September 7, 2012

Via Electronic Submission

Office of the General Counsel
Federal Housing Finance Agency
400 Seventh Street SW, Eighth Floor
Washington, D.C. 20024

RE: No. 2012-N-11; Use of Eminent Domain to Restructure Performing Loans

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this comment letter in response to the request of the Federal Housing Finance Agency ("FHFA") for input regarding your notice entitled "Use of Eminent Domain to Restructure Performing Loans" (No. 2012-N-11).[2] ASF is strongly opposed to the use of eminent domain to acquire mortgage loans, and we have actively advocated against its use in a number of jurisdictions.

We recognize and appreciate the serious challenges associated with the current housing market, and our members continue to improve methods to help borrowers that are in distress find ways to retain their homes. Millions of mortgage loan modifications have been conducted across the country to help borrowers in distress meet their mortgage payments. Certainly, in a severe economic downturn marked by high unemployment, all parts of the country are facing economic challenges.

But even in the most challenging of economic times, poor policy solutions such as proposals to seize mortgage loans through eminent domain are not productive or even legal answers. The eminent domain proposal currently being publicly debated was developed by a private entity called Mortgage Resolution Partners LLC ("MRP"), and we use it as a model to discuss in this letter. While MRP's proposal initially may seem like an attractive method to assist borrowers in challenging economic times, the proposal, as a policy matter, would be short-sighted and ultimately be counterproductive for the residents of municipalities where it is adopted. Moreover, it would violate the United States Constitution.

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[1] The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF has over 330 member firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to www.americansecuritization.com.

[2] *See* http://www.fhfa.gov/webfiles/24147/77_FR_47652_8-9-12.pdf.

Notably, the proposal is ***not*** set up to help borrowers who are having difficulties making their monthly mortgage payments. Servicing standards and all major modification protocols to date have been established to help borrowers who are challenged economically to make their monthly mortgage payments (that is, those who are in default or otherwise face reasonably foreseeable default), rather than those who have the ability to pay their mortgages and, as such, are current on their payments. By targeting this latter group, the plan seeks to seize assets that would be most profitable for MRP rather than address a public purpose to aid the housing market. Not only would such a proposal fail to help those most at risk, it would undermine the national housing market as a whole, making credit less accessible for homeowners and devaluing the investments of pension funds, mutual funds and other entities that hold mortgage-backed securities.

In this letter, we provide:

(1) a brief description of the facts of the plan as we presently understand them;

(2) an explanation of why MRP's proposal will not address the issues it is ostensibly intended to and would be harmful from a policy perspective; and

(3) a summary of the legal defects associated with the contemplated use of eminent domain for such purposes.

Our members would welcome the opportunity to explore ways in which municipalities can foster market-based solutions to the nation's current housing woes. However, no one would be served by following an unlawful plan that would only profit a select group of private investors, while doing little to address the stated public purposes.

Factual Background

The following are the facts as we understand them based on our review of San Bernardino County's (the "County") Joint Exercise of Powers Agreement (the "Agreement"), which may serve as a model for various eminent domain plans around the country, as well as from press accounts and certain publicly available documents describing the details of MRP's plan, including a Memorandum by Cornell Law School professor Robert C. Hockett,[3] who we also understand has been employed as a consultant to MRP. We believe MPR's plan is indicative of many of the pitfalls associated with using eminent domain to seize mortgage loans as a policy matter.

[3] *See*, e.g., Nick Timiraos, Cities Consider Seizing Mortgages, WSJ.com, July 4, 2012, http://online.wsj.com/article/SB10001424052702303933404577505013392791018.html. *The Wall Street Journal* online article includes links to (a) a Powerpoint presentation prepared by MRP on the Program ("MRP Presentation"), (b) a "Frequently Asked Questions" information sheet prepared by MRP ("MRP FAQ"), (c) the Memorandum written by Professor Hockett, "Breaking the Mortgage Debt Impasse: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery," Cornell Law School Research Paper No. 12-12; and (d) the Agreement.

On June 19, 2012, the County adopted a resolution to approve the Agreement among it, the City of Ontario, and the City of Fontana. The Agreement establishes the Joint Powers Authority ("JPA") pursuant to Section 6500 *et seq.* of the California Government Code to explore and implement options for the Homeownership Protection Program (the "Program"). According to the Agreement, the "Program may include the Authority's acquisition of underwater residential mortgage loans by voluntary purchase or eminent domain and the restructuring of these loans," but it "expressly excludes the power to acquire homes by eminent domain." *See* Agreement, Recital (C), ¶¶ 4, 8.

Based on material prepared by MRP and Professor Hockett's Memorandum, we understand that MRP is proposing to manage and facilitate the eminent domain and loan restructuring process, including: (a) raising funds for the Program; (b) identifying properties to be acquired by eminent domain proceedings; and (c) arranging for the loan refinancing. MRP's targets are mortgage loans that are part of the pool of assets backing "private-label" residential mortgage-backed securities ("RMBS"). Such "private-label" securitizations are legal entities that are not sponsored by federal government arms such as Fannie Mae, Freddie Mac or Ginnie Mae and are generally located outside of the state in which the actual property is located. Moreover, the property or collateral of the securitization trusts—the mortgage loans—are generally located outside of the jurisdiction of most localities.

In particular, MRP intends to target loans that are "underwater" (the home value is less than the amount of the loan), but are currently performing, in that the borrowers are continuing to honor their contractual obligations by making their payments as scheduled.[4] While such loans could potentially be at a higher risk of default compared to certain properties with positive equity, they are not currently delinquent, and are not required to be identified as being on the road to foreclosure or even likely to default.[5] In fact, some of these loans may have already been modified to help the borrower achieve a reasonable ability to repay. MRP purports to seek to acquire the loans at "fair market value" but makes clear that it intends to pay only 75-80% of the value of the property based on a "foreclosure discount." In other words, MRP seeks to value loans that are *not* in default, and are likely to never be in default, by treating them as if default is imminent. Although valuations will differ by loan, it is clear that MRP would not be paying anywhere near "fair market value" of the loan. By way of reference, researchers have estimated that the "fair market value" for a loan with a 660 FICO, 140 LTV, and 3.7% gross weighted average coupon would be at least 96% of the current market value of the property. This fact pattern is especially concerning considering that MRP would like to refinance the loan into an FHA loan that would price closer to 107% of par value.[6]

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[4] *See* MRP Presentation at p. 9; MRP FAQ No. 17; *see also* Mortgage Resolution Partners website, http://mortgageresolutionpartners.com/ (explaining their plan of "[c]hoosing only performing mortgages").

[5] For example, researchers estimate that prime loans with a 120% loan-to-value ratio, which appear to be encompassed within MRP's proposal, currently have only around an 8.4-8.8% chance to default. *See* "Global Securitized Products Weekly," Credit Suisse, July 12, 2012 at p. 8. http://www.americansecuritization.com/uploadedFiles/CS_Eminent_Domain_20120711.pdf.

[6] *Id.* at 12.

These two components – hand-selecting the best borrowers among those with underwater loans and paying significantly less than the market value of the property – appear critical to MRP's plan, which would result in MRP reaping substantial profits for itself and its investors. The plan seeks to refinance the loans into federal government-backed FHA loans, which will then be re-securitized into a new pool of Ginnie Mae mortgage-backed securities. All in all, as shown in Appendix I to this letter, MRP and its partners would earn returns estimated to be 27% by merely reselling the loan,[7] which is the strongest signal possible that just compensation would not be paid by the JPA to the securitization trusts through eminent domain.

MRP's Eminent Domain Plan Would Not Remedy the Stated Problem and Would Have Unintended Consequences

For several reasons, MRP's eminent domain proposal would not actually result in a constructive solution and would have negative unintended consequences for the residents of jurisdictions where it is implemented. Adopting what MRP calls its "business model" is, quite simply, poor public policy.

First, MRP's plan addresses the wrong mortgage loans for the stated public purpose of such programs—that is, to reduce foreclosures. Rather than targeting loans that are currently in default and on the road to foreclosure – *i.e.*, those that present an immediate danger to the housing markets – MRP's proposal only targets *performing* mortgage loans. It is impossible to identify particular performing loans that will end up in foreclosure proceedings, and most probably will not end up in default. Indeed, these are the borrowers who remained current through the economic crisis, shunned the opportunity for strategic default, and continue to honor their contractual obligations well after their loans went "underwater." It seems quite strange to formulate a proposal for preventing foreclosure and remedying blight that neither seeks to prevent imminent foreclosures nor directly addresses current blight. But defaulted mortgage loans are not nearly as valuable as performing mortgage loans, and therefore, not part of MRP's business model. Although we think that the use of eminent domain by the Authority to acquire delinquent loans would also have negative consequences, the use of eminent domain to acquire performing loans is particularly egregious.

Second, there is little logic to why MRP's plan targets only "private-label" securitized mortgage loans. The plan purportedly seeks to solve a "collective action problem" that limits loan modifications, but we are unaware of any prudent lending standards that would call for principal reduction for *performing* loans. To the extent loans are *in default or are reasonably foreseeable to go into default*, the vast majority of securitization contracts give the mortgage loan servicer significant discretion to engage in loss mitigation, including making various kinds of loan modifications.[8] Regardless, it is not clear why MRP would target only private-label

[7] Such estimation depends on the underlying characteristics and value of the loan. *See* Appendix I *and* "Global Securitized Products Weekly," Credit Suisse, July 12, 2012 at p. 8. http://www.americansecuritization.com/uploadedFiles/CS_Eminent_Domain_20120711.pdf.

[8] *See* ASF's "Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans," June 2007,

securitized loans, except based on an expectation that it is easier to proceed legally against the out-of-state trusts that manage the interests of diverse groups of investors, as compared to banks or FHFA as conservator of Fannie Mae and Freddie Mac. Further, because FHFA notably precludes principal reduction as a permitted form of loan modification, borrowers whose loans are held in a government security or a bank portfolio would get radically disparate treatment from those borrowers with loans held in a private-label securitization.

Third, MRP's plan threatens to restrict the availability of mortgage loans to all potential homeowners in jurisdictions that have implemented an eminent domain program. As set forth in the June 28, 2012 letter[9] from ASF and numerous other organizations, MRP's plan would harm current mortgage loan investors, as it would compel the liquidation of performing loans at a "foreclosure discount," even though the loans are continuing to generate cash flow for their investors and are likely to eventually be paid off. It has been estimated that investors could be faced with loan loss severities in the neighborhood of 43%.[10] If the government reserves such power, the market would have to respond to this new risk. For example, most lenders in affected jurisdictions will likely require substantially lower loan-to-value ratios and corresponding increases in down payments to guard against loans going "underwater," or take other measures that would reduce the pool of eligible borrowers able to buy homes. No lender will want to bear the risk that if the loan goes underwater, the city will seize the loan and flip it at the expense of the original lender and to the profit of entities like MRP. Other lenders may simply choose not to serve these municipalities due to the potential risks associated with government intervention through eminent domain or otherwise. In addition, investors in mortgage loans (including investors in RMBS) may refuse to invest in mortgage loans that could be acquired through the exercise of eminent domain, which would ultimately reduce the availability of mortgage loans for borrowers. In fact, studies have found that if all fifty states were to adopt the program, losses for prime jumbo RMBS pools would increase by around 30%, resulting in an average downgrade of three notches for investment-grade RMBS, a clear and significant disincentive for future investors.[11]

We also note that actions are already being considered that could impair credit availability affected municipalities, including a decision to disqualify loans in these districts from being included in the "to be announced" ("TBA") market.[12] The TBA market facilitates the bulk of trading of Fannie Mae and Freddie Mac loan pools and is the nation's preeminent source of mortgage credit. Constriction of credit for new borrowers is the opposite of what the housing

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http://www.americansecuritization.com/uploadedfiles/asf%20subprime%20loan%20modification%20principles_060107.pdf.

[9] Available at: http://www.americansecuritization.com/uploadedFiles/Joint_Letter_on_JPA-San_Bernardino_6_28_12.pdf.

[10] *See* "Global Securitized Products Weekly," Credit Suisse, July 12, 2012 at p. 8.

[11] *See* http://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBS_SF292513, http://www.fitchratings.com/creditdesk/press_releases/detail.cfm?pr_id=754505, and http://www.dbrs.com/research/249049/u-s-structured-finance-newsletter-using-eminent-domain-to-rehabilitate-underwater-mortgages.pdf?v=1343146735004.

[12] *See* "SIFMA Statement on Eminent Domain and TBA Trading," SIFMA, July 19, 2012, http://www.sifma.org/news/news.aspx?id=8589939537.

market needs. It means less ability for new borrowers to buy homes, resulting in reduced demand and the continued build-up of housing stock, thus reducing market values for all homes in the area. In fact, in the most recent minutes of the Federal Reserve Board of Governors Open Market Committee, the Committee cited tight lending standards as a primary cause for the slow housing recovery.[13] Finally, a further reduction in home prices could result in more underwater borrowers, and thus more seizures under MRP's proposal— a disastrous cycle.

Fourth, not only would MRP's proposal harm local housing markets, it may also result in reduced property tax revenues for municipalities in which it is implemented. The tax assessment for a particular property is based on the "market value" of that property. Under the plan, a court would determine the fair market value of a mortgage loan based on the value of the underlying property, which would likely be lower than the assessed value for property tax assessment purposes. That would give the homeowner a legitimate basis to challenge the property assessment, reducing the revenue that cities have available to provide municipal services that help support property values in the area.[14]

Fifth, such eminent domain plans may have a substantial impact on the federal and state tax obligations of homeowners who obtain a principal write-down through the program. Ordinarily, when a homeowner receives a principal write-down on a mortgage loan that is considered a recourse loan, the value of the forgiven debt is considered by the IRS to be ordinary income during the tax year the principal is written down and therefore is subject to related federal taxes. Under current law, as enacted by the Mortgage Forgiveness Debt Relief Act of 2007 and extended in the Emergency Economic Stabilization Act of 2009, this federal tax liability has been waived through the end of 2012; however, it does not appear that Congress is likely to further extend this relief.[15] If it is not extended, by the time such eminent domain programs may be implemented, the reduced principal values of these mortgage loans will be taxable at the homeowner's current federal tax rate and may be substantial enough to place the homeowner in a top federal income tax bracket for that year. In addition, depending on the type of mortgage loan, state income tax may be payable on the amount of the principal write-down. Thus, a homeowner may owe significant unanticipated taxes as a result of the principal write-down, potentially placing the homeowner in financial distress and offsetting any benefits of the loan modification.

At base, MRP's plan rests on the premise that a private investment group can use a government's eminent domain power to expropriate selected assets of other investors for its own use, and then convert the expropriated assets into government guaranteed FHA loans on the other end to earn substantial profits. That would be a dangerous and untenable national precedent,

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[13] *See* http://www.federalreserve.gov/newsevents/press/monetary/fomcminutes20120620.pdf at page 7.

[14] We note the recent decision by San Bernardino city to seek bankruptcy protections. *See* Phil Willon, San Bernardino Seeks Bankruptcy Protection, Los Angeles Times (online), July 10, 2012, http://www.latimes.com/news/local/la-me-0711-san-bernardino-20120711,0,5646419.story.

[15] Senator Debbie Stabenow (D-MI) introduced a bill to extend the Mortgage Forgiveness Tax Relief Act until 2015; however, the bill was referred to the Senate Committee on Finance and no formal discussions or action has been taken on it since March, 2012. *See* http://www.gpo.gov/fdsys/pkg/BILLS-112s2250is/pdf/BILLS-112s2250is.pdf.

regardless of the public purpose asserted. But here, MRP's plan would not actually help to support homeownership and instead would negatively impact the community.

The Plan to Use Eminent Domain to Acquire Mortgage Loans Is Legally Improper

In addition to the proposal being ill-conceived as a policy matter, the eminent domain proposal raises numerous, fundamental legal issues. Press accounts have widely observed that the idea of using eminent domain to acquire mortgage loans is "unusual," but it is much more than that—the plan would be unlawful and unconstitutional as a matter of both state and federal law.

A. The Plan Is Not a Legitimate "Public Use" Under State or Federal Standards

The U.S. Constitution allows takings only for a "public use." U.S. Const. amend. V. Even in its broadest formulation, "public use" has never encompassed the situation envisioned here, where a private entity seeks to use a governmental agency as a vehicle to seize property for its direct use and profit.

Unsurprisingly, Professor Hockett cites to the U.S. Supreme Court's 5-4 decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), but *Kelo* does *not* support the plan proposed here. In *Kelo*, the majority affirmed the city's power to take property for a comprehensive economic development of a "riverwalk" and marina area that involved converting the property for a variety of commercial, residential, and public recreational uses. Even the four-justice majority opinion and Justice Kennedy's concurring opinion were careful to distinguish that kind of comprehensive development project from a one-to-one taking of property to be given to another private party. And the four dissenting Justices warned that defining "public use" to mean anything that benefits the public would obliterate the constitutional limitation.

Other courts throughout the country have issued Constitutional rulings that include reasoning similar to that set forth in *Kelo*. In *City and County of San Francisco v. Ross*, 44 Cal. 2d 52 (1955), the California Supreme Court distinguished the implementation of a general development plan from the case before it, which involved the acquisition of property for a privately run parking lot. The Court rejected the argument that parking, in general, provided a sufficient public benefit, explaining: "The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." *Id.* at 59; *see also Thayer v. Cal. Dev. Bd.*, 164 Cal. 117, 127 (1912) ("The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character.").

MRP's proposal to seize individual loans so that it can flip them in the capital markets would be an improper distortion of the "public use" doctrine and an untenable extension of *Kelo*. The hope that restructuring underwater loans (that are, in fact, already performing) will provide incidental benefits to the community cannot be enough. If it were, any private party could take any property interest – homes, businesses, contractual distribution rights, corporate stock – on

the ground that the new owner would put the property to better use, thereby raising local taxes, creating jobs, or providing some other environmental, safety, or health benefit.

That MRP's plan targets performing loans only confirms that the proposal is not a valid "public use." MRP's plan does not focus on saving homes at imminent risk of foreclosure or remedying current blight. Instead, the structure of MRP's plan is to identify people who would be the best credit risk, and thereby produce the most valuable assets *for MRP and its investors*.

B. The Eminent Domain Proposal Would Impermissibly Interfere With Interstate Commerce and Contractual Rights

Even if implementing a private party's plan to appropriate mortgage loans could constitute a "public use," the plan would still violate other constitutional restrictions. For example, the "Dormant Commerce Clause" acts as a limit on state regulation that has a direct, rather than merely incidental, effect on interstate commerce, especially where there is a risk that state intervention will harm a national market. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (striking down law that burdened out-of-state business based on asserted interest in protecting interests of its residents); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-45 (1970) (striking down law that imposed unreasonable burden on interstate commerce).

In *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414 (1985), the court applied the Dormant Commerce Clause to reject an attempt by the City to exercise eminent domain over a sports franchise. Notably, proponents of using eminent domain in the Program, such as Professor Hockett, have cited an earlier decision in that action, *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60 (1982), which held that the City was entitled to a trial on whether it could exercise eminent domain over a sports franchise. Proponents of MRP's plan neglect the ultimate result: on remand, the plan was found to be an unconstitutional interference with interstate commerce.

The problem identified in *City of Oakland* arises here with equal, if not greater, force. MRP's proposal specifically targets mortgage loans that have been securitized in out-of-state transactions to back securities traded in interstate commerce. Indeed, a principal purpose and justification of the proposal is to remove individual mortgage loans from securitized "pools" and avoid contractual restrictions put in place by RMBS investors and servicers. Those contractual restrictions are a direct requirement of IRS REMIC regulations that ultimately regulate securitization trusts nationally. Such a proposal would undermine the securities backed by those loans and the applicable federal rules governing these transactions, thereby disrupting the securitization market as a whole, especially if it were adopted in multiple jurisdictions. The effect and burden on interstate commerce would be intentional and direct, rather than only "incidental" or "indirect," and would interfere with Congress's role in regulating the nationwide market.

For similar reasons, the eminent domain proposal would likely violate the U.S. Constitution's "Contracts Clause," which prohibits laws impairing the obligations of contracts. U.S. Const. art I, § 10; *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983). The Contracts Clause has frequently been applied to state action that

limits creditors' rights or materially changes the nature of their security. *See, e.g., U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) (violated Contracts Clause to repeal, in contract between two states, covenant that provided important protection to bondholders); *Los Angeles v. Rockhold*, 3 Cal. 2d 192 (1935) (act that materially changed security interests for bondholders and landowners declared invalid). Here, among other things, exercising eminent domain to compel a "foreclosure" sale of currently performing loans would impair RMBS investors' contractual rights to future cash flows and the value of their securities.

C. The Authority Cannot Assert Eminent Domain over Property Outside the County

Local agencies have the power of eminent domain only to the extent authorized by statute, *see* Cal. Code Civ. Proc. ("CCP") § 1240.020, and by statute, "[a] local public entity may acquire by eminent domain only property within its territorial limits," subject to exceptions not applicable here. CCP § 1240.050. "Statutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of the power is resolved against the entity." *Kenneth Mebane Ranches v. Superior Court*, 10 Cal. App. 4th 276, 282-83 (1992) (rejecting extraterritorial exercise of eminent domain). Moreover, because eminent domain arises out of the power of the State as sovereign, *see People v. Chevalier*, 52 Cal. 2d 299, 304 (1959), the State lacks power to authorize the taking of property outside its boundaries. *See Mayor & City Council of Baltimore v. Baltimore Football Club, Inc.*, 624 F. Supp. 278 (D. Md. 1986) (rejecting attempt to condemn football franchise that had moved out of state).

Here, MRP's proposal is to seize not real property, but mortgage *loans* held by securitization trusts. In many, if not most, cases the trusts and notes evidencing the loans will be located outside the municipality and even outside the State. The "situs" for such rights typically is where the written instrument evidencing the rights (*i.e.*, the note) is held or at the owner's domicile or business situs under the principle *mobilia sequuntur personam* ("the chattel follows the person"). *See, e.g., Texas v. New Jersey*, 379 U.S. 674 (1965) (adopting version of *mobilia sequuntur personam* principle for escheat determinations); *S. Pac. v. McColgan*, 68 Cal. App. 2d 48 (1945) (explaining "situs" of intangible property for tax purposes); Restatement (Second) of Conflict of Law § 63 (jurisdiction over written instrument exists where instrument is located); *see also, e.g., West v. White*, 307 Or. 296 (1988) (en banc) ("situs" of promissory note was domicile of testator, even though note was secured by trust deed on real property in Oregon).

Professor Hockett's Memorandum argues that eminent domain can be based on the location of the real property securing the loan, but none of the cases it cites addresses eminent domain or supports such a premise. Instead, it cites cases on jurisdiction to pursue collection against a debtor, *see Harris v. Balk*, 198 U.S. 215 (1905); *Chi. R. I. & P. Ry. Co. v. Sturm*, 174 U.S. 710 (1899), and *Waite v. Waite*, 6 Cal. 3d 461, 467 (1972), which states that "[t]he location assigned to [an intangible asset] depends on what action is to be taken with reference to it."

Professor Hockett's authorities are unavailing. *First*, MRP's plan does not involve pursuing a debt against a local debtor; the condemnation proceeding is as against note holders and seeks to seize the rights of creditors. *Second*, the issue is not whether a state court is a fair forum to adjudicate a dispute consistent with due process, but whether the City or County can wield the exclusive sovereign power to appropriate the property. *See Baltimore Football Club*,

624 F. Supp. at 284-85 (expressly rejecting "minimum contacts"-based inquiry for eminent domain). Accordingly, we are unaware of any authority that would support the municipality's power to seize such property outside its territorial limits.

D. Even If the Property Could Be Taken, MRP's Valuation Method Would Not Stand

Even if the mortgage loans were subject to condemnation, the municipality would be required to pay in just compensation far more than MRP intends to pay. As noted above, MRP appears to assume that these performing underwater loans would be valued at 20-25% or more below the value of the property based on a "foreclosure discount."

This valuation model ignores, among other things, that: (a) the loans are *not* in foreclosure and are likely to never be in foreclosure; (b) the loans are continuing to generate cash flow for the indefinite future, which would accrue to the RMBS investors even if the loans did go into foreclosure at some later time; (c) property values in the future may rise; and (d) the securitization trusts are not distressed sellers of loans. Moreover, because cash flows generated by the loans distribute differently to different investor classes, it is not clear that the various interested parties even could be justly compensated. Critically, if MRP cannot acquire the loans at the discount it seeks, it will not be able to turn the profit it is touting to potential investors and the funding for the Program may not manifest.

Using Eminent Domain Will Also Involve Substantial and Costly Procedural Hurdles

The foregoing discussion merely illustrates some of the legal issues that we have observed from our preliminary review; it is not an exhaustive list of the legal authority or arguments that can or would be raised against the eminent domain proposal. Aside from these substantive issues, there are numerous procedural hurdles to implementing such a plan, as outlined below using San Bernardino as an illustration.

First, prior to initiating any eminent domain proceeding, the JPA will have to (a) notify the holder of each mortgage loan; (b) hold a hearing in which interested parties are given the opportunity to be heard; and (c) adopt a "resolution of necessity." *See* CCP §§ 1245.230, 1245.235.

Second, if eminent domain proceedings are commenced, defendants may seek to transfer venue to a neutral County and would have a *right* to do so if any defendants are not residents of, or doing business in, the County. *See* CCP § 1245.010; *see also* CCP §§ 394, 397. Regardless, interested parties will be able to challenge in court the Authority's right to take the property and will be able to conduct full discovery. *See* CCP §§ 1250.350-.360, 1258.010.

Third, while MRP's materials and Professor Hockett's Memorandum suggest that the JPA could use a "quick take" procedure, that is *highly* unlikely. The right to take will be disputed, and the JPA will not be able to make the requisite showings – including, for example, that there is an "overriding need" to take the property before final adjudication, and that absent immediate possession of the property the JPA will suffer a "substantial hardship" that outweighs the hardship to defendants. *See* CCP § 1255.410(d)(2).

Fourth, the substantial legal questions around the novel use of eminent domain in the proposal would certainly generate time-consuming litigation at the trial level, and if not struck down immediately at the trial level, would likely be appealed to the state and/or U.S. Supreme Courts. If the municipalities do not prevail on the right-to-take issue, these jurisdictions will be liable for attorneys' fees, in addition to any other damage caused by any pre-condemnation activity. The tens of millions of dollars in litigation losses may even push some cities into bankruptcy.

For these reasons, in addition to the policy issues and substantive legal problems, we urge FHFA to oppose the use of eminent domain in programs around the country. There are far more reasonable ways to address the foreclosure crisis than to follow an unprecedented, burdensome proposal that is legally unsupportable and, even if implemented, would do more harm than good for the impacted communities.

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ASF very much appreciates the opportunity to provide the foregoing comments in response to FHFA's notice. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 212.412.7107 or via email at tdeutsch@americansecuritization.com.

Sincerely,

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum

Appendix I

Proceeds to Trust & MRP Investors

Loan Balance	100,000	A
LTV	140	B
Home Value	71,429	C=A/(B/100)
Proceeds to Trust (Investment made by MRP)	57,143	D=C*80%
Loss Severity (PLS)	42.9%	E=(A-E)/A
New Loan	67,857	F=C*95%
GNMA 3.5 Price	107	G
Net Proceeds to MRP	15,464	H=F*(G/100) - D

Assumes loan is purchased at 80% of real estate price. For simplicity FHA MIP is not considered here.

Source: Credit Suisse