

1 BRUCE D. GOLDSTEIN #135970  
County Counsel  
2 KATHLEEN A. LAROCQUE #124569  
[klarocqu@sonoma-county.org](mailto:klarocqu@sonoma-county.org)  
3 Deputy County Counsel  
PHYLLIS C. GALLAGHER #152129  
4 [pgallag1@sonoma-county.org](mailto:pgallag1@sonoma-county.org)  
Deputy County Counsel  
5 County of Sonoma  
575 Administration Drive, Room 105  
6 Santa Rosa, California 95403-2815  
Telephone: (707) 565-2421  
7 Fax: (707) 565-2624

8 Attorneys for Plaintiff County of Sonoma

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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION

13 County of Sonoma, ) CASE NO. C 10-03270 CW  
14 Plaintiff, )  
15 vs. ) PLAINTIFF'S SUPPLEMENTAL  
16 Federal Housing Finance Agency, et al., ) BRIEF IN SUPPORT OF  
17 Defendants. ) PRELIMINARY INJUNCTION PER  
18 ) COURT'S DECEMBER 20, 2010  
ORDER

19 **INTRODUCTION**

20 In its December 20, 2010, order, the Court requested additional briefing on the balance of  
21 hardships incurred by a preliminary injunction requiring the defendant Federal Housing Finance  
22 Agency ("FHFA") to begin notice-and-comment rulemaking regarding Property Assessed Clean  
23 Energy programs ("PACE"), without being required to withdraw the defendants' announcements  
24 on the subject and without further constraints or requirements on the rulemaking process or  
25 outcome. Plaintiff County of Sonoma ("Sonoma") submits this brief in response to the  
26 defendants' arguments that the harm imposed on FHFA<sup>1</sup> by having to commence rulemaking

27 <sup>1</sup> Defendants' brief was submitted on behalf of FHFA and its Director in his official  
28 capacity, and identified purported harm only to FHFA and not to Fannie Mae or Freddie Mac. In  
this brief, Sonoma refers to FHFA and its Director collectively as FHFA.

1 outweighs the harm to Sonoma if such rulemaking is not commenced promptly.

2 Contrary to FHFA's assertions, a preliminary order requiring FHFA to initiate notice-  
3 and-comment rulemaking with respect to PACE, while FHFA's July 6, 2010 Statement remains  
4 in effect and the litigation continues, would cause no appreciable harm to FHFA, is likely to  
5 shorten the duration of uncertainty in the regulatory environment that is causing harm to  
6 Sonoma, and is in the public interest. Sonoma respectfully requests that the Court enter a  
7 preliminary injunction ordering the defendant FHFA to promptly initiate rulemaking regarding  
8 PACE in compliance with 5 U.S.C. § 553.

9 **ARGUMENT**

10 FHFA takes the extreme position that the Court's proposed limited and interim remedy  
11 will significantly undermine its ability to communicate information and guidance to the regulated  
12 entities on PACE *and* other matters. With respect to PACE specifically, FHFA complains of "the  
13 significant hardship of compelled formal rulemaking on a matter as to which the routine and  
14 responsive approach of supervisory guidance ... would be more effective and more efficient."  
15 (Defendants' Brief p. 2.) FHFA's concern is misplaced since the Court has clearly stated it is  
16 not proposing to disturb the defendants' existing statements regarding PACE. Under the  
17 proposed preliminary injunction, FHFA's existing "informal, supervisory guidance" with respect  
18 to PACE (the July 6<sup>th</sup> Statement) would remain in effect. Thus, the only burden to FHFA is the  
19 time and resources required to begin a notice-and-comment process, a procedure with which  
20 FHFA is certainly familiar and can manage without difficulty. *See, e.g.*, 75 Fed. Reg. 72751-01  
21 (Nov. 25, 2010) (FHFA notice of proposed rulemaking and request for comments re: voluntary  
22 mergers of Federal Home Loan Banks); 75 Fed. Reg. 68534-01 (Nov. 8, 2010) (FHFA notice of  
23 proposed rulemaking and request for comments re: reorganizing and readopting existing Federal  
24 Housing Finance Board regulations dealing with consolidated obligations); 75 Fed. Reg. 60347-  
25 01 (Sept. 30, 2010) (FHFA notice of proposed rulemaking and request for comments re:  
26 information sharing among Federal Home Loan Banks); *see also* 75 Fed. Reg. 81145-01 (Dec.  
27 27, 2010) (FHFA advanced notice of proposed rulemaking re: Federal Home Loan Bank  
28 membership); 75 Fed. Reg. 49932-01 (August 16, 2010) (FHFA 5-page notice of proposed

1 guidance and request for comments re: prohibition on regulated entities dealing in mortgages on  
2 properties encumbered by private transfer fee covenants).

3 FHFA also asserts a “slippery slope” argument -- that “compelling formal rulemaking in  
4 this instance would embolden future plaintiffs” to litigate over informal guidances on matters  
5 other than PACE. (Defendants’ Brief pp. 2, 8-9.) The Court’s proposed narrow, preliminary  
6 ruling with respect to this particular action by FHFA is not going to open the floodgates of legal  
7 challenges to FHFA based on a procedural violation of the federal Administrative Procedure Act  
8 (“APA”), particularly where the Court has not yet ruled on the merits or determined whether  
9 vacating the July 6<sup>th</sup> Statement is required. Admittedly Congress vested the FHFA with the  
10 ability to conduct some of its business through “informal supervisory guidance,” but not every  
11 action taken by the FHFA fits within this authority. Congress also made clear that some action  
12 taken by the FHFA would require compliance with the APA (12 U.S.C. § 4526(g)), and the  
13 merits of Sonoma’s procedural APA claim turns on this very distinction. Certainly if Sonoma  
14 ultimately prevails, FHFA may need to examine more closely which directives can be issued  
15 informally and which require rulemaking, but there is nothing improper in this; such a result  
16 would be consistent with Congress’ intent.

17 The Court has considerable discretion to fashion a remedy to address and balance the  
18 hardships alleged. Requiring FHFA to commence rulemaking regarding PACE would not harm  
19 FHFA, would hasten resolution of some of the uncertainty that is causing Sonoma’s PACE  
20 program to lose momentum, and would be in the public interest by allowing public participation  
21 in a regulatory action that has far-reaching consequences on the environment and the emerging  
22 green economy. This public process will give Sonoma and others the opportunity to demonstrate  
23 publicly that PACE can work, a process that will in turn give Sonoma the opportunity to correct  
24 the general, misleading, and negative representations that FHFA has made about PACE to the  
25 detriment of Sonoma’s program. In addition, anything that hastens resolution of this uncertain  
26 regulatory environment is in Sonoma’s interest. A preliminary injunction requiring the agency to  
27 commence the process now in the likely event that Sonoma will prevail on its procedural claim,  
28 while not granting Sonoma the ultimate relief of voiding the previous agency action, increases

1 the likelihood that the PACE issue will be resolved sooner rather than later and appropriately  
2 balances the competing harms.

3 **CONCLUSION**

4 For the foregoing reasons, Sonoma respectfully requests that the court order the  
5 defendant FHFA to promptly (*e.g.* no more than thirty days from the date of the order)  
6 commence rulemaking pursuant to 5 U.S.C. § 553 regarding PACE programs. Sonoma requests  
7 that the order remain in effect until Sonoma's procedural APA claim is decided on the merits.

8 DATED: January 13, 2011.

BRUCE D. GOLDSTEIN, County Counsel

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By: /s/ Phyllis C. Gallagher  
Phyllis C. Gallagher  
Deputy County Counsel