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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, *et al.*

Defendants.

Case No. 13-cv-3664-CRB

TRUSTEES' OPPOSITION TO MOTION FOR RULE 11 SANCTIONS

Date: January 24, 2014
Time: 10:00 a.m.
Judge: Hon. Charles R. Breyer
Courtroom 6, 17th Floor

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants[1] ask this Court to punish the Trustees[2] for seeking to have their day in court. *See* Notice of Motion and Motion for Rule 11 Sanctions (D.E. #55) ("Sanctions Mot."). Specifically, Defendants ask this Court to take the extreme step of imposing Rule 11 sanctions because, according to Defendants, the Trustees should have known *at the time they filed their complaint* that the Court would dismiss their lawsuit as unripe and therefore the Trustees' lawsuit was frivolous. *Id.* at 5-7.

There is absolutely no merit to Defendants' assertion that the Trustees' lawsuit challenging Defendants' unconstitutional seizure program was frivolous. As demonstrated in the Trustees' opposition to Defendants' motion to dismiss, the Trustees had valid and good faith arguments as to why the substantial and concrete actions taken by Defendants to implement their seizure program were ripe for review by the Court. Although the Court ultimately disagreed with the Trustees' position, that in no way justifies Rule 11 sanctions. Essentially, Defendants ask this Court to transform Rule 11 sanctions from the "rare and exceptional case where the action is clearly frivolous" (*Operating Eng'rs Pension Trust v. A-C Co.,* 859 F.2d 1336, 1344 (9th Cir. 1988), to one where the losing party on a motion to dismiss is automatically subject to punitive sanctions. The Ninth Circuit has expressly cautioned against such a transformation. *See id.*

Defendants also criticize the Trustees for proceeding with their lawsuit after this Court dismissed the complaint in a related case filed by Wells Fargo Bank, National Association, Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (the "Wells Fargo case"). Defendants assert that the Trustees should have voluntarily dismissed their lawsuit, and abandoned efforts on behalf of the trusts to seek adjudication by this Court, because *different* plaintiffs in a *different case* advancing *different legal and factual arguments* failed to

[1] Defendants the City of Richmond ("City" or "Richmond"), Richmond City Council, Mortgage Resolution Partners L.L.C. ("MRP"), and Gordian Sword LLC are referred to collectively as "Defendants."

[2] Plaintiffs The Bank of New York Mellon, The Bank of New Mellon Trust Company, U.S. Bank National Association, Wilmington Trust Company, and Wilmington Trust, National Association are referred to collectively as the "Trustees."

convince the Court as to the ripeness of their claims.

Defendants' assertion is mistaken for multiple reasons. As a matter of law, the decision in the Wells Fargo case was *not* binding authority on this Court (or any other court for that matter). *See Camreta v. Greene,* 131 S. Ct. 2020, 2033 n.7 (2011). The Trustees had every right to zealously pursue the trusts' rights in this case in an effort to protect the trusts' assets from Defendants' unlawful seizure program.

Moreover, as this Court recognized, Defendants' arguments were *different* from those advanced in the Wells Fargo case. The Wells Fargo plaintiffs focused on ripeness for the preliminary injunction they sought and the harm that would be caused by the City filing an eminent domain lawsuit. In contrast, here, the Trustees focused on the *threat* of litigation embodied in the July 31 offer letters, which threats already had occurred and were sufficiently concrete to permit the Court to issue a declaratory judgment. *See* Declaration of Brian D. Hershman in Support of Trustees' Opposition to Motion for Rule 11 Sanctions ("Hershman Decl."), ¶ 2, Ex. A at 13:21-14:7 (motion to dismiss hearing transcript). The Trustees contended (and still contend) that the decision of the City Council to send the offer letters, followed by the supermajority vote by the City Council not to revoke the offer letters, was sufficient to meet the standard for Article III ripeness. The Trustees had every right to pursue this approach, notwithstanding the lack of success of the Wells Fargo plaintiffs in advancing different legal arguments and theories.

Further, Defendants' unsupported assertion that the Trustees are seeking to chill the political process is backwards. The Trustees have a First Amendment right to petition the government, including by filing a lawsuit challenging Defendants' unconstitutional seizure program. *See Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances . . . ."). The notion that a party should be punished for challenging governmental action because it might "chill" the government is antithetical to the democratic process. Rather, what is "chilling" is Defendants' attempt to use Rule 11 to deter the Trustees from exercising their rights and to stamp out vigorous debate over Defendants' seizure program.

Such attempts are a plainly improper abuse of Rule 11.

The Trustees were confronted with a novel and plainly unconstitutional effort by Defendants to take the mortgage loans and cause immense harm to the trusts. After observing numerous concrete steps by Defendants to implement their seizure program (detailed below), including a letter threatening to initiate eminent domain proceedings if offers to purchase were not accepted, the Trustees, acting on behalf of the trusts, elected to seek review by this Court. After engaging the parties' counsel in a spirited and thoughtful exchange at oral argument, this Court concluded that the claims are not yet ripe. But it is a tremendous leap from that conclusion to a finding that the Trustees were acting frivolously and for an improper purpose. This Court should not chill zealous and good faith advocacy by condoning Defendants' efforts to seek Rule 11 sanctions, and should instead deny Defendants' motion.

STATEMENT OF ISSUE TO BE DECIDED

Whether Defendants' motion for Rule 11 sanctions should be denied.

PROCEDURAL BACKGROUND

To fully understand why the Trustees' actions were neither frivolous nor brought for an improper purpose, it is important to understand the procedural history and the factual background which prompted the Trustees to file this action on behalf of the trusts.

A. The Initiation of the Seizure Program

Over the last two years, mayors and city councils throughout the United States have been considering the merits and legality of utilizing eminent domain to seize residential mortgage loans. For the most part, these discussions remained theoretical, as every city council to consider the issue rejected the option; many citing concerns about the Constitutionality of such a seizure program and/or because of the risks associated with such a venture. *See* Hershman Decl., ¶¶ 3-4, Exs. B, C (collection of news articles). That remained the case until earlier this year, when Richmond became the first city to take concrete steps to implement MRP's seizure program.

First, on or about April 2, 2013, Richmond entered into an "Advisory Services Agreement" with MRP, engaging MRP to, among other things, advise the City regarding the acquisition of mortgage loans through eminent domain. *See* Hershman Decl., ¶ 5, Ex. D (Advisory Services Agreement). The Advisory Services Agreement was supported by the City Manager, and approved by the City Council by a vote of 6-0, with one council member absent. *See id.*, ¶ 6, Ex. E at 7-8 (Richmond City Council minutes for April 2, 2013 meeting). Notably, the approval was by a supermajority of the City Council – the same number of votes needed to adopt a resolution of necessity and initiate eminent domain proceedings. *See* Cal. Civ. Proc. Code § 1245.240.

Second, on or about June 28, 2013, defendant MRP sent warning letters to financial institutions throughout the United States, stating that "underwater" mortgage "loans *would be acquired* as part of a public program." *See, e.g.*, Hershman Decl., ¶¶ 7-8, Ex. F (June 28, 2013 MRP letter to The Bank of New York Mellon and The Bank of New York Mellon Trust Company), Ex. G (June 28, 2013 MRP letter to U.S. Bank National Association).

Third, Defendants hired a third party to appraise more than 624 loans held by the Trustees and other trustees and servicers. *See id.*, ¶¶ 9-11, Ex. H (City of Richmond July 31, 2013 "offer letter" to The Bank of New York Mellon and The Bank of New York Mellon Trust Company), Ex. I (City of Richmond July 31, 2013 "offer letter" to U.S. National Bank Association), Ex. J (City of Richmond July 31, 2013 "offer letter" to Wilmington Trust Company and Wilmington Trust National Association). The stated purpose of the appraisal was to allow Richmond to determine the fair market value of the residential loans so that Richmond could make formal offers to purchase the loans – a prerequisite to initiating eminent domain proceedings. *See* Cal. Gov. Code § 7267.2(a)(2).

Fourth, on or about July 31, 2013, the City sent threatening letters to approximately 32 trustees and servicers of residential mortgage backed securitization ("RMBS") trusts, including the Trustees. *See* Hershman Decl., ¶¶ 9-11, Exs. H, I, J. In the letters, the City offered to purchase specifically identified targeted loans, held in specifically identified trusts, at specifically identified prices, including trusts administered by the Trustees. *See* Hershman Decl., ¶¶ 9-11, Exs. H, I, J. The City notified each Trustee that a third party had appraised the mortgage loans and that the offer purportedly represented the fair market value of the loans. *See* Hershman Decl., ¶¶ 9-11, Exs. H, I, J. Significantly, the City warned that, if the Trustees refused the offers, the City could "proceed with the acquisition of the Loans through eminent domain." Hershman Decl., ¶¶ 9-11, Exs. H, I, J.

Richmond's decision to send the July 31, 2013 letters was the final straw. The Trustees were convinced that Defendants' seizure program violated numerous provisions of the United States and California Constitutions, as well as other federal and state laws, and that the actions taken to date by Richmond had caused cognizable harm. The Trustees decided to seek judicial review with respect to the Constitutionality of the program before further harm ensued to the trusts. On August 7, 2013, The Bank of New York Mellon filed this action seeking declaratory and injunctive relief and asserting that the seizure program was unlawful. *See* Complaint (D.E. #1). The other trustees joined the action shortly thereafter, and the Trustees filed the Second Amended Complaint (D.E. #36) ("SAC") on August 26, 2013, pursuant to a stipulation with

Defendants. *See* Stipulation for Filing of SAC (D.E. #17).

B. The Related Wells Fargo Case

The Trustees were not the only trustees to receive threatening letters from the City in connection with the seizure program. Wells Fargo Bank, National Association, Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (each, as trustee) also received letters on or about July 31, 2013, offering to purchase specifically identified targeted loans, and warning that the City may commence eminent domain proceedings if the offers to purchase were rejected. *See* Complaint (D.E. #1) at ¶ 66, *Wells Fargo Bank, Nat'l Ass'n, et al. v. City of Richmond, California, et al.*, No. 3:13-cv-03663 (N.D. Cal. 2013).

On August 7, 2013, the Wells Fargo plaintiffs filed a complaint against the City and MRP seeking declaratory and injunctive relief and asserting that the City's seizure program violated the United States and California Constitutions. *See* Complaint at ¶ 1, *id.* Not only did the Wells Fargo plaintiffs file a complaint, they simultaneously filed a motion for preliminary injunction seeking to stop the City's seizure program in its tracks. *See* Motion for Preliminary Injunction (D.E. #8), *id.*

Significantly, after the Wells Fargo plaintiffs filed their complaint and just two days before the preliminary injunction/motion to dismiss hearing, the Richmond City Council considered and voted on three resolutions related to the seizure program. *See* Hershman Decl., ¶ 12, Ex. K at 7-9 (Richmond City Council minutes for September 10, 2013 meeting). First, the council voted to pursue the formation of a Joint Powers Authority with other municipalities to effectuate the seizure program. *See id.* Second, the council rejected, by a supermajority vote, a resolution to withdraw the July 31, 2013 offer letters and terminate the seizure program. Third, the council rejected a resolution to refrain from further implementing the seizure program until MRP could provide adequate insurance. *See id.* The outcome of the votes on each resolution demonstrate that the council was undeterred by the filing of the Wells Fargo action and this case, and that there was no "chilling" on the legislative process in Richmond.

On September 12, 2013, the Court held a hearing on the Wells Fargo plaintiffs' motion for preliminary injunction and Defendants' motion to dismiss the Wells Fargo complaint. On

September 16, 2013, the Court entered its order dismissing the Wells Fargo case without prejudice, finding that the claims were not ripe for adjudication. *See* Order on Defendants' Motion to Dismiss (D.E. # 78), *Wells Fargo Bank, Nat'l Ass'n, et al.*, No. 13-cv-03663.

C. The Rule 11 Correspondence

After the hearing on the motion for preliminary injunction/motion to dismiss in the Wells Fargo case, but before the Court issued any ruling, Defendants contacted the Trustees' counsel and demanded that the Trustees voluntarily dismiss their complaint with the threat that, if they did not, Defendants would file an expedited motion to dismiss and "consider pursuing Rule 11 remedies." *See* Decl. of S. Leyton in Supp. of Motion for Rule 11 Sanctions (D.E. #55-1) ("Leyton Decl."), ¶ 2, Ex. A.[3]

In response, the Trustees declined to dismiss their case, but agreed to provide Defendants the professional courtesy of extending the time for Defendants to respond to the SAC. *See id*. Defendants accepted the Trustees' offer, and the parties stipulated to a 15-day extension for Defendants to file their responsive pleading. *See* Stipulation to Extend Time to Answer Complaint (D.E. #23).

Thereafter, on September 24, 2013, Defendants sent a draft Rule 11 motion threatening to seek sanctions and an order dismissing the case with prejudice if the Trustees persisted in seeking an adjudication by the Court with respect to Defendants' motion to dismiss. *See* Leyton Decl., ¶¶2-3. The Trustees responded by explaining that Defendants' Rule 11 threat was improper because, among other things, Defendants stipulated to the filing of the SAC, the arguments being advanced by the Trustees were different from those raised by the Wells Fargo plaintiffs, and the lawsuit was not being pursued for an improper purpose. *See* Hershman Decl., ¶ 13, Ex. L (October 15, 2013 letter from M. Martel to S. Leyton). Finally, the Trustees reminded

[3] In addition to threatening Rule 11 sanctions, Defendants indicated that, if the Trustees would not voluntarily dismiss, Defendants intended to file an *ex parte* application to advance the hearing on the motion to dismiss and to request that the Court rule without a hearing. *See* Leyton Decl., ¶ 2, Ex. A. The Trustees declined to accede to Defendants' demands, and Defendants thereafter filed their *ex parte* application for an order shortening time and waiving hearing on the motion. *See* Defs' Ex Parte Motion to Shorten Time and Forego Hearing (D.E. #29). Both of Defendants' requests were denied by the Court. *See* Order Denying Defendants' Ex Parte Motion to Shorten Time (D.E. #33).

Defendants that if they followed through on their threat and filed a Rule 11 motion, "the Court may, following denial of the motion, award the Trustees their 'reasonable expenses, including attorney's fees, incurred for the motion'" pursuant to Fed. R. Civ. P. 11(c)(2). *Id.*

D. The Motion to Dismiss Hearing In This Action

On November 1, 2013, the Court held a hearing on Defendants' motion to dismiss in this action. The Court noted the differences between the arguments that the Wells Fargo plaintiffs made and those being advanced by the Trustees:

> THE COURT: So that's the issue. It's different. You have your letters out there. You're threatening litigation that's very real, and therefore they should be able to argue for declaratory relief because of that distinction. How that distinguishes it from the other proceedings we've had, I'm not sure it distinguishes -- it may be now there's a different argument that's being advanced -- I'm not sure that argument couldn't have been advanced the last time around, but it wasn't. Not to the extent that they've advanced it anyway.
>
> MR. FALK: We weren't here, your Honor.
>
> THE COURT: They weren't here. New day. New lawyer. New argument. There we go. Okay.
>
> Hershman Decl. ¶ 2, Ex. A at 13:21-14:7.

After further discussion, the Court honed in on the distinctions between the Wells Fargo plaintiffs' arguments and the Trustees' arguments. In particular, the Wells Fargo plaintiffs focused on events that had not yet occurred (the passage of a resolution of necessity and the filing of an eminent domain action) and asserted that those events were a foregone conclusion. The Trustees, on the other hand, asserted that their claims were ripe because of actions *already taken* by the City Council, namely the decision to send the July 31, 2013 letters threatening to initiate eminent domain proceedings if offers to purchase were not accepted and the Council's recent vote not to withdraw the letters. *Id.* at 11:19-13:19. Those votes *already had occurred,* and the Trustees asserted that the threatening letter was, in and of itself, causing harmful uncertainty that justified declaratory relief. *Id.* at 15:25-16:16. As the Court explained:

> THE COURT: Well, I think counsel's argument, as I understand it, is -- you're both right and wrong. He would say, Of course, we're very concerned about the ultimate harm that would occur if these proceedings proceeded. That is, in fact, if

> eminent domain proceeded. Yes, that would be terrible. That would be very harmful. But he says, But that doesn't mean that because the horrible thing has yet to occur, that something harmful is not occurring right now. And he's saying that -- as I understand it -- he's saying, The very -- the fact is that the city has notified, as I understand it, notified individuals or homeowners that their house may be subject to these proceedings -- is that correct? I haven't seen the letter; I don't know what's actually gone out.
>
> MR. FALK: Notified the trustees of all the loans that they propose to take.
>
> THE COURT: And that's the harm -- and that's a harm in and of itself that makes it ripe for determination.
>
> *Id.*

After taking the matter under submission, the Court issued a detailed Order explaining why, in the Court's view, the arguments being advanced by the Trustees still were insufficient to establish Article III ripeness. *See* Order Granting Defendants' Motion to Dismiss (D.E. #53). But at no point during the contested, lengthy oral argument or in the Court's written Order did the Court suggest, much less assert, that the Trustees' ripeness arguments were frivolous or somehow improper. On the contrary, the Court concluded the oral argument by indicating he understood the arguments, would go back and take a look at the exhibits the Trustees referenced during the oral argument, and thanked counsel for the debate, noting the Court "appreciate[d] it." Hershman Decl. ¶ 2, Ex. A at 29:12-30:8.

ARGUMENT

A. Rule 11 Standard

As the Ninth Circuit has recognized, "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution." *Operating Eng'rs*, 859 F.2d at 1344. Therefore, courts should "reserve sanctions for the rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Id.*

Moreover, because the primary duty of an attorney is to represent his or her client zealously, Rule 11 must be construed in a manner that does not create a conflict with the attorney's obligations. *Id.* While the goal of Rule 11 is to deter plainly frivolous conduct, the Rule must be read "'in light of concerns that it will spawn satellite litigation and chill vigorous

advocacy[.]'" *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996) (quoting *Cooter & Gell v. Hartmarx Corp. et al.*, 496 U.S. 384, 393 (1990)).

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). As a matter of law, a complaint cannot form the basis for Rule 11 sanctions when it is "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); *see also Holgate*, 425 F.3d at 676. Further, "[a]lthough the 'improper purpose' and 'frivolousness' inquiries are separate and distinct, . . . with regard to complaints which initiate actions, . . . such complaints are not filed for an improper purpose if they are non-frivolous." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990).

B. The Trustees' Complaint Was Neither Frivolous Nor Filed For an Improper Purpose

In deciding whether a complaint is frivolous for Rule 11 purposes, it is well-established that the Court's inquiry must focus on the attorney's conduct in light of the situation which existed when the allegedly frivolous document was filed. *See Hamer v. Career Coll. Ass'n*, 979 F.2d 758, 759 (9th Cir. 1992). The type of hindsight analysis that Defendants ask this Court to engage in is expressly forbidden. *See Cunningham v. Cnty. of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988) (reversing the imposition of Rule 11 sanctions as improper because the claims were not frivolous *at the time of filing*). Thus, for purposes of Rule 11, this Court must examine the status at the time the Trustees filed the complaint; i.e. *before* this Court's ruling in the Wells Fargo action.

Applying this standard, Rule 11 sanctions plainly are not warranted. As an initial matter, Defendants' position is puzzling in light of the fact that Defendants *stipulated* to the filing of the SAC. *See* Stipulation for Filing of SAC. Defendants fail to explain why they stipulated to the filing of the SAC if, as they now contend, they believed that the SAC was frivolous and being

filed for an improper purpose.

Second, the Trustees' challenge to Defendants' unconstitutional seizure program plainly was not frivolous. At the time the Trustees filed their lawsuit, the City had taken substantial and concrete steps to implement their program: (1) the City contracted with MRP to assist with the acquisition of mortgage loans through eminent domain; (2) the City hired third parties to appraise the loans so that offers could be made and, if rejected, eminent domain proceedings initiated; and (3) the City sent letters to the Trustees offering to purchase specifically identified loans and threatening to initiate eminent domain proceedings if the offers were not accepted. Under these circumstances, the Trustees' efforts to seek a judicial declaration can in no way be seen as frivolous or improper.

Third, although Defendants assert that there should not have been "any reasonable doubt" that the Trustees' claims were not ripe at the time the action was commenced (Sanctions Mot. 1), Defendants did not and cannot cite any definitive authority holding that a declaratory relief action is not ripe in this unique context. On the contrary, the precise issue here is unsettled. The Trustees cited substantial authority in their opposition to Defendants' motion to dismiss demonstrating that, in similar situations, courts have permitted declaratory relief actions and found that such challenges, in the face of threatened litigation, were ripe. The Trustees understand that the Court rejected these arguments, concluding that different ripeness rules apply when the threat of litigation—like other significant municipal action—could be carried out only after legislative action. *See* Order Granting Defendants' Motion to Dismiss at 4-5. But the fact that the Court disagreed with the Trustees does not mean that the law is not unsettled, much less that Rule 11 sanctions are appropriate. The Ninth Circuit has clarified that Rule 11 is limited to the "rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Operating Eng'rs,* 859 F.2d at 1344. None of those elements are present here.

Moreover, this is not a case where, as in those relied on by Defendants (Sanctions Mot. 5), pro se plaintiffs filed successive complaints without conducting appropriate inquiry. Here, experienced attorneys from four different well respected law firms evaluated Defendants' actions

and determined that a declaratory relief action was ripe for review. Again, the fact that the Court concluded to the contrary does not mean the arguments advanced by these attorneys and law firms were frivolous or improper.

Finally, Defendants' unsupported assertion that the Trustees refused to dismiss the SAC to "further chill the political and legislative process" (Sanctions Mot. 1,3,8) is simply wrong and, paradoxically, describes precisely what Defendants' baseless sanctions motion is seeking to achieve. The First Amendment right to petition the government, including the courts, is one of "the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); *see also Bill Johnson's Rests., Inc.*, 461 U.S. at 741, and protects "petitioning whenever it is genuine, not simply when it triumphs," *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002). Further, "even unsuccessful but reasonably based suits advance some First Amendment interests" in that they "raise matters of public concern." *Id.* Here, far from "chilling" government action, the Wells Fargo case and this case prompted the City Council to engage in further debate about the merits of the seizure program. *See* Hershman Decl., ¶ 12, Ex. K, at 9. And it is evident that this debate did not "chill" the political and legislative process. *After* the filing of the Wells Fargo case and this case, Richmond held three council votes related to its loan seizure program, and each vote reaffirmed the City's intention to move forward. *See* Hershman Decl., ¶ 12, Ex. K at 9. In fact, it is Defendants' abuse of Rule 11 that is improperly attempting to "chill" protected First Amendment activity by the Trustees. The Trustees had every right to challenge Defendants' unconstitutional seizure program, including by petitioning the government through this lawsuit. Rule 11 sanctions should not be used to chill such activity. *See Allstate Ins. Co. v. Tricare Mgmt. Activity*, 662 F. Supp. 2d 883, 896 (W.D. Mich. 2009) ("[Because] the First Amendment articulates a general right to petition the government, including the courts[,] . . . [s]anctions must not be applied to constrain novel or weak arguments that nonetheless have an arguable basis in fact and law.").

C. The Trustees Acted Properly In Opposing Defendants' Motion to Dismiss

As shown, the Trustees' lawsuit was proper at the time it was filed in this Court. Nevertheless, Defendants assert that the Trustees should have abandoned their claims after this

Court ruled in the Wells Fargo action that the Wells Fargo plaintiffs' lawsuit was not ripe. According to Defendants, the Trustees were precluded from attempting to advance arguments to distinguish their case, and instead should have simply dismissed their claims and foregone any appeal. Defendants assert that the Trustees' insistence that they have their day in court to protect the trusts' assets warrants Rule 11 sanctions. Defendants are mistaken for several reasons.

To begin, as a matter of law, the decision in the Wells Fargo case was *not* binding authority on this Court (or any other court for that matter). As noted by the Supreme Court in *Camreta,* 131 S. Ct. at 2033 n.7 (2011), "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district or even upon the same judge in a different case." (Internal quotation marks omitted.) Indeed, in a case with a nearly identical procedural posture as this one, the court declined to impose Rule 11 sanctions where the defendants filed a motion to dismiss essentially identical to one denied by the same court in a case with different defendants. *Long v. Marubeni Am. Corp.,* 406 F. Supp.2d 285, 303 (S.D.N.Y. 2005). The court held that: "While it may be predictable that the author of that opinion would reject defendants' motion, [the court's previous decision] is a district court opinion, and is not a binding precedent. . . . Defendants are perfectly entitled to challenge its correctness, in order to preserve their apparent disagreement with its conclusion for appellate review." *Id.*; *see also Federal Savings & Loan Ins. Corp v. Molinaro*, 923 F.2d 736, 739 (9th Cir. 1991) (reversing sanctions order because, although prior rulings with respect to *other property owners* had arguably foreclosed the plaintiff's claims, "none of the preceding orders in the litigation ever adjudicated [defendant's] claim to the property" at issue).

Moreover, here (unlike in *Long* and *Molinaro*), the Trustees made good faith arguments that were different than those advanced in the Wells Fargo case, and the Trustees had the right to attempt to persuade the Court as to the merits of the Trustees' arguments. In particular, the Trustees asserted that the City's July 31, 2013 letters placed them in reasonable apprehension of suit, which under the test set forth in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), was sufficient for ripeness purposes. Although the Court ultimately granted the motion to dismiss, the Court's conclusion was far from foregone, and the Trustees were "perfectly entitled"

to advance arguments in an unsettled area of law. *Long*, 406 F. Supp.2d at 303. Further, even if the area were settled, the Trustees were likewise entitled to advance arguments to "extend[], modify[], or revers[e] existing law or [to] establish[] new law" (Fed. R. Civ. P. 11(b)(2)), which is what occurred in *MedImmune* itself. Indeed, at the hearing on the motion to dismiss, the Court did not chastise counsel for wasting the Court's time. On the contrary, the Court recognized that the arguments being advanced by the Trustees were "different," agreed to take a fresh look at the evidence, and indicated that the Court "appreciate[d]" the parties' oral presentations. Hershman Decl. ¶ 2, Ex. A at 13:21-14:7, 30:8.

Finally, the cases relied on by Defendants to suggest that Rule 11 sanctions are warranted are wholly inapposite. In *Welbon v. Burnett*, Nos. 07-4248, 07-2992, 08-123, 2008 WL 789896 (N.D. Cal. Mar 24, 2008), a pro se plaintiff filed successive, frivolous lawsuits arising from the same dispute. The court sanctioned the pro se plaintiff because he filed a complaint after numerous courts (including the same district court) had dismissed several identical complaints previously filed by the plaintiff. *Id*. at *4. The Trustees here have only filed one lawsuit and have not presented their claims to any other court.

Defendants also misplace reliance on *Wells Fargo Nat'l Bank Ass'n v. Vann*, No. 12-05725, 2013 WL 791474 (N.D. Cal. Mar. 4, 2013), the holding of which, if anything, confirms that sanctions should not be imposed. In *Vann*, the pro se defendant on two occasions removed the exact same unlawful detainer case, even though the Court explained on the first occasion that it did not have jurisdiction to hear the matter. *Id.* at *1. The Court found that the defendant removed the case *in bad faith* because case law precedents and its own previous order "unequivocally prohibit[ed] removal under the circumstances of th[e] case." *Id.* at *2. Even under those significantly different circumstances, the Court *declined to award Rule 11 sanctions*. Here, the Trustees were not acting in bad faith, advanced different legal arguments from the Wells Fargo plaintiffs, and their lawsuit had never been addressed by any court prior to this Court's November 6 decision. There is no basis to impose Rule 11 sanctions.

D. Defendants' Request for Sanctions Is Improper

As shown, Defendants come nowhere near satisfying the standard for imposing Rule 11

sanctions. Moreover, there is no basis for the specific relief being sought. Defendants seek attorney's fees for (1) reviewing the SAC and "materials related to this case"; (2) briefing and arguing the motion to dismiss; and (3) briefing and arguing the motion for sanctions. Sanctions Mot. 7. Yet Defendants refuse to provide supporting documentation for the purported fees incurred, instead indicating that they will do so "[w]hen filing the reply brief." *Id.* Because almost all of this information was available when Defendants filed their motion, the only purpose in waiting until the reply brief is to prevent the Trustees from evaluating the data and responding in their opposition. Such gamesmanship should not be tolerated. *See Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993) (presenting new information in a reply is improper and deprives the opposing party of an opportunity to respond).

Defendants also request that the SAC be dismissed with prejudice. Sanctions Mot. at 7-8. However, the Court has already dismissed the SAC without prejudice, and Defendants cite no authority for the proposition that this Court can subsequently convert the dismissal to one with prejudice.[4] Regardless, the request is plainly inappropriate. It is unclear what Defendants are specifically requesting, but to the extent Defendants are asking the Court to forever bar the Trustees from challenging the Constitutionality of an eminent domain action initiated by the City, such a sanction plainly does not comport with due process. Defendants previously represented to this Court that the Trustees' claims were not ripe because the City may never adopt a resolution of necessity, may never initiate eminent domain proceedings, and if they do go forward it is unknown what form such actions will take. To request that the City be given carte blanche to take such actions without allowing judicial review is patently absurd.

Finally, as Defendants themselves point out, when deciding whether to impose Rule 11 sanctions, the Court "may award to the *prevailing party* on the motion the reasonable expenses and attorney's fees incurred in presenting . . . the motion." Sanctions Mot. 7 (emphasis supplied).

[4] To the extent Defendants are seeking reconsideration of the Court's dismissal without prejudice, Defendants meet none of the criteria for reconsideration. *See Sch. Dist. No. 1J, Multnomah Cnty., Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) ("Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.").

As shown, neither the filing of the SAC nor the opposition to the motion to dismiss were frivolous, and the Trustees should prevail on this Rule 11 motion.[5]

CONCLUSION

For the foregoing reasons, the Trustees respectfully request that the Court deny Defendants' motion for Rule 11 sanctions.

Dated: November 22, 2013

JONES DAY
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By: /s/ Brian D. Hershman
Brian D. Hershman

Attorneys for Plaintiff
U.S. BANK NATIONAL ASSOCIATION, as Trustee for the trusts listed on Exhibit B to the Second Amended Complaint

Dated: November 22, 2013

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[5] The Court has the discretion to award the Trustees their reasonable fees as the prevailing party. Fed. R. Civ. P. 11(c)(2).

Dated: November 22, 2013

ALSTON & BIRD LLP
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Whitney Chelgren

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Kurt Osenbaugh

Attorneys for Plaintiffs
WILMINGTON TRUST COMPANY and WILMINGTON TRUST, NATIONAL ASSOCIATION, as Trustees for the Trusts listed in Exhibit C to the Second Amended Complaint

SIGNATURE ATTESTATION

I, Brian D. Hershman, attest that the concurrence in the filing of this Trustees' Opposition to Motion for Rule 11 Sanctions has been obtained from Kurt Osenbaugh and Bronwyn F. Pollock.

Dated: November 22, 2013

JONES DAY

By: /s/ Brian D. Hershman
Brian D. Hershman

Attorney for Plaintiff
U.S. BANK NATIONAL ASSOCIATION, as Trustee for the trusts listed on Exhibit B to the Second Amended Complaint

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