanctions, the Court "may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting . . . the motion." Fed. R. Civ. P. 11(c)(1)(A). The Court may also require the payment of other fees and expenses "incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). In addition, the Court may award other types of sanctions, including "directives of a nonmonetary nature [or] an order to pay a penalty into court." *Id.* "'The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.'" *In re DeVille*, 361 F.3d 539, 553 (9th Cir. 2004) (quoting Fed. R. Civ. P. 11 advisory committee notes (1993)).

Defendants seek both monetary and non-monetary sanctions. A reasonable monetary sanction would be to award Defendants its attorneys' fees incurred in (1) reviewing the Second Amended Complaint and materials related to this case; (2) drafting, filing, briefing, and (if applicable) arguing its Motion to Dismiss and accompanying papers; and (3) drafting, filing, briefing, and (if applicable) arguing the present motion. By compensating for expenses that could have been avoided had Plaintiffs' counsel conducted a reasonable inquiry, this award would deter Plaintiffs, Plaintiffs' counsel, and other parties and attorneys from future Rule 11 violations of the type that occurred here. *See Cooter & Gell*, 496 U.S. at 393 ("any interpretation [of Rule 11] must give effect to the Rule's central goal of deterrence"). When filing the reply brief in support of this motion, Defendants will provide billing records documenting the fees incurred for the tasks described above.

In addition to the monetary sanction, Defendants respectfully request that the Second Amended Complaint be dismissed with prejudice. This non-monetary sanction would further deter

Plaintiffs, Plaintiffs' counsel, and other parties and attorneys from advancing premature claims that no reasonable attorney could conclude are ripe, for improper purposes. *See Bus. Guides, Inc.*, 498 U.S. at 554 (affirming Rule 11 award of monetary sanctions in the amount of legal expenses and out-of-pocket costs in addition to dismissal with prejudice); *Jimenez v. Madison Area Technical College*, 321 F.3d 652, 657 (7th Cir. 2003) (dismissal with prejudice an appropriate Rule 11 sanction where calculated to deter repetition of misconduct or similar conduct by third parties; monetary sanctions also awarded).

The need for deterrence is particularly strong in this case, with multiple unripe cases having already been filed by well resourced plaintiffs in an effort to chill the political process.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court find that Plaintiffs' counsel's filing of the Second Amended Complaint, and refusal to dismiss that complaint voluntarily after this Court's ruling in the related case *Wells Fargo*, violated Rule 11. Defendants further respectfully request that the Court sanction Plaintiffs and Plaintiffs' counsel by requiring them to compensate Defendants for the aforementioned expenses and impose the non-monetary sanction of dismissing Plaintiffs' claims with prejudice.

Dated: November 8, 2013

Respectfully submitted,

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