ROCKY C. TSAI (SBN 221452)
(rocky.tsai@ropesgray.com)
ROPES & GRAY LLP
Three Embarcadero Center
San Francisco, CA 94111-4006
Telephone: (415) 315-6300
Facsimile: (415) 315-6350

Attorneys for Plaintiffs Wells Fargo Bank, N.A., as Trustee, *et al.*

ADDITIONAL COUNSEL LISTED ON SIGNATURE PAGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee, *et al.*

Plaintiffs,

v.

CITY OF RICHMOND, CALIFORNIA, a municipality, and MORTGAGE RESOLUTION PARTNERS LLC;

Defendants.

Case No. CV-13-3663-CRB

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

ACCOMPANYING PAPERS: Declarations of John C. Ertman, Esq., David Stevens, Phillip R. Burnaman, II, Kevin Trogdon, and Ronaldo Reyes; [Proposed] Order

Date:	September 13, 2013
Time:	10:00 a.m.
Judge:	Hon. Charles R. Breyer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 13, 2013, at 10:00 am Pacific Standard Time, or as soon thereafter as counsel may be heard by the above-entitled Court, Plaintiffs will move and hereby do move this Court for a preliminary injunction enjoining Defendants the City of Richmond, California and Mortgage Resolution Partners LLC (collectively, "Defendants") from taking any further action to implement their program to seize residential mortgage loans through eminent domain (the "Richmond Seizure Program") with respect to any mortgage loans held in residential mortgage-backed securitization trusts for which Plaintiffs serve as trustees (the "RMBS Trusts"), including taking any steps under state law to seize the loans through eminent domain.

Plaintiffs bring this Motion on the grounds that they are likely to prevail on the merits of their lawsuit, that the RMBS Trusts and their beneficiaries will suffer irreparable harm absent a preliminary injunction, and that the balance of equities and the public interest warrant the proposed injunction. This Motion is supported by the accompanying Memorandum of Points and Authorities; Plaintiffs' Complaint; the Declarations of John C. Ertman, Esq. ("Ertman Decl."), David Stevens ("Stevens Decl."), Phillip R. Burnaman, II ("Burnaman Decl."), Kevin Trogdon ("WF Decl."), and Ronaldo Reyes ("DB Decl.") in support and all exhibits thereto; any reply memorandum and reply Declarations that Plaintiffs may file; any testimony, evidence, or oral argument that Plaintiffs may present at the hearing; and any other further materials that this Court may consider.

STATEMENT OF ISSUE TO BE DECIDED

Should the Court preliminarily enjoin Defendants from further implementing the Richmond Seizure Program and from utilizing eminent domain powers to seize residential mortgage loans held in the RMBS Trusts?

Respectfully submitted,

By: /s/ Rocky C. Tsai

Rocky C. Tsai
ROPES & GRAY LLP
Attorneys for Plaintiffs

SUMMARY OF THE ARGUMENT

This is an injunction action to prevent the City of Richmond, California ("Richmond" or the "City") and its partner Mortgage Resolution Partners ("MRP"), a private, for-profit California investment firm, from seizing residential mortgage loans held in residential mortgage-backed securitization ("RMBS") trusts for which Plaintiffs serve as trustees (the "RMBS Trusts" or the "Trusts"), and which are located outside of Richmond. The Program would use Richmond's power of eminent domain to generate significant profits for MRP and MRP's investors, with a small cut going to Richmond.

Under the guise of providing "mortgage relief" to Richmond homeowners, Richmond and MRP intend to use Richmond's eminent domain power to seize mostly performing mortgage loans hand-selected by MRP at steeply discounted prices (typically 80% of the current value of the home, but in many cases much less) and then allow MRP immediately to flip the loan to a new government-backed securitization pool trust for a much higher price (around 95% of the current value of the home). The substantial profit resulting from this eminent domain arbitrage would be shared by MRP, MRP's investors, and Richmond.

Plaintiffs are the trustees of approximately 350 RMBS Trusts, the investors in which beneficially own loans being targeted by the Richmond Seizure Program. If the Program is allowed to proceed, the Trusts and their beneficiaries alone will incur tens of millions of dollars of losses, and together with other similarly-situated RMBS trusts holding Richmond loans and their beneficiaries, the losses from the Program could exceed $200 million. Because the Trusts are essentially pass-through investment vehicles, these losses would immediately and directly be suffered by the Trusts' investors, also known as "certificateholders," which include a vast number of public and private pension funds, 401(k) plans, insurance companies, mutual funds, university endowments and individual investors and retirees across the country. And if Richmond is allowed to proceed, other local governments would likely follow suit, with the result that losses across RMBS trusts and their investors would exceed billions of dollars.

The Program is a profit-driven scheme designed to enrich a private investment firm, its financial backers, and the City, at the expense of private RMBS trusts located outside of Richmond and their beneficiaries. As such, the Program self-evidently does not involve a legitimate "public use" for which the power of eminent domain is expressly reserved. Richmond contends that the Program, by seizing underwater loans (i.e., those where the value of the home is less than the amount of the mortgage loan), will prevent defaults, foreclosures, home abandonment and blight in Richmond. But that justification is a mere façade, as the Program primarily targets performing loans – i.e., those of homeowners who have been making their monthly payments for years despite being "underwater," and who have good credit ratings – as opposed to those loans that are in deep default. The Program targets performing loans precisely because they are not at serious risk of default and therefore can be easily refinanced and flipped to a new government-backed mortgage loan pool, with Richmond and MRP pocketing the profit. Thus, contrary to the assertions of Richmond and MRP, the vast majority of the loans being targeted by the Program are not at imminent risk of default, and the homeowners in question are not at risk of being foreclosed upon and evicted. For these reasons, the Richmond Seizure Program clearly violates multiple provisions of the U.S. Constitution, the California Constitution, and California statutes, even assuming for the sake of argument that the Program paid fair value for the loans (which it clearly does not, and by definition, cannot, or the Program would not work):

(1) The Program illegally reaches beyond Richmond's geographic borders to seize mortgage loans located outside of Richmond, in violation of the due process requirements of the U.S. Constitution and the California Constitution, and California eminent domain law. *See Texas v. New Jersey*, 379 U.S. 674, 680-81 (1965) (holding that "a debt is property of the creditor, not of the debtor," and is accordingly located in the creditor's home state); *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) ("Pennsylvania does not and could not claim that the same debts or demands could be escheated by two States."); *Mayor & City Council of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 286 (D. Md. 1985) ("[T]he [*Western Union*] Court was recognizing the *exclusive* nature of escheat – and by analogy, condemnation – proceedings.").

(2) The Program targets for seizure mortgage loans for a purely private, rather than public, use, in violation of the Takings Clause of the U.S. Constitution, the California Constitution, and California eminent domain law. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) ("[T]ransfers intended to

confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.") (Kennedy, J., concurring).

(3) The Program seeks to regulate interstate commerce, in violation of the Commerce Clause of the U.S. Constitution, attempting to correct Defendants' perception of a "market failure" by rewriting the contracts between local residents and out-of-Richmond and out-of-state creditors, with the resulting harm to the national mortgage and housing industries vastly outweighing the minimal purported local benefits of the Program. *See City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 421 (Cal. App. 1st Dist. 1985) (holding that a city's exercise of eminent domain that impacts interstate commerce "is the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit."); *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993) (Dormant Commerce Clause prohibits state action that "1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests.")

(4) The Program abrogates the debts of local citizens at the expense of creditors without any legitimate public purpose, in violation of the Contracts Clause of the U.S. Constitution. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (holding that state impairment of contracts is only permissible where based upon a "legitimate public purpose . . . rather than providing a benefit to special interests.").

Plaintiffs now move for a preliminary injunction, to prevent Richmond and MRP from taking steps to seize loans while this Court is adjudicating whether the Program is unconstitutional, as Plaintiffs contend. A preliminary injunction is necessary because Defendants have now initiated their seizure efforts. On or around July 31, 2013, Richmond sent its first wave of coercive "offer" letters to Plaintiffs and other RMBS trustees and servicers, in which it identified approximately 624 loans that it proposed to buy for a fraction of their unpaid principal balance, under threat that the loans will be seized by eminent domain if Plaintiffs and other trustees and servicers do not accept Richmond's offer. As set forth in the accompanying Declarations of Phillip Burnaman and David Stevens, if Richmond is not enjoined and is allowed to proceed with the Program, immediate, significant and irreversible harm would be inflicted on the Trusts and their beneficiaries, along with numerous other constituencies nationwide, which harm could not be compensated by Richmond or MRP, including the following:

- The value of the performing loans primarily targeted by Richmond is approximately the loan's unpaid principal balance, plus more intangible value to the Trust pool as a whole, including the scheduled payments of anticipated cash flows and geographic diversity of the loan pool, and other risk control measures. If the Program is carried out, the immediate losses to the owners of the targeted loans could reach as high as $200 million or more, with additional, incalculable harm to the remaining assets of the trusts. The harm to the Trusts alone could exceed $65 million. *See, e.g.*, Burnaman Decl. ¶¶ 40-44; WF Decl. ¶¶ 15-16.
- The immediate and irreparable harm to the Trusts and their beneficiaries would be impossible to unwind and would be exacerbated by California's "Quick Take" procedure, Cal. Code Civ. Proc. § 1255.410, under which Richmond and MRP would take possession of targeted loans before final adjudication of the eminent domain action. That procedure would wreak havoc in the Trusts, because performing loans, and the Trust beneficiaries' cash flows from those loans, could abruptly be removed from the Trusts, upending the diversification and risk mitigation features upon which the Trusts are organized, and upon which their investors based their investment decisions. Moreover, the Program's subsequent refinancing of the loans at reduced amounts could not be undone, and the parties could not be restored to their original, pre-Program status. Burnaman Decl. ¶ 45.
- The Trusts are essentially pass-through investment vehicles, so the immediate harm from the seizures of the Trusts' collateral would flow directly to the Trusts' certificateholders, which include among others, numerous state and local pension plans, 401(k) plans, college savings plans, insurance companies, mutual funds, and university endowments. WF Decl. ¶ 6.
- If the Program is not enjoined and other municipalities implement similar programs, the harm to the Trusts' beneficiaries and to investors in other RMBS trusts would exponentially multiply. Stevens Decl. ¶¶ 19-24.
- As explained in the Declaration of Mortgage Bankers Association CEO David Stevens, "[b]asic economics tells us that lenders will have to factor this risk into any new lending

activity in Richmond. . . . It is my view that lenders and investors will use a combination of higher rates and down payments to mitigate the significant new risks arising from eminent domain." Stevens Decl. ¶ 15. Mr. Stevens also explains that if the Program is adopted in other cities, "[t]he impact of eminent domain risk will ripple through the real estate market for years, largely in the form of higher down payments and higher interest rates to price-in the new market risk." Stevens Decl. ¶ 20.

Thus, there is no adequate remedy at law for the irreparable harm that implementation of the Program would cause if it is not preliminarily enjoined. *See, e.g., Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (noting that "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm"; and conditions that would "disrupt and change the whole nature of [plaintiff's] business" most likely could not be compensated with damages alone); *Taylor v. Westley*, 488 F.3d 1197, 1201 (9th Cir. 2007) (finding irreparable harm because "it may be impossible for plaintiffs to reacquire" property seized under California's escheat procedures); *EIG Global Energy Partners, LLC v. TCW Asset Mgmt. Co.*, No. CV 12-7173, 2012 WL 5990113, at *9 (C.D. Cal. Nov. 30, 2012) (finding irreparable harm because "complex business transactions cannot be simply unwound").

I. STATEMENT OF FACTS

A. The Parties

The Plaintiffs in this action are the Trustees of hundreds of specific RMBS Trusts that hold mortgage loans made to homeowners in Richmond, California that are being targeted by the Richmond Seizure Program (the "Richmond Loans"). Those Trusts' investors include public and private pension funds, 401(k) plans, insurance companies, mutual funds, university endowments and individual retirees and investors across the country. WF Decl. ¶ 6.

Defendant Richmond is a California municipality. Defendant MRP is a privately-owned, for-profit, San Francisco-based investment company. MRP was formed solely for the purpose of partnering with local governments like Richmond to seize (or purchase under threat of seizure) residential mortgage loans using those local governments' powers of eminent domain and then restructuring and reselling those loans, resulting in a profit to MRP and its investors. On information and belief, MRP has no other business operations. MRP has attempted to partner with numerous local governments in California and other states to implement its program. While several of these municipalities have taken steps towards implementing MRP's program, Richmond is believed to be furthest along. Ertman Decl. Ex. J at 10; Ex. L; ¶ 13.

B. The Richmond Seizure Program

According to statements published by Defendants Richmond and MRP, under the Richmond Seizure Program, MRP would primarily target for seizure loans that are (a) performing (i.e., not in default), (b) underwater (i.e., where the loan balance is higher than the home value), and (c) held by borrowers with good credit ratings. Richmond and MRP plan to seize these loans from the Trusts through Richmond's eminent domain powers, at prices equivalent to approximately 80% of the market value of the underlying home, although the offer letters often indicate an even lower price. After the loans are seized, MRP would refinance the seized loans with new loans priced at approximately 95% of the underlying home value. Ertman Decl. Ex. J at 7, 17-18. The purported premise of the Program is that RMBS trusts are often restricted by their governing documents from granting a wholesale permanent write-down of the principal amount owned on a loan to a borrower who is underwater, and therefore Richmond and MRP need to step in and, through eminent domain, effect permanent principal reductions on mortgage debts, by seizing and extinguishing the homeowner's existing loan, and replacing it with a new smaller one. According to Richmond and MRP, the Program, by granting permanent debt relief through re-writing the borrower-lender contract, corrects a "market failure" and allegedly avoids widespread evictions and home abandonment. *See, e.g.*, Ertman Decl. ¶ 12.

Richmond has stated that it does not intend to seize and hold the mortgage loans. Rather, for the Program to operate as planned and be profitable to its participants, the loans must be refinanced and resold. Loans targeted for seizure must meet the Federal Housing Administration's ("FHA") guidelines for loan-to-home value ratios and credit ratings. Otherwise, the new loans would not be accepted for sale into a government-backed securitization pool, and Richmond would remain the holder of the loans. *See, e.g.*, Ertman Decl. Ex. D at 7. In addition, for the Program to be profitable to Richmond, MRP, and MRP's investors, loans must be acquired for prices far less than their outstanding principal balances. The difference between the stated 80% seizure price and the 95% refinancing price creates a substantial profit spread per loan, which (after deducting the expenses of the loan seizure) would be shared by Richmond, MRP, and MRP's investors. Richmond will receive a flat payment of 5% of the refinancing price per loan, and MRP and its investors will receive the remainder, including a flat per-loan fee paid to MRP itself of $4,500. *See, e.g.*, Ertman Decl. Ex. J at 17-18.

C. The Richmond Loans and the RMBS Trusts

The Richmond Loans targeted by the Program are the collateral backing for what are known as "private-label" RMBS trusts, meaning that they were pooled into securitizations by private sponsors, rather than by government-sponsored enterprises ("GSE") such as Fannie Mae or Freddie Mac (and thus do not have any government guarantee of repayment to investors). WF Decl. ¶ 5; DB Decl. ¶ 6.

RMBS trusts are a critical component of the national mortgage and housing markets. There are tens of thousands of private-label RMBS trusts in existence. Such trusts typically acquire 1,000 to 3,000 residential mortgage loans at their inception, purchased with funds raised through the offering of certificates in the trusts to investors, known as certificateholders. RMBS trusts typically hold these loans through maturity, unless the loans are paid off early or go into default.[1] The trusts are structured

[1] No Trust exclusively holds Richmond loans (or even California loans). Instead, the Trusts hold geographically diverse portfolios of loans. DB Decl. ¶ 7; WF Decl. ¶ 7.

under federal tax laws as "real estate mortgage investment conduits," or "REMICs," and, as such, are prohibited from selling performing loans. WF Decl. ¶ 8; Burnaman Decl. ¶ 37.

The Richmond Loans are comprised of approximately 1,700 or more loans held by approximately 1,100 RMBS trusts. Burnaman Decl. ¶ 40. All or substantially all of the RMBS trusts are administered by one of the following seven trustee entities or their affiliates: Wells Fargo Bank, N.A.; Deutsche Bank Trust Company Americas ("DBTCA"); Deutsche Bank National Trust Company; Bank of New York Mellon, N.A.; Citibank, N.A.; U.S. Bank National Association; and HSBC Bank USA, N.A. None of the Plaintiffs have any corporate trust office or employees in Richmond (and Wells Fargo and DBTCA do not have their principal corporate trust office in California). WF Decl. ¶¶ 11-12; DB Decl. ¶¶ 10, 12. Moreover, the physical notes evidencing the targeted mortgage loans held by the Trusts all are located outside of Richmond, and in many cases, are located outside of California. WF Decl. ¶ 12; DB Decl. ¶ 12.

D. California Eminent Domain Law

Under California eminent domain law, before Richmond can seize the Richmond Loans, it must first make offers to acquire the loans from their owners. Richmond initiated that process on or about July 31, 2013, by sending letters to the trustees, including Plaintiffs, and servicers for RMBS trusts, that identified approximately 624 mortgage loans collateralized by homes in Richmond, which it was "interested in acquiring." It offered to buy certain loans held in each Trust for a fraction of their remaining principal balance, while indicating that it might "decide[] to proceed with the acquisition of the loans through eminent domain" if its offer is not accepted by August 13, 2013. DB Decl. Ex. 1; WF Decl. Ex. B. Because the Trusts are REMICs, they are legally prohibited from voluntarily selling any performing loans to MRP. Moreover, because they consist primarily of performing loans of borrowers with good credit ratings, the value of the Richmond Loans is approximately the loan's unpaid principal balance (and for some loans would be higher than that). Accordingly, Richmond's stated target price of 80% of the value of the underlying home vastly understates the value of the loans, and their seizure for that price would be highly damaging to the Trusts and their beneficiaries.[2] *See, e.g.*, Burnaman Decl. ¶¶ 40-44; WF Decl. ¶¶ 14-15.

Second, the Richmond City Council must hold a hearing and reach a determination that, among other things, the seizure of the loans is necessary for a legitimate public purpose (the "Necessity Hearing"). Third, after conducting the Necessity Hearing, Richmond must file an eminent domain lawsuit in California state court. California statutory law provides for a procedure known as a "Quick Take," under which Richmond could obtain an expedited court order giving Richmond possession of the targeted loans prior to a final adjudication of the eminent domain action, provided that Richmond pays into the court the amount of its proposed seizure price, and subject to having to give the loans back – which, as discussed *infra*, it would not be able to do – if the state court ultimately determines that the taking is illegal. MRP has indicated that the Quick Take "will be a necessary component" of its Program. *See* Ertman Decl. Ex. D at 3. Thus, under this procedure, Richmond would be given possession of any targeted Richmond Loans at the outset of a state court suit, and would have the opportunity to extinguish and refinance those loans while any challenges raised by the Plaintiffs in the state court suit were being litigated.

E. The Immediate and Irreparable Harm Caused by the Richmond Seizure Program

If allowed to proceed, the Program would cause immediate irreparable harm to the Trusts and their beneficiaries, along with numerous other constituencies nationwide, which could not be compensated by Richmond or MRP. A more detailed discussion of that harm is set forth in the supporting Declarations of Phillip Burnaman and David Stevens, and is incorporated herein.

By contrast, the issuance of a preliminary injunction will maintain the status quo while causing no significant harm to Richmond or MRP whatsoever because the Program's stated purpose is to assist a small, select group of homeowners in Richmond, the vast majority of whom are currently paying their mortgage loans and are in no imminent danger of losing their homes at all. Moreover, as

[2] It appears that approximately two-thirds of the 624 loans included in this first wave of loans for which MRP has made purchase offers are performing loans. To the best Plaintiffs can determine, the remaining loans in this initial wave are not current, but it is unclear whether Defendants plan to seize those loans or whether they have other plans for such loans. It is also unclear how those loans relate to MRP's stated Program of seizing performing loans. The inclusion of this relatively small number of delinquent loans in the first wave of Defendants' seizure plan confirms that the Program is proceeding as planned – i.e., it is primarily targeting performing loans. *See, e.g.*, WF Decl. ¶ 14.

described in the accompanying declarations, the Program is not designed to, or likely to, achieve any of the public benefits that Richmond and MRP claim, including avoiding foreclosures and home abandonment, and their attendant effects of blight and economic depression. First, as the first wave of offer letters confirms, Richmond is primarily targeting performing loans of homeowners with good credit ratings that are unlikely to default. The property securing these loans is not at imminent risk of being abandoned or foreclosed upon. Burnaman Decl. ¶ 53. Second, contrary to the dire picture painted by Richmond and MRP, even if the small minority of the targeted loans were to go into default, servicers of RMBS trusts today routinely grant modifications or other forms of work-outs in Richmond and elsewhere to allow distressed homeowners to have more affordable mortgage payments and to stay in their homes. Indeed, many of the loans targeted by Richmond have already received such modifications. Burnaman Decl. ¶¶ 26-27; 59-61. Thus, contrary to Richmond and MRP's claims, the Program is not the only means for underwater borrowers of "private label" loans to obtain "mortgage relief." Third, home prices in Richmond rose in the last year by more than 20% and are forecasted to rise further in the coming year. Burnaman Decl. ¶ 58, App. D. As a result, there is no credible basis for Richmond and MRP to contend that the homeowners of the performing, underwater loans the Program is targeting are in imminent danger of walking away from or being removed from their homes. At best, the Richmond Seizure Program provides a windfall for a small, select group of Richmond homeowners, while negatively impacting Richmond's housing market across the board.

II. ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The Ninth Circuit utilizes a "sliding scale" approach as part of this four-factor test whereby a stronger showing of one element can sometimes offset a weaker showing on another. Under this analysis, a preliminary injunction can issue "when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiffs' favor" as long as the other two *Winter* factors have been met. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). All of the factors are satisfied here.

A. Plaintiffs Are Highly Likely to Prevail on Their Claims

1. Richmond Cannot Take Extraterritorial Property

The Program proposes to seize intangible property located outside of Richmond – and, for the most part, outside of California – thereby violating both California's own eminent domain statute, and the limitations placed on the exercise of eminent domain by the state and federal constitutions.[3]

a. Under the U.S. Constitution, Richmond Cannot Seize Loans of Out-of-State Trusts

Because "[a] state's power of eminent domain is, by its very nature, exclusive of another state's power to condemn the same property, . . . only one state may condemn a particular piece of property, whether tangible or intangible." *Mayor & City Council of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 284 (D. Md. 1985). In cases involving intangible property such as a debt, the Supreme Court has established a "simple and easy to resolve" rule: "a debt is property of the creditor, not of the debtor," and is accordingly located in the creditor's home state. *Texas v. New Jersey*, 379 U.S. 674, 680-81 (1965). *See also Delaware v. New York*, 507 U.S. 490, 499-500 (1993) (same). The Supreme Court's ruling, which involved escheat, applies with equal force in the eminent domain context, because eminent domain, like escheat, turns upon a state's exercise of exclusive jurisdiction over property within its boundaries, whether tangible or intangible. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) ("Pennsylvania does not and could not claim that the same debts or demands could be escheated by two States."); *Balt. Football Club, Inc.*, 624 F. Supp. at 286 ("[T]he [*Western Union*] Court was recognizing the *exclusive* nature of escheat – and by analogy, condemnation – proceedings.").

In the analogous context involving a state's ability to tax loan assets and proceeds, the Supreme Court has likewise held that loans – including mortgage loans, secured by an interest in real property – are located in the home state of the creditor, and not in the state where the debtor resides or the property is located:

[3] The due process demands of the Fourteenth Amendment prohibit a state exercising eminent domain over property located in another state. *Cf. W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) ("[W]hen a state court's jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction….")

> Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, . . .the right of the creditor to 'proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . . has no locality independent of the party in whom it resides.

Baldwin v. Missouri, 281 U.S. 586, 592 (1930)[4] (quoting *Kirtland v. Hotchkiss*, 100 U.S. 491, 498-99 (1879) ("[D]ebt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor.").

The Supreme Court's "simple and easy to resolve rule," turns on the premise that "the debt was an asset of the creditor," *Texas*, 379 U.S. at 681, which applies with equal force in the context of eminent domain. After all, only the creditor, not the debtor, could ever sell, transfer, profit from, or modify the terms of a loan. It is the creditor's property, and the U.S. Constitution only permits the creditor's home state to seize it. Richmond therefore cannot seize loans held by Trusts located outside of California, including the vast majority of those at issue here. *See Balt. Football Club, Inc.*, 624 F. Supp. at 284.

b. California Law Prohibits the Seizures of Loans Outside of Richmond

California law applies these same principles of exclusive jurisdiction as between public entities within the state, generally prohibiting a public entity from seizing property located outside of its territorial boundaries.[5] California courts have followed the Supreme Court's "simple and easy to resolve rule" in cases involving exclusive jurisdiction over property, ruling that loans are located where the creditor is domiciled, since they are necessarily the property of the creditor, even if secured by property in another location. *See San Francisco v. Lux*, 64 Cal. 481, 484 (1884) ("[A]n assessment of a debt secured by mortgage should be made where the creditor resides, and not in the county where

[4] Although the main holding of *Baldwin* – that the Fourteenth Amendment prohibits two states from taxing the same assets – has been subsequently abrogated by the Supreme Court, its reasoning regarding the situs of a debt remains valid, as is shown by the Supreme Court's more recent escheat opinions in *Texas* and *Delaware*.

[5] California's eminent domain laws state that "[a] local public entity may acquire by eminent domain only property within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers." Cal. Code Civ. Proc. § 1240.050. Another statute identifies the express authority for extraterritorial takings, allowing them "for water, gas, or electric supply purposes or for airports, drainage or sewer purposes." Cal. Code Civ. Proc. § 1240.125. The Richmond Program is not for any of these expressly authorized purposes; nor is there another statutory power for which the authority to take mortgages held outside of Richmond is "necessarily implied."

the mortgaged premises are situated."); *see also In re Mercantile Guar. Co.*, 238 Cal. App. 2d 426, 437 (1965) (holding that under *Texas v. New Jersey*, "the right and power to escheat intangible property is accorded to the state of the creditor's last known address. . . ."). California's eminent domain law thus forecloses Richmond's ability to seize any of the loans held in the Trusts, as none of the creditors who own the loans are located in Richmond.

2. Defendants Are Prohibited from Seizing Property for Private Use

Under the Fifth Amendment to the U.S. Constitution, any taking of private property must be for a legitimate public use, pursuant to the Public Use Clause. U.S. Const. Amend. V. ("[N]or shall private property be taken for public use, without just compensation."). In *Kelo v. City of New London*, 545 U.S. 469, 490 (2005), the Supreme Court's most recent case addressing the legitimate public purpose requirement, the Court made clear that property "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." [6] (Kennedy, J., concurring); *see also id*. at 478 (Stevens, J.) (Fifth Amendment forbids "tak[ing] property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."). While the Court confirmed that a relatively deferential rational basis test applies to whether a local government has a legitimate public purpose for the property seizure, the Court made clear – both in its majority opinion, and as further articulated by Justice Kennedy in his concurrence – that:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits. . .

Id. at 491 (Kennedy, J., concurring); *id.* at 488 (Stevens, J.) (Public Use Clause requires that government's "purpose is legitimate and its means are not irrational."). The California Constitution also has a public use requirement for takings that has been similarly interpreted. *See, e.g., City of Stockton v. Marina Towers LLC*, 171 Cal. App. 4th 93, 104 (2009) ("It is a cardinal principle of . . .

[6] Justice Kennedy's fifth vote was essential to the five-Justice majority in *Kelo*, and his opinion gives further context to Justice Stevens's opinion for the Court. Plaintiffs cite to both opinions.

constitutional law that private property may only be taken for a *public* use.") (internal citations omitted).[7]

The Program fails under the Public Use Clause at each turn: it is primarily "intended to favor a particular private party"; its proffered public benefits are incidental and pretextual; and its "means" are "irrational." Indeed, by its own terms, the Program is self-evidently intended to benefit particular private parties, going well beyond anything permitted under *Kelo*. MRP hand selects the loans to be seized, MRP acquires the loans with private investor money, and MRP and its financial backers pocket most of the profits after quickly flipping the loans. The Program would take the private property (including expected profits) of mostly out-of-state Trust beneficiaries and turn it over to a California private investment fund favored by Richmond. Richmond, in effect, has rented out its eminent domain powers to carry out a private money-making scheme. These facts confirm the Program's principally private purpose in violation of the Public Use Clause.[8] *Kelo* does not authorize the Defendants' proposal to rob Peter to pay Paul (with Paul's help). *See also*, *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 416 (1896) (invalidating compelled transfer of private property from one private party to another for its private benefit).

Not only would Richmond be taking the property of one private party for the sole purpose of putting it under the control of another private party (MRP), but MRP will "screen" and select the loans that the City will purport to seize, will fund the entire Program, and will stand to make a handsome profit from the transaction itself. Ertman Decl. Ex. C at 9; Ex. J at 10, 17-18. This reflects a marked distinction from *Kelo*, where the Court specifically noted that the identities of the private parties who would benefit from the takings were not even known when the plan was adopted. 545 U.S. at 478 n.6 (citing the trial court's finding that "[i]t is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown), *and id.* at

---

[7] California's statutory Eminent Domain law imposes even stricter 'public use' requirements. Eminent domain may only be exercised where [t]he public interest and necessity require the project," "[t]he project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury," and the property "is necessary for the project." Cal. Code Civ. Proc. § 1240.030.

[8] Justice Kennedy indicated in his *Kelo* concurrence that takings that are blatant private transfers should not even benefit from rational basis review, and instead should be deemed presumptively invalid. *See* 545 U.S. at 493. The Program here rises to that level.

493 ("The identities of most of the private beneficiaries were unknown at the time the city formulated its plans.") (Kennedy, J., concurring). Here, not only is the identity of the major private party to be benefitted known, but that private party actually devised and agreed to fund the Program, *and it will hand-select the very assets to be seized*, all in order to maximize its own private gains.

In *Kelo*, the Court relied heavily on the comprehensive nature of the economic development program behind the property takings to determine that the takings were not intended to "confer benefits on particular, favored private entities . . . with only incidental or pretextual public benefits." *Id*. at 490 (Kennedy, J. concurring); *id*. at 483, 474-475, 478 n.6. (noting that the challenged takings were just one part of a "comprehensive" and "integrated development plan" that was designed to create jobs, generate tax revenues, encourage spin-off economic activities, and create recreational opportunities on the waterfront"). The Program here is nothing close to a "comprehensive" or "integrated" economic development program: it will only serve to provide a small number of selected homeowners in no imminent danger of losing their homes with a cash windfall without focusing on the underwater homeowners in Richmond who have long been in default and whose loans might actually be foreclosed upon, since targeting those homeowners would not provide MRP its desired profit. Under *Kelo*, this type of property transfer "executed outside the confines of an integrated development plan," "would certainly raise a suspicion that a private purpose was afoot." *Id*. at 487.

The Program's "means" are "irrational," the "primary benefit" of the plan is to MRP and its investors, and any public benefit is incidental at best. *See id.* at 490-92 (stating that even under rational-basis review, transfers intended to "confer benefits on particular, favored private entities" with only incidental public benefits are prohibited, and noting that the trial court found the "primary motivation" was public, not private) (Kennedy, J. concurring). The Program as envisioned by MRP would only affect about 1,500 homeowners in Richmond. Ertman Decl. Ex. J at 2. Most critically, the Program does not focus on distressed loans likely to cause economic dislocation, but rather the small subset of loans that will be most profitable to MRP and its investors: those that are "relatively current (not in default)" from "borrowers who appear likely to repay their loans." Ertman Decl. Ex. C at 9. These loans are highly unlikely to default, as the borrowers have continued to make their payments, even during times of economic turmoil, and many have already been modified by the loan servicers.

Burnaman Decl. ¶¶ 53; 59-61. MRP's focus on the more valuable loans to mortgagees who are most likely to continue paying shows that the primary purpose of the scheme is to benefit MRP and its investors, that the Program's means are not rationally tailored to meet its alleged public purpose, and that any benefit to Richmond is purely incidental (which is not surprising, since it was designed for MRP's benefit, not the City's).

Allowing private investment companies to rent out a city's eminent domain power for their own private profit because it could provide tangential public benefits would eviscerate the legitimate public use requirement of the U.S. and California Constitutions. In *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), for example, a case cited favorably by the Supreme Court in *Kelo*, the public redevelopment agency defendant argued that preventing "future blight" was a sufficient public use within the meaning of the Fifth Amendment. 237 F. Supp. 2d at 1130. The Court rejected this argument, noting that this rationale would permit a government to condemn any property because "no redevelopment site can ever be truly free from blight because blight remains ever latent, ready to surface at any time." *Id.* at 1131. *See also Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (Courts must examine the "government's purported public use to determine whether that is the genuine reason or if it is merely pretext."). Richmond's purported justification is just as nebulous; that some currently performing loans *could theoretically* default in the future is not sufficient justification for a taking.[9]

3. The Program Violates the Dormant Commerce Clause's Ban on Direct Regulation of Interstate Commerce

The Commerce Clause of the U.S. Constitution, U.S. Const. art. I, § 8, has long been interpreted under the so-called "Dormant Commerce Clause" doctrine as prohibiting state action that "1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors

[9] Defendants are not seeking a preliminary injunction based on the Fifth Amendment's Just Compensation Clause (requiring in any legal taking "just compensation" for the property taken). *See, e.g.*, *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). As noted above, while the Program by definition is designed to extract the loans at steeply discounted prices, the Program is unconstitutional and illegal even assuming for the sake of argument Richmond and MRP were offering fair value.

in-state economic interests over out-of-state interests." *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993) (citing *Healy v. Beer Inst.*, 491 U.S. 324, 337 n.14 (1989)). *See also Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (citing *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824) (Marshall, C. J.)); *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982). Under this standard, a municipality is barred from "control[ing] conduct beyond the boundaries of the state." *Edgar*, 457 U.S. at 642. However, the Richmond Seizure Program would do just that.

Richmond has adopted the Program in order to redress what Richmond perceives as a market inefficiency in the national housing and mortgage finance markets. RMBS trusts and the widespread housing finance that they enabled are a major segment of the U.S. economy: they increased available credit, which in turn increased home ownership, housing demand, and housing prices throughout the country before being significantly impacted by the country's major economic downturn in 2007 and 2008. Ertman Decl. Ex. E at 4-11. Even though home prices have begun to rebound and foreclosure rates have significantly decreased five years on from the 2008 economic crisis, suggesting that the housing and mortgage markets have begun to stabilize, MRP and Richmond claim that underwater homeowners present a continuing drag on the national housing market. They argue that lenders and borrowers should agree to permanently reduce the outstanding principal on loans when homeowners are underwater, but that restrictions in the documents governing RMBS trusts often make this outcome impossible. Ertman Decl. Ex. C at 8. The Program identifies the unwillingness or inability of the loan servicers for RMBS trusts to agree to permanent reductions in borrowers' principal balances as a key cause for what it terms "systemic problems in the housing and mortgage industries," including excess housing stock nationwide. Ertman Decl. Ex. C at 8.

To address this alleged intractable problem, Richmond proposes to coercively obtain these loans, and for MRP then to underwrite new loans. Richmond's proposed "solution" to this supposed problem in the interstate mortgage-backed securities sector will directly impact interstate commerce, and MRP openly admits as much: it says that its "primary motivate is to help this intractable problem that drags down the whole economy." Ertman Decl. Ex. F at 3. And in response to arguments that the Program will negatively impact the interstate mortgage market, Richmond and MRP argue that it will instead "promote[]" interstate commerce by purportedly "rendering marketable what are currently unmarketable . . . underwater loans." Ertman Decl. Ex. G at 2. This assessment is factually incorrect, because the Program will in fact be extraordinarily disruptive to interstate commerce. But that factual issue is beside the point: the Commerce Clause prohibits states from directly regulating interstate commerce at all, placing that exclusive authority with the federal government.

The Program's direct impact on a substantial part of the national economy and on transactions transpiring across state lines violates the Dormant Commerce Clause by itself, even taking at face value Richmond's faulty logic about the supposed benefits to the national economy. In *Edgar v. MITE Corp*. 457 U.S. at 641-43, the U.S. Supreme Court invalidated a far less intrusive Illinois statute that regulated tender offers for securities of public companies with certain connections to the state of Illinois. The *Edgar* Court noted that in contrast to the regulation of purely intrastate transactions, the statute necessarily impacted securities "transactions occurring across state lines," and accordingly invalidated it because of its "direct restraint on interstate commerce and . . . sweeping extraterritorial effect." *Id*. The Program goes much further than the statute in *Edgar*: It would not merely regulate interstate transactions, it would seize and rewrite the contractual terms of loans held in RMBS trusts organized outside of California, to the detriment of vast numbers of certificateholders nationwide. Richmond and MRP would then remake the mortgages according to Richmond's preferred economic policy and resell them into interstate commerce. Richmond could not directly order the reformation of these loans held in interstate commerce. And it cannot do so through eminent domain.

California courts have invalidated local exercise of the eminent domain power where it reflects "the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit." *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 421 (1985). The *Oakland Raiders* case specifically held that the City of Oakland's attempt to seize the Raiders franchise by eminent domain violated the Commerce Clause, and would "more than indirectly or incidentally regulate interstate commerce," by preventing the Raiders from moving out of Oakland, thereby impacting the nationwide professional football industry (i.e. the National Football League). *Id*.

The Program here reflects a much more direct form of "parochial meddling with the national economy" than the state conduct at issue in *Edgar* or *Oakland Raiders*. The Program would coerce the transfer of thousands of loans across state lines – causing substantial losses in those transactions and in the Trusts' remaining portfolios, which would be depleted of their most valuable assets – and then resell the loans back into interstate commerce. Richmond would inflict these losses in interstate commerce in order to benefit a local investment firm. This is precisely the type of local favoritism the Commerce Clause prohibits. And on top of that, it would directly threaten the interstate mortgage financing market with substantial upheaval and uncertainty by reducing the value of Trust assets and consequently the value of Trust certificates, disrupting the structure that defines the risk to RMBS certificateholders, and introducing a previously unforeseen threat of impairment across the entire market.[10] Stevens Decl. ¶¶ 11-25; Burnaman Decl. ¶¶ 47-52; 62-67. Its impact on the national housing, mortgage, and investment markets would dwarf the local regulations at issue in *Edgar* or *Oakland Raiders*, in clear violation of the Commerce Clause.

4. The Program Cannot Satisfy the Dormant Commerce Clause's Balancing Test

Even if for the sake of argument the Program could be seen as only having an "indirect" impact on interstate commerce, it would still violate the Dormant Commerce Clause, because the Supreme Court has long held that local government action that only has indirect effects on interstate commerce must still be struck down if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Edgar*, 457 U.S. at 640 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The Richmond Seizure Program clearly fails this balancing test. Initially, with respect to the "local benefits" prong of the balancing test, the Program is not even tailored to remedy the local concerns of foreclosures and blight that the Defendants claim it is intended to mitigate. The Program focuses on performing loans for seizure by eminent domain rather than the Richmond properties that are most at risk for foreclosure. Instead, the Program is tailored to benefit the private interests of MRP by allowing it to obtain and profit from these relatively valuable loans. The proffered "local benefits" are accordingly pretextual and negligible.

The Program fares no better under the second prong of the balancing test, which focuses on the burden it imposes upon interstate commerce, since it is expected to have a profoundly disruptive

[10] If, as predicted, other jurisdictions follow Richmond's lead and also attempt to seize loans from out-of-state trusts, the market segmentation and upheaval will increase exponentially, contrary to "strong federal interests in preventing economic Balkanization" that are advanced by the Commerce Clause. *Bacchus Imps. v. Dias*, 468 U.S. 263, 276 (U.S. 1984).

impact on the national markets for mortgage-backed securities, mortgage lending to homeowners, and housing sales. Initially, it is expected to substantially impair the value of hundreds of existing RMBS trusts outside of California, by removing loans from those trusts. That immediate impact will also in turn diminish the value of the certificates in those RMBS trusts, which are held by an untold number of investors across the country and the world and trade on the secondary market. Stevens Decl. ¶¶ 18-24; Burnaman Decl. ¶¶ 62-67. As explained in the accompanying Stevens and Burnaman Declarations, if a local government has the authority to reach outside its geographic borders to seize performing mortgage loans partway through the life of the mortgage, thereby imposing unforeseeable losses to the portfolio in which the loan was held, lenders and investors will face dramatically higher risks, setting off a chain of negative market events across the country: the increased investment risk will depress the demand for mortgage-backed securities; credit for new homebuyers will either disappear or become more costly to account for the risk of eminent domain seizures; and the shrinking universe of potential buyers will in turn decrease demand and housing prices, ultimately harming homeowners and creating even more underwater mortgages nationwide. Stevens Decl. ¶¶ 18-24; Burnaman Decl. ¶¶ 62-67.

This major market disruption is expected to be most profound in Richmond, where the market would naturally price the lending and investment risk the highest. Every Richmond homeowner who is not blessed by MRP for inclusion in its program could be harmed by diminishing and more expensive credit for home loans, thereby depressing the local housing market and turning the proffered local benefit on its head. Stevens Decl. ¶¶ 11-17. Because the Program will likely impose substantial commercial harm upon lenders, investors, and homeowners across the country – starting with Richmond homeowners themselves, but spreading much further to all participants in the housing and mortgage-backed securities markets – and would only benefit MRP and a small, select group of Richmond homeowners, it far exceeds the limitations of the Commerce Clause.

5. The Program Violates the Contracts Clause of the United States Constitution

The Program would also violate the Contracts Clause of the U.S. Constitution, which prohibits states from passing any law "impairing the Obligations of Contracts."[11] The Supreme Court's

[11] While the Supreme Court has previously observed that the normal operation of a state or local government's eminent domain power does not implicate the Contracts Clause, *see Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 243, n. 6 (1984), the Program goes much further than the typically targeted

explanation of the Founders' rationale for the Contracts Clause makes clear that it was intended to prevent exactly the type of local interference with interstate commerce under the guise of debt relief that Richmond and MRP threaten to implement:

> The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934) (quoting The Federalist, No. 44)

The Supreme Court has held that state impairment of contractual rights can only be justified where the proposed "adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (internal quotation omitted). As with the exercise of eminent domain, a state's impairment of contractual rights must be based upon a "legitimate public purpose . . . rather than providing a benefit to special interests." *Id*. at 412. The Program fails this balancing test for the same reasons that it is invalid under the Commerce and Takings Clauses: its actual purpose is to "benefit special interests," its supposed public purpose is unfounded, and it cannot justify the substantial impairment of private contractual rights that it would impose.

6. Defendants Threaten to Violate the Constitutional Rights of the Trusts and Their Beneficiaries Acting Under Color of State and Local Law

The Trusts also have a high likelihood of success on the merits of their Section 1983 claims against MRP and Richmond. 42 U.S.C. § 1983. Section 1983 requires the Trusts to show "(1) that the defendants acted under color of state law; and (2) that the defendants caused them to be deprived of a

---

seizure of real property, and would perpetrate the very problem of arbitrary abrogation of the rights of creditors that the Contracts Clause was intended to avoid. For example, while the Hawaiian government was specifically barred from making a profit on the transactions at issue in *Midkiff*, *id*. at 234, Richmond (along with MRP) both profit handsomely from their decision to implement the Program. Moreover, the Supreme Court has previously invalidated sweeping state action that would retroactively impair the existing rights of creditors, just as the Program proposes to do. *See Kener v. La Grange Mills*, 231 U.S. 215, 217-18 (1913) (Contracts Clause prevents state from retroactively exempting property from existing liens); *Sturges v. Crowninshield*, 17 U.S. 122, 196-97 (1819) (invalidating application of state bankruptcy law that would retroactively discharge existing debts).

right secured by the constitution and laws of the United Sates," elements that are easily met here. *Howerton v. Gabica*, 708 F.2d 380, 382 (9th Cir. 1983) (internal citations omitted). Indeed, as discussed above, the Program would deprive the Trusts and their beneficiaries of their rights under the Takings Clause, the Contracts Clause, and the Dormant Commerce Clause of the U.S. Constitution. Because the City's threatened actions would, by definition, be undertaken under color of law, the Trusts will prevail on their Section 1983 claim against the City, in addition to their claims for declaratory and injunctive relief based on the Program's unconstitutionality. And since "[a]ction taken by private individuals may be 'under color of state law' where there is 'significant' state involvement in the action," the same is true of MRP's threatened actions. *Id.* (internal citations omitted). While MRP is motivated by the private financial gain it anticipates for itself and its investors, by taking an active role in the Program, MRP is acting under the color of state law for purposes of Section 1983.

MRP has openly conspired with the City to unconstitutionally seize Trust assets through an illegal use of the City's eminent domain power. MRP describes its "Program" as a "public/private venture" and a "partnership" between it and local governments – and Defendants have memorialized their joint venture in a written advisory agreement. Ertman Decl. Ex. K. Pursuant to that joint venture, MRP is intricately involved in the City's exercise of its eminent domain rights: MRP will identify the mortgages that it would like the City to seize for its benefit; will "screen" the loans to ensure that only those most likely to repay are seized; and will fund the City's obligation to compensate the Trusts and other creditors, Ertman Decl. Ex. C at 9; Ex. J at 10, 17-18, thereby standing in the City's shoes to fulfill its constitutional obligation to compensate the Trusts (albeit pursuant to a facially inadequate compensation formula). Backed with the threat of that 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, as would the eminent domain proceedings that MRP threatens to initiate. MRP's integral role in prosecuting the Program with Richmond meets the color of law requirement. *See Adickes v. S.H.*

Kress & Co., 398 U.S. 144, 152 (1970) ("It is enough that [the private party] is a willful participant in joint activity with the State or its agents.").[12]

B. Plaintiffs Will Be Irreparably Harmed Absent an Injunction

In order to obtain a preliminary injunction, a plaintiff must demonstrate that it is likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 20. If the Program is not enjoined, Plaintiffs would likely be deprived of any meaningful relief. It is MRP's and Richmond's intent, as expressed by MRP in its marketing materials, to use California's "Quick Take" procedure to take possession of the mortgage loans in question on an expedited basis, rather than waiting for a Court to determine the constitutionality of the Program. *See* Ertman Decl. Ex. D at 3; Cal Const. Art 1. § 19 *and* Cal. Code Civ. Proc. § 1255.410 (providing for quick-take of property in question).[13] Under this procedure, MRP and Richmond could seize Trust property even if litigation concerning the legality of such a taking were still ongoing. While MRP would be obligated to deposit "fair value" for any property it seized, MRP could, and by definition for their Program to work must, repackage the seized loans and sell them to new investors before court proceedings even finished. Without a preliminary injunction, therefore, MRP and Richmond could implement their unconstitutional Program without any substantial Court review.

The harm caused by such a "Quick Take" of the Trusts' loans would be irreparable. First, as shown above, the constitutional rights of the Trusts and their beneficiaries would be violated by the Program in multiple ways, without any opportunity for the Trusts and their beneficiaries to challenge the illegal takings before they occur. *Cf. Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1218 (entering preliminary injunction against state eminent domain action to vindicate party's constitutional rights).

---

[12] If not enjoined by this Court, MRP would commandeer the City's inherently public function by choosing and screening the precise mortgage loans that it seeks to take by eminent domain, and by compensating the owners of those loans, thereby acting under color of state law pursuant to the "public function" test. *See West v. Atkins*, 487 U.S. 42, 56 (1988) (private doctor acting under color of law when delegated state function of providing medical care to prisoners). MRP's "entwinement" with the exclusively governmental process of eminent domain also meets the "under color of law" standard. *See Evans v. Newton*, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.").

[13] *See also, Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 40 Cal. 4th 648, 653-55 (2007) (outlining "Quick Take" procedure).

"It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also*, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.").

Second, once MRP and Richmond seize the Trusts' property, there will be no way to restore the status quo. After seizing the mortgage loans, MRP has stated that it plans to extinguish them, issue new loans, and sell them to new securitized mortgage pools. This series of transactions will be impossible to unwind, since there will be no practical (or legal) means to restore the original debt obligations on the affected homeowners, or to claw back the new loans from newly issued securities. Burnaman Decl. ¶ 45; WF Decl. ¶¶ 16-17. In *Taylor v. Westley*, 488 F.3d 1197, 1201 (9th Cir. 2007), the Ninth Circuit found irreparable harm under similar facts. In that case, plaintiffs' securities were allegedly at risk of being lost to escheat without adequate notice in violation of due process. The Ninth Circuit found that the Plaintiffs demonstrated a possibility of irreparable harm because "California will permanently deprive them of their property pursuant to its policy of immediately selling property upon escheat. Once the property is sold, it may be impossible for plaintiffs to reacquire it, thus creating the requisite 'irreparable harm.'" *Id.* at 1202;[14] *see also*, *EIG Global Energy Partners, LLC v. TCW Asset Mgmt. Co.*, No. CV 12-7173, 2012 WL 5990113, at *9 (C.D. Cal. Nov. 30, 2012) (finding irreparable harm because "complex business transactions cannot be simply unwound").

Monetary damages are also inadequate since the damages to remaining assets of the Trusts and to certificateholders are not easily quantified or compensated. For example, the Program cherry-picks certain loans, disrupting the risk diversification of the remaining assets of the Trusts. Similarly, certificateholders and other investors would be faced with uncertainty as to how to value the Trusts' loans after some have been seized. *See, e.g.*, Burnaman Decl. ¶¶ 19, 45; *Dealer Computer Serv., Inc.*

[14] The Ninth Circuit decided *Westly* under the "possibility" of irreparable injury standard that was utilized by the Ninth Circuit at the time. 488 F.3d 1197 at 1200. The Supreme Court later held in *Winter* that a plaintiff must show a "likelihood" of irreparable injury. 555 U.S. at 21. Given that the Ninth Circuit found that it was "almost impossible" for plaintiffs to recover their property, it is likely the Court would have held the same way regardless of the standard used. *Westly*, 488 F.3d 1197 at 1202; *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011) ("Of course, while 'likely' is a higher threshold than 'possible,' [a plaintiff] need not prove that irreparable harm is certain or even nearly certain.")

v. Ford, No. CV 12-1970, 2012 WL 6054846, at *3 (E.D. Cal. Dec. 5, 2012) (noting that when damages are "not accurately measurable or adequately compensable by money damages" "irreparable harm is a natural sequel") (quoting *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18 (1st Cir. 1996)). Richmond's and MRP's proposed seizures would also inject substantial uncertainty into the larger RMBS market, devaluing both the assets of the Trusts and securities held by a vast number of certificateholders nationwide in some unquantifiable amount. Stevens Decl. ¶ 25; *see, e.g.*, *Am. Trucking Ass'ns*, 559 F.3d at 1058 (noting that conditions that would "disrupt and change the whole nature of [plaintiff's] business" most likely could not be compensated with damages alone).

Moreover, as noted above, the immediate losses to the trusts holding Richmond loans – more than $200 million, including $65 million or more in losses just to the Trusts for which Plaintiffs serve as trustees – could not be compensated by Richmond or MRP. *See, e.g.*, Burnaman Decl. ¶¶ 40-44; WF Decl. ¶¶ 14-15. In 2011–2012, Richmond had revenues of $332,819,656 and expenditures of $379,481,479, Ertman Decl. Ex. M, and MRP is an LLC set up solely to carry out eminent domain programs and has no other operations.

C. The Balance of Equities Tips Sharply in Plaintiffs' Favor

A preliminary injunction is also required because the when the Court "balance[s] the interests of all parties and weigh[s] the damage to each," the balance of equities tips heavily in favor of the Plaintiffs, and the Trusts and certificateholders whose interests they represent. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). If the Program is allowed to go forward, the Trusts and their beneficiaries will be harmed by the unconstitutional seizure of hundreds of their performing loans, as detailed above. By contrast, any delay to the implementation of the Program will cause no significant harm to Richmond or MRP, because the Program's stated purpose is to assist a small, select group of homeowners in Richmond who are currently paying their mortgages, and the targeted homeowners are in no imminent danger of losing their homes at all.

D. The Public Interest Favors an Injunction

Public interest favors a preliminary injunction. First, the Ninth Circuit has held that it is "always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002. Second, granting preliminary injunctions against the illegal taking of private property by the government is itself a public interest. *See, e.g.*, *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1231 (C.D. Cal. 2002) ("The public interest also favors moving very cautiously in condemning private property for uses that are only questionably public."). Finally, a preliminary injunction is necessary to prevent the likely catastrophic effects on both the Richmond and national housing markets. As explained in more detail above, the Program is expected to lead to a large decrease or absolute reduction of lenders willing to lend money to Richmond residents. Stevens Decl. ¶¶ 11-17. The collateral damage to the national market would be even more devastating. And since the proposed preliminary injunction would primarily stop the City from seizing *performing* loans that are not likely to be foreclosed upon in the immediate future – for the benefit of a select group of private parties – the public interest would only be advanced by the granting of the injunction.

III. CONCLUSION

For the foregoing reasons, the Trusts respectfully request that this Court grant their motion for a preliminary injunction.

DATED: August 8, 2013

Respectfully submitted,

By: /s/ Rocky C. Tsai

ROPES & GRAY LLP

Attorneys for Plaintiffs

Rocky C. Tsai (SBN 221452)
(rocky.tsai@ropesgray.com)
ROPES & GRAY LLP
Three Embarcadero Center
San Francisco, CA 94111-4006
Telephone: (415) 315-6300
Facsimile: (415) 315-6350

John C. Ertman
(john.ertman@ropesgray.com)
(Pro hac vice applications pending)
Lee S. Gayer
(lee.gayer@ropesgray.com)
Evan P. Lestelle
(evan.lestelle@ropesgray.com)
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

Douglas H. Hallward-Driemeier
(douglas.hallward-driemeier@ropesgray.com)
(Pro hac vice application pending)
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005-3948
Phone: 202-508-4600

Daniel V. McCaughey
(daniel.mccaughey@ropesgray.com)
Nick W. Rose
(nick.rose@ropesgray.com)
ROPES & GRAY LLP
800 Boylston St.
Boston, MA
Phone: 617-951-7000

Thomas O. Jacob (SBN 125665)
tojacob@wellsfargo.com
WELLS FARGO & COMPANY
Office of General Counsel
45 Fremont Street, Twenty-Sixth Floor
MAC A0194-266
San Francisco, CA 94105
Telephone: (415) 396-4425
Facsimile: (415) 975-7864

Attorney for Wells Fargo Bank