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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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RULE 11 SANCTIONS

Date: January 24, 2013
Time: 10:00 a.m.
Judge: Honorable Charles R. Breyer
Courtroom 6, 17th Floor

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INTRODUCTION

California law makes legislative action a necessary prerequisite for the exercise of eminent domain authority. As such, there is simply no good faith argument that a federal court has jurisdiction to consider whether the exercise of such eminent domain power would be constitutional when the requisite legislative action has not occurred. This is not an "unsettled" issue. There is a United States Supreme Court case that is directly on point, and Plaintiffs have never cited *any case* permitting the exercise of jurisdiction in such circumstances.

Plaintiffs Bank of New York Mellon, *et al.* (the "Banks") must have been aware that the Court lacked subject matter jurisdiction when they filed their complaint. To the extent that they did not spot the lack of jurisdiction before they filed, it was made apparent to them by the legal briefing and this Court's decision that it lacked subject matter jurisdiction over the substantially identical lawsuit, *Wells Fargo Bank v. City of Richmond*, Case No. 13-03663-CRB. Nonetheless, the Banks rejected Defendants' repeated requests that the Banks withdraw their complaint without prejudice and required Defendants and the Court to expend resources to address an objectively frivolous case. The Banks' conduct can only be understood as an intimidation tactic by well-financed parties to improperly use the federal courts to chill the on-going political and legislative process in the City of Richmond. Sanctions are appropriate and necessary to deal with such tactics.

ARGUMENT

I. Defendants' Motion to Dismiss Did Not Present an "Unsettled" Issue

In Trustees' Opposition to Motion for Rule 11 Sanctions (Doc. 59) ("Opposition"), the Banks argue that the issue presented by Defendants' Motion to Dismiss (Doc. 28) is "unsettled." Opposition at 8, 11. This is not so. As Defendants have repeatedly demonstrated in this case and in the related *Wells Fargo* case,[1] federal courts lack jurisdiction to consider challenges to

[1] *See* Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 28); Reply in Support of Motion to Dismiss (Doc. 42); Defendants' Opposition to Motion for Preliminary Injunction (*Wells Fargo*, Doc. 32); Defendants' Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction (*Wells Fargo*, Doc. 38); Defendants' Reply

prospective government conduct requiring legislative action that has not occurred. Indeed, there is a United States Supreme Court decision directly on point. In *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471 (1896), the Supreme Court held that the federal courts may not interfere "by any order, or in any mode" with a city council's authority to exercise its legislative powers *before* those legislative powers have been exercised, *id.* at 481; *see also id.* ("If an ordinance be passed . . . the jurisdiction of the courts *may then* be invoked." (emphasis supplied)). The claim in *New Orleans* was exactly like the claim here in that the plaintiff alleged it would suffer injury from an allegedly unconstitutional ordinance that had not yet been passed; the Supreme Court held dismissal of the case was required.[2]

In repeated rounds of briefing and two oral arguments, neither the Banks in this case nor those in the *Wells Fargo* case have cited a single decision that permits the exercise of federal court jurisdiction over government conduct requiring legislative action that has not occurred.[3] Rather, the Banks' approach throughout these two cases, including in their Opposition to Defendants' Motion for Rule 11 Sanctions, has been to ignore the fundamental separation of powers issue animating the Constitutional ripeness and standing doctrines applicable here and to cite cases, such as *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), that do not involve the need for legislative action before the threatened constitutional injury can occur. *See* Opposition at 10-11.

Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction (*Wells Fargo*, Doc. 54).

[2] Federal courts have been consistent in enforcing this jurisdictional bar. *See, e.g., McChord v. Cincinnati, N.O. & Tex. P. Ry. Co.*, 183 U.S. 483, 496-97 (1902) (federal courts lack jurisdiction before the legislative action has occurred; "[t]he fact that . . . the legislative action threatened may be in disregard of constitutional constraints . . . does not affect the question" (citation, internal quotation marks omitted)); *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 415 (6th Cir. 1999) ("The *New Orleans* Court made clear that the role of the court is to intervene, if at all, only after a legislative enactment has been passed."); *FrontierVision Operating Partners, L.P. v. Town of Naples, Maine*, No. 01-16-P-DMC, 2001 WL 220192, at *7 (D. Me. Mar. 7, 2001) ("Unless and until the defendant enacts an ordinance . . . this court may not consider an application for injunctive relief . . . concerning such an ordinance.").

[3] *See* Plaintiffs' Opposition to Motion to Dismiss (Doc. 34); Opposition to Motion for Rule 11 Sanctions (Doc. 59); Plaintiffs' Notice of Motion and Motion for Preliminary Injunction (*Wells Fargo*, Doc. 8); Plaintiffs' Reply Memorandum in Further Support of Motion for Preliminary Injunction (*Wells Fargo*, Doc. 45); Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss (*Wells Fargo*, Doc. 46).

There was no other approach for the Banks to take in briefing except to divert attention from the relevant legal issue because it was clear before this case was filed that the Court could not exercise subject matter jurisdiction over the Banks' claims under the governing law.

Similarly, the Banks have made no good faith argument for "extending, modifying, or reversing existing law." Fed. R. Civ. P. 11(b)(2). Because the Banks never engaged with the separation of powers issue, they offered no non-frivolous explanation for why their claims should be considered ripe for adjudication and why this Court should take it upon itself to expand "the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Nor could such an argument reasonably be advanced. Uncertainty as to whether a prospective legislative action would be consistent with the Constitution is not a cognizable injury sufficient to confer standing and render a claim ripe; otherwise, every individual potentially affected by as yet undefined legislation (i.e., everyone) would have standing, any claim to hypothesized government action would be ripe, and these Article III justiciability requirements would be rendered meaningless. *See* Nov. 6, 2013 Order (Doc. 53) at 6 ("[T]o intervene before the Richmond City Council adopts an eminent domain program would stretch the role of the judiciary beyond what is contemplated by Article III and what is reasonable to maintain judicial efficiency. If the courts were expected to intervene in every legislative proposal that had potential constitutional ramifications, their dockets would be filled with prospective litigation.").

There is nothing about this case that makes these fundamental principles inapposite. In their Opposition, the Banks argue that the law governing justiciability requirements in declaratory relief actions is unsettled and that they were thus entitled to require Defendants and the Court to expend resources addressing the issue. Opposition at 8. That is nonsense. The governing law is clear that Article III case and controversy requirements apply with no less force when plaintiffs seek declaratory relief – because the Declaratory Judgment Act cannot modify the Constitution. *See* Reply in Support of Motion to Dismiss (Doc. 42) at 1-2; *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007) ("[T]he phrase 'case of actual controversy' in the [Declaratory Judgment] Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article

III." (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)); *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) ("The limitations that Article III imposes upon federal court jurisdiction are not relaxed in the declaratory judgment context.").

The Banks state that they "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." Opposition at 8 (emphasis added). To the contrary, not one of the cases that the Banks cited concerned legislative action – the critical fact relied upon by Defendants in their briefing and by the Court in its decision, *see* November 6, 2013 Order (Doc. 53) at 4-6 – so these decisions do not present "similar situations."

Further, contrary to the Banks' contention, *see* Opposition at ii, 8, 10, there was no basis whatsoever for the Banks' argument that the City's conduct constituted "threats" rendering the Banks' claims ripe. In this respect, the Banks primarily rely on the offer letters sent to the Banks as evidence of "concrete steps" rendering their claims ripe. *Id.* at 2, 5, 8, 10. But the offer letters and attached generic pamphlets are clear on their face that no decision had been made to exercise eminent domain power and explain that in order to initiate an eminent domain action the City is required to adopt a Resolution of Necessity, which may be done only after a noticed, public hearing at which the recipient of the letter would have the opportunity to present objections. *See* Offer Letter and Pamphlet (Doc. 61) at 8; *see also* Doc. 42 at 6-7. The Banks' own pleadings admit that a Resolution of Necessity is required by California law before an eminent domain action may be commenced and, therefore, it would be legally impossible for a letter to dispense with that legislative prerequisite. In fact, under California law at least 15-days' advance notice to certain property owners is required if a governing body intends to hold a hearing to even consider the adoption of a proposed Resolution of Necessity. Cal. Code Civ. Proc. §1245.235.

Given the existence of a Supreme Court decision directly on-point and the lack of any contrary authority, there has never been a non-frivolous argument that existing law permits adjudication of the Banks claims. Further, given the fundamental nature of the separation of powers concerns animating the well-settled standing and ripeness doctrines applicable in this case,

there is no non-frivolous argument for "extending, modifying, or reversing existing law" in a manner that would have rendered the Banks' claims justiciable. Fed. R. Civ. P. 11(b)(2). Simply put, because legislative action is required for the exercise of eminent domain authority, there is no good faith argument that a federal court has jurisdiction to consider whether the exercise of such power would be constitutional when the legislative action has not occurred. This fact was apparent when the Banks filed their Complaint.[4]

II. There Is No Good Faith Basis for Distinguishing this Case from the Related *Wells Fargo* Case

To the extent that the Banks may have missed the subject matter jurisdiction issue when they filed their original complaint, the objective frivolousness of the Bank's claims was made apparent by the legal briefing and this Court's decision in the related *Wells Fargo* case. The Banks' initial complaint in this case was filed on the same day as that in the *Wells Fargo* case, made similar factual allegations, and raised similar claims. *See* Complaint (Doc. 1); *Wells Fargo* Complaint (*Wells Fargo*, Doc. 1).[5] Like the Banks here, the plaintiffs in the *Wells Fargo* case are also trustees of trusts holding mortgage loans which the City offered to purchase, *see Wells Fargo* Complaint (*Wells Fargo*, Doc. 1 at ¶¶16-18), meaning that the two groups of plaintiffs are identically situated with respect to the property at issue and Defendants' conduct. In its order dismissing this case, the Court characterized the two cases as "nearly identical." Nov. 6, 2013 Order (Doc. 53) at 1. Even if the Banks somehow missed the jurisdictional issue when they originally filed, they could not have had a basis for believing that their claims were justiciable after seeing the briefs in the *Wells Fargo* case and this Court's determination that the claims in the *Wells*

[4] The Banks argue that Defendants' stipulation to the filing of the Second Amended Complaint is a concession that the Banks' claims were not frivolous and were raised for a proper purpose. Opposition at 7-8. But the Second Amended Complaint did not add new legal claims or material allegations against Defendants, only additional trustee Plaintiffs and technical edits, so there was no legal basis for opposing the technical amendment. *Compare* Doc. 6, *and* Doc. 20-2. Defendants had already informed the Banks that their lawsuit was unripe (and sanctionable) and Defendants successfully moved for dismissal of the entire lawsuit.

[5] The Banks' subsequent amended complaints added plaintiffs and the Second Amended Complaint (Doc. 20-2) made "other minor revisions." August 26, 2013 Order (Doc. 18).

Fargo case were not ripe and that no amendment could cure the lack subject matter jurisdiction. *See* September 16, 2013 Order at 2 n.3 (*Wells Fargo*, Doc. 78).

The Banks assert that their case is different from *Wells Fargo* because their ripeness argument was based on conduct that had already occurred, whereas the plaintiffs in *Wells Fargo* relied only on prospective conduct and the harm that would be caused by an anticipated eminent domain lawsuit. Opposition at ii, 5, 10. In particular, the Banks argue that "the Wells Fargo plaintiffs focused on events that had not yet occurred . . . 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 5; *see also id.* at 10 (arguing that letters "placed them in reasonable apprehension of suit, which . . . was sufficient for ripeness purposes"). In fact, the plaintiffs in the *Wells Fargo* case received *the same offer letters* that the Banks in this case complain of, and they also argued that those letters made their claims justiciable. The plaintiffs in the *Wells Fargo* case argued: "[T]he offer letters here are sufficient to show that Defendants have already taken substantial steps towards satisfying the statutory prerequisite to effectuate the unconstitutional seizures. . . . Accordingly, this case is ripe." *Wells Fargo*, Doc. 46 at 4. *See also Wells Fargo*, Doc. 8 at 17 ("Backed with the threat of [eminent domain] power, MRP has attempted to coerce the Trusts and many others like them around the country to sell performing loans at fire sale prices. MRP's attempt to make the Trusts 'an offer they can't refuse' – because of the coercive consequences of refusal – violates the constitutional rights of the Trusts and their beneficiaries under color of law . . . ."); *Wells Fargo*, Doc. 46 at 1 (lawsuit is ripe because city "sen[t] letter to the owners offering to acquire loans under threat of eminent domain seizure"). Thus, the Banks' contention that their case presented a different ripeness issue than the *Wells Fargo* case is just as objectively frivolous as their contention that the Court had jurisdiction to hear their claims.

Equally frivolous is the Banks' argument that the fact that they sought declaratory relief in this case distinguishes it from the *Wells Fargo* case. Opposition at ii, 5, 8. The *Wells Fargo*

plaintiffs also sought declaratory relief, *see* Complaint (*Wells Fargo*, Doc. 1), and the *Wells Fargo* plaintiffs pointed this out in opposition to Defendants' motion to dismiss their lawsuit, *see Wells Fargo*, Doc. 46, at 9. As stated above, moreover, the Declaratory Judgment Act does not amend Article III of the Constitution.

III. Plaintiffs Must Have Been Aware that the Court Lacked Jurisdiction When they Refused to Withdraw their Complaint

Less than one week after the Banks filed this lawsuit, Defendants sent them a letter that 1) explained that the Banks' claims were not ripe because the City had not adopted a resolution of necessity authorizing an eminent domain action, 2) explained that under California law the notice requirement for the hearing at which such a resolution of necessity would be considered provided the Banks with ample time to oppose such an action when and if it became necessary, and 3) accordingly requested that the Banks withdraw their unripe lawsuit without prejudice. Doc. 55-5 (August 13, 2013 letter).[6] The letter also stated, "If your clients require the City to expend any resources responding to . . . an obviously unripe lawsuit, the City will seek whatever sanctions may be available." *Id.* Similarly, after this Court dismissed the *Wells Fargo* case for lack of subject matter jurisdiction, Defendants sent the Banks an email on September 16, 2013, again asking them to withdraw this lawsuit: "Now that the *Wells Fargo* case has been dismissed without leave to amend for lack of Article III jurisdiction, on grounds that present no distinction from your case, we ask that you agree to file a voluntary dismissal of your case by the close of business tomorrow. If we cannot obtain that commitment, we will be forced to file what would seem to be a completely unnecessary Rule 12(b)(1) motion to dismiss that will waste the resources of the parties and the court." Doc. 55-2. Nonetheless, the Banks refused to withdraw their complaint, requiring Defendants to litigate a frivolous issue and the Court to spend additional time on the case.

This conduct is sanctionable. Rule 11 is intended "to deter baseless filings in district court." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). The Rule "requires the court

[6] The August 13, 2013 letter was addressed to the plaintiffs in both this case and the *Wells Fargo* case. Doc. 55-5.

to impose an 'appropriate sanction' on a litigant who wastes judicial resources by filing a pleading that is not well grounded in fact and warranted by existing law or a good-faith argument for its extension, modification, or reversal." *Id.* at 409 (Stevens, J., concurring in part and dissenting in part).

The Banks argue that the Court must assess whether their complaint was frivolous as of the time when it was filed. Opposition at 7. As explained above, it was frivolous at that time. *See supra*, Section I. Further, this Court has recognized that refusal to withdraw a pleading after it becomes obvious that the pleading is baseless may be grounds for Rule 11 sanctions. *See 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.) (imposing sanctions when plaintiff "proceeded with the prosecution of [his] lawsuit . . . [after] it was objectively apparent that the complaint would fail since his two other nearly identical complaints had failed"); *see also Johnson v. Univ. of Rochester Med. Ctr.*, 715 F. Supp. 2d 427, 430-31 (W.D.N.Y. 2010) (finding monetary sanctions appropriate based in part on "counsel's inexplicable refusal to withdraw the frivolous claims for nearly a year, even after their baselessness had been precisely identified and briefed by defendants"). The Banks argue that *Welbon* is inapposite because the plaintiff there had filed multiple complaints, whereas this case involves complaints by distinct groups of plaintiffs. Opposition at 11. While the two cases at issue here are initiated by nominally different groups of plaintiffs, the two groups are identically situated vis-à-vis the Defendants, they challenge the same conduct by the Defendants, raise five nearly identical federal claims, and were filed on the same day, suggesting that the two lawsuits are not unrelated. Regardless, in *Welbon* the point was that it was "objectively apparent" that the plaintiff's complaint would fail because two "nearly identical" complaints had failed. 2008 WL 789896 at *4. Because the Banks in this case were plainly aware of the *Wells Fargo* case, they had the same information as the plaintiff in *Welbon* and it was "objectively apparent" that their complaint would fail, whether the related suit was brought by the same group of banks or another group identically situated.

The Banks also argue that because sanctions were not awarded in *Wells Fargo Nat'l Bank Ass'n v. Vann*, No. C 12-05725 CRB, 2013 WL 791474 (N.D. Cal. Mar. 4, 2013) (Breyer, J.),

sanctions should not be awarded in this case. Opposition at 11. But in *Vann* the Court explained that the opposing party *did not seek sanctions*. 2013 WL 791474 at *4. Nonetheless, as Defendants noted in their Motion, the Court cautioned the offending party that the Court could commence Rule 11 proceedings on its own initiative. *See* Motion for Rule 11 Sanctions (Doc. 55) ("Motion") at 5 (citing *Vann*, 2013 WL 791474 at *4). As noted above, Defendants in this case explained to the Banks that the lawsuit was not ripe less than a week after it was filed, repeatedly requested that the Banks withdraw their unripe lawsuit, and gave the Banks 21-days' notice to comply with the Rule 11 safe-harbor. Imposition of sanctions here is entirely consistent with *Vann.*

The Banks also note that in both *Welbon* and *Vann* the parties that were sanctioned or cautioned that their conduct may lead to sanctions were proceeding pro se, whereas the Banks are represented by respected law firms. *See* Opposition at 8-9, 11. But respected law firms should not be held to a lower standard than pro se parties when it comes to responsibility for advancing frivolous arguments for improper purposes. To the contrary, because they are sophisticated parties represented by respected law firms, the Banks have no basis to claim ignorance of or inability to understand the relevant legal principles.

Contrary to the Banks' assertion, *see* Opposition at 10, *Long v. Marubeni Am. Corp.*, 406 F. Supp. 2d 285, 303 (S.D.N.Y. 2005), does not support their argument against sanctions. In that case, the court considered whether the plaintiffs had stated a claim for race discrimination under 42 U.S.C. §1981 based on allegations that appeared to more clearly allege national origin discrimination. The court noted that it faced the same issue in a prior case and held that such allegations did support a §1981 claim, 406 F. Supp. 2d at 289, but declined to sanction the defendants for moving to dismiss the claim, *id.* at 303. Importantly, in *Long* the court explained that its decision was based on Supreme Court authority acknowledging that "the line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place or nation of origin, is not a bright one." *Id.* (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring)) (internal quotation marks omitted). Given this lack of clarity, the court concluded that "[d]efendants were entitled to argue that plaintiffs' complaint

alleges facts that fall on the latter side of the line." *Id.* By contrast, as explained above, the controlling authority cited by Defendants in this case admits no such uncertainty with respect to the critical issues in this case: 1) federal courts lack jurisdiction to consider challenges to government conduct requiring legislative action that has not occurred, and 2) the jurisdictional requirements of Article III are not relaxed in the declaratory judgment context. *See supra*, Sec. I.

Similarly, in *Federal Savings & Loan Ins. Corp. v. Molinaro*, 923 F.2d 736, 739 (9th Cir. 1991), another case the Banks rely upon, the Ninth Circuit's decision to reverse the sanctions order was based not only on the fact that the relevant previous order had not adjudicated defendant's claim to the property at issue, but also on the plausibility of the legal arguments made by the defendant. *Id.* at 739. For the reasons explained above, the Banks advanced no plausible argument for weakening the Article III justiciability requirements in this case.

The Banks' argument on this point is premised on a misapprehension of Defendants' position. *See* Opposition at 10. Defendants do not argue that this Court's decision in the *Wells Fargo* case was controlling with respect to Defendants' motion to dismiss the Banks' complaint in this case. Rather, the point is that *New Orleans* and the other Supreme Court and Ninth Circuit authorities cited by Defendants are controlling, and that, even if this entire line of well-settled, controlling precedent about Article III jurisdiction somehow escaped the Banks' notice when they filed suit (and it could not have) the controlling precedents would have become apparent to the Banks after the Court dismissed the related *Wells Fargo* case without leave to amend.

Finally, the Banks' argument, *see* Opposition at 9, that Defendants' Rule 11 motion "chills" their First Amendment right to petition the government is a red herring. The existence and structure of Rule 11 make it apparent that the First Amendment right the Banks identify does not extend to protect the filing of legally or factually baseless pleadings in federal court or to making filings for an impermissible purpose. The Supreme Court has explained, "Although the Rule must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, . . . any interpretation must give effect to the Rule's central goal of deterrence." *Cooter & Gell*, 496 U.S. at 393; *see also DeBauche v. Trani*, 191 F.3d 499, 511 (4th Cir. 1999) ("[W]hen a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth

encouraging."); *In re Itel Sec. Litig.*, 791 F.2d 672, 676 (9th Cir. 1986) (dismissing as "frivolous" the contention that the First Amendment protects the right to make any argument, no matter how baseless). Should the City adopt a resolution of necessity, providing factual content to the issues raised by the Banks' Second Amended Complaint and rendering them ripe for review, the Banks will have "every right to challenge" the City's actions by petitioning this Court. Opposition at 9. The Banks do not, however, have every right to force Defendants and the Court to expend time and resources responding to plainly non-justiciable claims.

IV. The Sanction Sought

As a remedy for the Banks' Rule 11 violation, Defendants seek attorneys' fees and costs incurred in reviewing the Second Amended Complaint, litigating their motion to dismiss the Banks' unripe lawsuit, and fees and costs incurred in presenting this motion. *See* Fed. R. Civ. P. 11(c)(1)(A), (c)(2).[7] "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonable expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). There is a strong presumption that this "lodestar" amount is the reasonable fee. *See Burlington v. Dague*, 505 U.S. 557, 562 (1992).

The following chart sets forth the lodestar calculation for the work performed as a result of the Banks' Rule 11 violation:

Timekeeper	**Hours**	**Hourly Rate**	**Lodestar**
Stephen Berzon	17.2	$875	$15,050
Michael Rubin	2.9	$875	$2,538
Scott Kronland	41.05	$780	$32,019
Jonathan Weissglass	2.25	$725	$1,631

[7] Defendants do not seek dismissal of the Banks' lawsuit with prejudice. As Defendants explained in their motion, the Rule 11 motion was drafted and served on the Banks more than 21 days before it was filed in compliance with the "safe harbor" requirement of Rule 11(c)(2). *See* Motion at 1 n.1. Thus, the motion was drafted prior to the Court's dismissal of the Banks' lawsuit, and the request for dismissal with prejudice reflects that fact. The only change made to the motion prior to filing was the modification of the relevant dates. Defendants understand that any other changes to the motion would have been inconsistent with the "safe harbor" requirement.

Stacey Leyton	35.8	$665	$23,807
Peder J. Thoreen	0.7	$575	$403
Eric Brown	73.2	$400	$29,280
Paralegals	4.2	$225	$945

With one exception, all hours for which compensation is requested are supported by detailed, contemporaneous time records, maintained in the normal course of business. Declaration of Stacey Leyton ("Leyton Decl.") ¶11 and Exh. B. Time has also been included based on Defendants' estimate that one attorney will spend three hours preparing for the hearing on this motion, and two attorneys will attend the hearing. *Id.* ¶13. Counsel allocated tasks in a manner that permitted the litigation to be conducted efficiently and eliminated time that was arguably spent, in whole or in part, on matters not directly bearing on the Banks' sanctionable conduct. *Id.* ¶12.

The reasonable hourly rate is derived from the community where the district court is located. *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010). "The rates prevailing in that district for similar services by lawyers of reasonably comparable skill, experience, and reputation thus furnish the proper measure of the reasonableness of the rates." *Id.* at 455 (internal quotation marks omitted). Further, the comparison is not limited to attorneys who practice in the same area of law, "but rather extends to all attorneys in the relevant community engaged in equally complex Federal litigation, no matter the subject matter." *Id.* (internal quotation marks omitted). The rates at which compensation is sought for Defendants' counsel are amply supported by evidence in the record, including the declarations of attorneys not involved in this case which are attached as exhibits to the Leyton Declaration. Leyton Decl. Exhs. D, E, F. Further, Defendants have submitted evidence that their counsel are compensated at these rates by fee-paying clients and have been awarded those rates in other cases. *Id.* ¶¶16, 17.

CONCLUSION

For the reasons stated herein and in Defendants' Motion for Rule 11 Sanctions, Defendants seek an award of $105,672 in fees and $1,117 in costs as compensation for time spent unnecessarily litigating the Banks' unripe lawsuit and time spent litigating this motion.

Dated: December 20, 2013

Respectfully submitted,

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