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UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF NEW YORK

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THE TOWN OF BABYLON, No.

Plaintiff,

vs. **COMPLAINT**

FEDERAL HOUSING FINANCE AGENCY; EDWARD DeMARCO, in his capacity as Acting Director of FEDERAL HOUSING FINANCE AGENCY; FEDERAL HOME LOAN MORTGAGE CORPORATION; CHARLES E. HALDEMAN, JR. in his capacity as Chief Executive Officer of FEDERAL HOME LOAN MORTGAGE CORPORATION; FEDERAL NATIONAL MORTGAGE ASSOCIATION; MICHAEL J. WILLIAMS, in his capacity as Chief Executive Officer of FEDERAL NATIONAL MORTGAGE ASSOCIATION, OFFICE OF THE COMPTROLLER OF THE CURRENCY, a component of the UNITED STATES DEPARTMENT OF THE TREASURY, and JOHN G. WALSH, ACTING COMPTROLLER OF THE CURRENCY

Defendant.

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INTRODUCTION AND OVERVIEW OF CLAIM

1. Plaintiff, the Town of Babylon (the "Town") formed the Long Island Green Homes Program ("LIGH" or the "Program") in 2008, under New York law and pursuant to its taxing authority, to provide financing to Town property owners for energy

efficiency improvements. The Town created LIGH as a mechanism to reduce energy and water use and to provide clean power. The program is a significant part of The Town's efforts to promote clean energy and green jobs. The Town finances these energy efficient improvements and imposes an assessment on the property in the amount of the cost of the improvement. The improvements are affixed to real property. Programs similar to LIGH are in place or are being initiated across the Country. Such programs are generally referred to as Property Assessed Clean Energy ("PACE") Programs.

2. Notwithstanding New York State's long-standing practice of local assessments and the support for and investment in such programs by various federal agencies and President Barak Obama's Administration, defendants, Federal Housing Finance Agency ("FHFA"), Federal National Mortgage Association ("Fannie Mae"), Federal Home Loan Mortgage Corporation ("Freddie Mac") and the Office of the Comptroller of Currency ("OCC") claim that PACE and "PACE-like" Programs, including LIGH, are a risk to the home mortgage industry and, as such, now refuse to purchase mortgages that are subject to PACE repayment obligations. Recently issued directives and guidelines from Defendants threaten the very existence of PACE programs nationwide.

3. The Department of Housing and Urban Development ("HUD") and Department of Energy ("DOE") have identified PACE Programs as eligible for over one billion dollars in federal stimulus funds. Through the American Recovery and Reinvestment Act's Energy Efficiency ("ARRA") and Conservation Block Grant Program, the DOE has awarded over $166.64 million directly to New York State's local governments including $1.54 million to the Town. ARRA also funded the New York

State Energy Program, through which the state has received more than $123.11 million. Both DOE and the New York State Energy Research and Development Authority ("NYSERDA") support funding for PACE programs, and, accordingly, dozens of counties, towns and cities across New York are poised to launch their own PACE programs financed, in part, with federal dollars.

4. LIGH allows the Town to provide financing to residential property owners to fund upfront costs of energy efficiency and on-site renewable energy projects. Initial funding was generated from the Town's residential garbage improvement program.

5. Property owners who opt to participate in LIGH to finance these projects are billed on a monthly basis over a term of up to 10 years. The average term for repayment is 8.7 years. Unlike PACE and "PACE-like" programs, LIGH is a benefit assessed program ("BASE"). Under this type of program, if a participating homeowner defaults on its monthly payment obligation, only the amount of the delinquent payment(s) attaches to the real property as a lien. The remaining balance of the LIGH improvement is not accelerated upon default. To date, there have been no delinquencies in LIGH repayment obligations. The LIGH obligation is transferable from one property owner to the next and does not have to be repaid in full when title is transferred.

6. Hundreds of houses have been retrofitted in the Town since the launch of LIGH in October, 2008. The average house has installed efficiency measures with a 1.9 savings-to-investment-ratio (SIR), which means that, for the vast majority of participants, the savings generated by reduced energy costs meet or exceed the homeowner's monthly repayment cost. At less than $9,000 for an average project, there have been no loan-to-

value (LTV) ratios exceeding 5 percent. The average monthly repayment obligation is $91.56.

7. Energy efficiency improvements lower energy costs making it more affordable for the homeowner to maintain the home. This reduces the risk of default and foreclosure. Energy efficiency and clean energy improvements also typically increase the value of the improved property. Therefore, participation by a homeowner in the LIGH program is beneficial (not detrimental) to a mortgagee.

8. LIGH finances energy efficient retrofitting on residential homes in the Town for the purposes of air sealing, attic insulation and upgraded heating systems.

9. On May 5, 2010, both Fannie Mae and Freddie Mac issued directives to all lending institutions through a "Lender Letter" stating that areas (towns, cities, states) that offer PACE or "PACE-like" programs should be treated disparately when reviewing the residents of such areas for mortgages. The premise is that residents, who live in an area that offers a PACE or "PACE-like" program, like LIGH, have the ability to participate in the program, and if so, this could result in an assessment with a first lien priority, as a benefit assessment. The directives apply to all residents in any area that has a PACE and "PACE-like" program, and to all homeowners regardless of whether the homeowner is actually participating in one of the programs. Because Fannie Mae and Freddie Mac erroneously view assessments as "loans," they incorrectly contend that PACE, LIGH and other similar programs are prohibited by the terms of the Fannie Mae/Freddie Mac Uniform Security Instruments.[1] Fannie Mae's Lender Letter is annexed hereto as Exhibit A.

[1] "Uniform Security Instruments" are standard form documents that must be completed and provided by borrowers to lenders under FHFA, Fannie Mae and Freddie Mac guidelines.

10. Freddie Mac's Lender Letter declared that "an energy-related lien" may not be senior to a mortgage delivered to Freddie Mac, and encouraged lenders in jurisdictions that have an "energy loan program" to determine whether a "first priority lien" is permitted. Freddie Mac's Lender Letter is annexed here as Exhibit B.

11. Together, Fannie Mae and Freddie Mac own or guarantee approximately one-half of all residential home mortgages in the United States. Fannie Mae and Freddie Mac purchase home loans from banks and other lenders, in theory freeing up more capital for additional home mortgage lending. Because Fannie Mae and Freddie Mac essentially control the mortgage resale market, lenders will not issue mortgages that do not meet their lending requirements. As a result, Fannie Mae's and Freddie Mac's determination – which is in violation of State and Federal law – resolves to foreclose LIGH and PACE programs and undermines federal and New York state support for energy loans and energy retrofit programs.

12. On July 6, 2010, the FHFA issued a statement that "energy retrofit lending programs present significant safety and soundness concerns that must be addressed by [the regulated entities]." FHFA's Statement is annexed hereto as Exhibit C.

13. In its statement, the FHFA directed its regulated entities to undertake, among other things, the following actions: (1) adjust loan-to-value ratios to reflect the maximum permissible PACE "loan" amount available to borrowers in PACE jurisdictions; (2) ensure that loan covenants require approval consent for any PACE "loan"; (3) tighten borrower debt-to-income ratios to account for additional obligations associated with possible future PACE "loans"; and (4) ensure that mortgages on

properties in a jurisdiction offering "PACE-like" programs satisfy all applicable federal and state lending regulations and guidelines.

14. The FHFA's July 6, 2010 statement supported Fannie Mae's and Freddie Mac's interpretation that PACE "first liens" run contrary to the Uniform Security Instruments. Nonetheless, the statement directed Fannie Mae and Freddie Mac to waive prohibitions against senior liens for any homeowner who obtained a PACE or PACE-like "loan" prior to July 6, 2010.

15. On July 6, 2010, Defendant OCC also issued a Bulletin concerning PACE financing and attached FHFA's July 6 Statement. OCC directed national banks to take actions that will effectively preclude homeowners with first lien priority PACE assessments from obtaining mortgages, (or refinancing existing mortgages), through any national bank. A copy of OCC's July 6 Bulletin is attached as Exhibit D.

16. Subsequently and pursuant to the FHFA's July 6, 2010 Statement/Directive, on August 31, 2010, Fannie Mae and Freddie Mac issued bulletins affirmatively stating that they will not purchase mortgages secured by properties subject to PACE obligations that create first lien priority. A copy of the August 31, 2010 Bulletins are attached hereto as Exhibit E.

17. Directives and statements by Fannie Mae, Freddie Mac, FHFA and OCC mischaracterize PACE programs as "loans," rather than benefit "assessments" as they are defined pursuant to New York law.

18. A state legislature may, by statute, prospectively alter the priority of liens arising under state law in order to give priority to a public charge. New York law provides that certain assessment liens, including assessments to finance LIGH

improvements, are granted a priority equal to that of liens for general taxes and are superior to all other liens.

19. Mischaracterizing PACE assessments as "loans," the FHFA has stated that "[f]irst liens for such loans represent a key alteration of traditional mortgage lending practice" and, absent substantiation, "are not essential for successful programs to spur energy conservation."

20. The FHFA statements set forth in the preceding paragraph are incorrect. First lien status for property assessments has been commonplace for over a century. Further, LIGH has achieved substantially greater market penetration than a conventional energy efficiency program run for three years by a local power authority. The program has been embraced by the community and the improvements funded by the program have achieved significant greenhouse gas reductions.

21. The FHFA acknowledges, that by affirming Fannie Mae's and Freddie Mac's position, it is effectively putting an end to PACE programs through imposition of a "pause," with no indication of when, if ever, such programs will recommence in the future.

22. Defendants' actions have effectively prohibited mortgage holders from participating in PACE and "PACE-like" programs and will, without the relief requested herein, eliminate the effectiveness and viability of PACE and "PACE-like" programs nationally, including LIGH. Further, Defendants' actions have jeopardized grant applications for hundreds of millions of dollars that would otherwise be available to institute and realize public benefits from PACE and "PACE-like" programs.

23. FHFA has effectively precluded the LIGH program and deprived the Town's residents of the associated residential energy efficiency benefits, thereby significantly impacting the human environment, without performing the required environmental review under the National Environmental Policy Act ("NEPA").

24. In violation of New York and federal law, by treating LIGH assessments differently from other local assessments, Defendants are severely restricting the Town's efforts to assist its homeowners in reducing energy use and in creating local job opportunities through performance of the work.

25. By treating LIGH assessments differently from other local assessments, Defendants OCC, FHFA, Freddie Mac and Fannie Mae are negatively impacting the Town's ability to meet its greenhouse gas/carbon footprint reduction goals and additional goals set at the state and federal levels.

26. By treating LIGH assessments differently from other assessments, Defendants, OCC, FHFA, Freddie Mac and Fannie Mae are interfering with the Town's sovereign authority and negatively impacting the Town's ability to levy benefit assessments for public purposes, a power vested in the Town by the federal and state constitutions.

27. The illegal and harmful acts of the OCC and the FHFA and its government-sponsored, shareholder-owned private corporations, threaten the viability and future effectiveness of PACE and "PACE-like" programs and the loss of hundreds of millions of dollars in federal stimulus funding, under the guise of benefitting Defendants' pecuniary interests.

28. As a result, the Town has suffered economic damages including increased administrative costs, lost staff time, the hiring of personnel and other costs that cannot now be recovered. Additionally, the Town has lost private funding from the investment banking community. Defendants' actions have caused the Town additional damages that currently cannot be calculated.

29. The Town has a significant and legitimate interest in, among other things: preserving its home rule and assessment powers; pursuing energy conservation and greenhouse gas emissions reductions; protecting the health and welfare of its citizens; protecting the economic interest of its residents in financing energy conservation improvements; providing work opportunities for local trades and vendors; protecting its citizens from unfair trade practices and/or unfair competitive advantage; and receiving federal monies slated for energy conservation.

30. The Town seeks a prompt judicial declaration against OCC, FHFA, Fannie Mae and Freddie Mac that, under applicable law: (1) LIGH programs operate by assessments, are not loans, and therefore, are valid assessments; (2) liens that may result from these energy benefit assessments, like those resulting from any other type of assessment, have payment priority over mortgages; (3) participation in LIGH is compatible with, and not in violation of Fannie Mae's and Freddie Mac's standardized mortgage documents; (4) that the FHFA is required to conduct the required environmental review under NEPA before taking any action that will limit or foreclose LIGH (PACE) in Babylon; and (5) the OCC and the FHFA, and their government-sponsored, shareholder-owned private corporations, have acted arbitrarily and

capriciously in issuing their respective Bulletin, Statements and Lender Letters, and that all statements contained therein should be withdrawn and vacated.

31. The Town seeks a prompt judicial declaration against FHFA that, under Federal law, it has violated Administrative Procedure Act ("APA"), 5 U.S.C. §701-706, NEPA, 42 U.S.C. §4332, *et seq.*, and the Federal Housing Finance Reform Act of 2008, 12 U.S.C. §§4501 *et seq.*

JURISDICTION AND VENUE

32. This Court has jurisdiction pursuant to 28 U.S.C. §1331 (action arising under the laws of the United States) and 5 U.S.C. §70 1-706 (judicial review of federal agency actions); 5 U.S.C. §701-706 (Administrative Procedure Act), 12 U.S.C. 1452(f) (original jurisdiction in federal district court for actions involving Freddie Mac), 28 U.S.C. §1367 (supplemental jurisdiction) and under any relevant New York State Laws, including but not limited to New York State Town Law §54(8), §198(9)(b through d) and Section (b) of §209-I, and New York State General Municipal Law, Article 5-L - (119-EE -119-GG), pursuant to its supplemental jurisdiction.

33. The FHFA has made a final administrative determination that is subject to review under the APA, 5 U.S.C. §702.

34. The OCC's Directive, FHFA's Statement and Fannie Mae and Freddie Mac's Lender Letters and the directives contained therein constitute a "rule" under the APA.

35. The APA requires that, before an agency promulgates a rule that will affect the rights of individuals, it must provide notice to the public and solicit input regarding the new Rule. 5 U.S.C. § 553(b), (c); *see also id.* § 551(4) (defining rule), (5)

(defining rulemaking). Pursuant to 5 U.S.C. §706(2)(D), a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … without observance of procedure required by law."

36. The APA requires a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. §706(2)(A).

37. NEPA requires that the agency provide a "detailed statement," also known as an Environmental Impact Statement ("EIS"), concerning "the environmental impact of the proposed action" whenever an agency undertakes a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C)(i).

38. Where an agency does not know whether the effects of its proposed action will be "significant," it may prepare an Environmental Assessment ("EA") to determine whether an EIS is required. 40 C.F.R. § 1501.4(b). If the EA concludes that the action may significantly affect the quality of the human environment, the agency must prepare an EIS. *Id*. §1501.4(c). If the agency concludes, based upon the EA, that the environmental impacts are insignificant, it must prepare a "Finding of No Significant Impact." *Id*. §1508.13.

39. The Federal Housing Finance Reform Act of 2008 established the FHFA and sets forth the scope of its regulatory authority. 12 U.S.C. §§4501 *et seq*. Pursuant to 12 U.S.C. §4526(a), the Director of FHFA is authorized to "issue regulations, guidelines or other orders necessary to carry out [its] duties." When issuing regulations pursuant to section 4526(a) authority, the Director must comply with the notice and comment requirements of the APA. *Id*. §4526(b); 5 U.S.C. §553(b).

40. Pursuant to 12 U.S.C. §4623(b), "[t]he Court may modify, terminate, or set aside an action taken by the Director and reviewed by the Court pursuant to this section if the Court finds, on the record on which the Director acted, that the action of the Director was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable laws."

41. OCC is charged with assuring the safety, soundness, legal compliance and regulations of national banks. 12 U.S.C. §1. Pursuant to statute, the Comptroller of the Currency is granted broad authority to prescribe rules and regulations to carry out the responsibilities of his office except where expressly and exclusively granted to another agency. *Id.* §93a. In wielding this rulemaking authority, the Comptroller must comply with the APA's substantive and procedural requirements. 5 U.S.C. §§551, 553(b), (c), 706.

42. Venue is proper in this district under 28 U. S. C. §1391(e). The events of omissions giving rise to the claim occurred here. Additionally, the Town is located within this judicial district. Venue also lies in this judicial district by virtue of New York law because a substantial part of the events or omissions giving rise to the claims occurred in this district.

43. An actual controversy exists between the parties within the meaning of 28 U.S.C. §2201(a). This Court may grant declaratory relief, injunctive relief, and any additional relief pursuant to 28 U.S.C. §§2201, 2202 and 5 U.S.C. §§705, 706 and under any relevant state laws pursuant to its supplemental jurisdiction.

THE PARTIES

44. Plaintiff, the Town of Babylon (the "Town") is a municipal corporation with offices located at 200 E. Sunrise Highway, Lindenhurst, New York.

45. Defendant, Fannie Mae, is a federally chartered, private corporation of a type commonly referred to as a government-sponsored enterprise ("GSE"). Together with Freddie Mac, another GSE, Fannie Mae owns or guarantees approximately one-half the home loans in the U.S. and the Town. Fannie Mae is publicly traded, has a board of directors, and is required to report to the Securities and Exchange Commission. By statute, Fannie Mae has the power to sue and be sued in both state and federal court. 12 U.S.C. §1723a(a).

46. Defendant, Michael J. Williams, is the Chief Executive Officer of Fannie Mae and is named as a defendant in that capacity.

47. Defendant, Freddie Mac, is a federally chartered, private corporation and is also a GSE. Together with Fannie Mae, Freddie Mac owns or guarantees about one-half the home loans in the U.S and the Town. Freddie Mac is publicly traded, has a board of directors, and is required to report to the Securities and Exchange Commission. By statute, Freddie Mac has the power to sue and be sued. 12 U.S.C., §1452(c).

48. Defendant, Charles E. Haldeman, Jr., is the Chief Executive Officer of Freddie Mac and is named as a defendant in that capacity.

49. Defendant, FHFA, is a federal agency created on July 30, 2008 by the Federal Housing Finance Regulatory Reform Act of 2008 to oversee Fannie Mae, Freddie Mac and the Federal Home Loan Banks.

50. Defendant, Edward DeMarco, is the Acting Director of the Federal Housing Finance Agency and is named as a defendant in that capacity.

51. Defendant, OCC is a federal government agency that charters, regulates, and supervises all national banks.

52. Defendant, John G. Walsh, is the Acting Comptroller of the OCC and is named as a defendant in that capacity.

AS AND FOR A FIRST CAUSE OF ACTION
(VIOLATION Of APA, 5 U.S.C. §§551(4), (5), 553(B), (C), 706(2)(D), 12 U.S.C. 4526(A))

53. Plaintiff realleges and incorporates the allegations of all preceding paragraphs of this Complaint as if fully set forth herein.

54. Defendants' May 5 and July 6, 2010 Lender Letters, Statement and Bulletin collectively caused an effective end to all residential PACE programs including LIGH, and said communications constitute regulations, guidelines, orders or rules (hereinafter "Rules") within the meaning of the APA, 5 U.S.C. §§551 *et. seq.* and 553.

55. Under 5 U.S.C. §551(4), a Rule is defined as "the whole part or a part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy …."

56. Defendants' Rules are agency statements of general applicability designed to implement, interpret or prescribe law or policy.

57. 5 U.S.C. §551(5) requires an agency to follow specific rulemaking procedures to formulate a Rule. Procedures include, but are not limited to: publishing a notice of proposed rulemaking in the Federal Register; giving "interested persons" an opportunity to comment on the proposed rule; and, after considering public comments,

publishing the final Rule. When publishing the final Rule, the agency is also required to include a general statement setting forth the basis for the Rule and the purpose for the Rule.

58. Among other things, Defendants failed to: (1) publish a notice of proposed rulemaking in the Federal Register; (2) give "interested persons" an opportunity to comment on the proposed Rule; (3) consider public comments; and (4) provide a sufficient statement of the Rule's basis and purpose.

59. Defendants' Rules violate the substantive requirements of the APA because the findings in the Rules are unsupported by fact or law, inaccurate in basis and purpose and exceed their statutory authority.

60. Among other things, Defendants have failed to: (1) identify a nexus between PACE and "PACE-like" assessments and an increased risk of default of Fannie Mae or Freddie Mac's mortgage instruments or any detrimental impact to the mortgage industry; (2) identify or articulate a rational basis for disparately treating PACE and "PACE-like" assessments as "loans" while other types of assessments remain senior priority liens; and (3) identify or articulate why existing mortgages or refinancing applications with PACE assessments enacted prior to July 6, 2010 are acceptable and that those filed subsequent to that date are not.

61. Defendants' actions are contrary to public interest, exceed the powers vested in them by statute, impermissibly encroach upon New York State's powers of taxation and assessment, adversely impact lawfully created PACE programs like LIGH and the economic, environmental and public issues PACE and LIGH were created to address.

62. Agency action must be held unlawful and be set aside if it is: arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority or limitations; without observance of procedure required by law; unsupported by substantial evidence; or unwarranted by the facts. 5 U.S.C. §706(2).

63. Pursuant to 12 U.S.C. §4513(A)(1)(B)(v), Defendants must act in a manner which is consistent with the public interest.

64. Defendants' Rules incorrectly and arbitrarily conclude that first liens by PACE and "PACE-like" programs are: "unlike routine tax assessments"; "do not have the traditional community benefits associated with taxing initiatives"; "disrupt a fragile housing finance market"; and "are not essential for successful programs to spur energy conservation."

65. In reaching their conclusions, Defendants have taken actions that are: arbitrary and capricious, in excess of their discretion and contrary to law; an abuse of their constitutional right, powers and privileges; without observance of procedure required by law; and unsupported and unwarranted by substantial evidence and facts.

66. Also arbitrary and capricious is Defendants' determination that PACE assessments enacted prior to July 6, 2010 are acceptable while those after that date are not. There is no justification for this differentiation and it is irrelevant to the validity of PACE programs.

67. By reason of the foregoing, the Court should vacate, set aside and/or nullify Defendants' Rules because Defendants unlawfully failed to comply with

procedures prescribed by law, have acted in an arbitrary and capricious manner, have abused their discretion and otherwise taken actions that are not in accordance with law.

AS AND FOR A SECOND CAUSE OF ACTION
(VIOLATION OF NEPA, 42 U.S.C. §§4332)

68. Plaintiff realleges and incorporates by reference the allegations of all preceding paragraphs of this Complaint as if fully set forth herein.

69. NEPA, 42 U.S.C. §4332(2)(c), requires all federal agencies to prepare an environmental impact analysis in the form of an EA or EIS for any major federal action that may significantly affect the quality of the human environment.

70. Defendant federal agencies failed to conduct any form of environmental impact analysis in promulgating their Lender Letters, Statements and Directives.

71. Defendants' actions in issuing their Lender Letters, Statements and Directives have curtailed or eliminated PACE financing programs around the country, including LIGH, thereby eliminating significant energy savings that these programs would have generated, which could significantly affect the quality of the human environment.

72. Defendants have violated NEPA, 42 U.S.C. §§4231 *et seq.* by failing to undertake any analysis of potential environmental impacts that could be caused by Defendants' Lender Letters, Statement and Directives.

73. Defendants have violated NEPA, 42 U.S.C. §§4231 *et seq.* and 40 C.F.R. § 1501.4(b) by failing to provide an EIS or EA.

74. Because Defendants' Lender Letters, Statements and Directives were issued without observance of procedure required by law, (*see* 5 U.S.C. §706(2)(D)), this Court should hold the directives unlawful and set them aside. *Id.* §706(2).

75. By reason of the foregoing, the Court should vacate, set aside and/or nullify Defendants' Rules because Defendants unlawfully failed to comply with procedures prescribed by law, have acted in an arbitrary and capricious manner, have abused their discretion, and otherwise have committed actions not in accordance with law.

AS AND FOR A THIRD CAUSE OF ACTION
(VIOLATION OF THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION)

76. Plaintiff realleges and incorporates the allegations of all preceding paragraphs of this Complaint as if fully set forth herein.

77. The Tenth Amendment to the United States Constitution (the "Constitution") expressly reserves to the states all powers not delegated to the United States by the Constitution or prohibited to the states by the Constitution.

78. Congress has no power under the Constitution to levy or regulate local government, special assessments or to delegate such powers to others.

79. The Constitution does not prohibit states from taking actions to levy and regulate local government, special assessments.

80. Therefore, the Tenth Amendment reserves the authority to levy and regulate special assessments to the states and/or their county or municipal governments and/or subdivisions.

81. Through issuance of the Rules and by other actions, Defendants improperly attempt to define and regulate local government, special assessments and

thus, interfere with and violate the powers reserved by the Tenth Amendment to the states including the State of New York and/or its subdivisions.

82. Defendants' Rules and other actions unconstitutionally interfere with the powers of the State of New York and its subdivisions concerning, among other things: property assessments; contracts; taxation; and local energy efficiency programs and goals.

83. Defendants' authority is conferred by and limited to only what is granted to Defendants by Congress. Such authorizing statutes do not confer to Defendants any powers to preempt state or local government legislation or programs concerning state or local assessments.

84. Defendants do not have the right or authority to overrule or negatively impact New York State or its subdivisions' rules or law regarding local assessment powers and related lien priorities.

85. Defendants' Rulings and other actions misconstrue New York State and its subdivisions' laws and regulations regarding local assessments and lien priorities.

86. Defendants are without power or authority to preempt New York State's and/or its subdivisions' right to levy and prioritize special assessments. As such, Defendants' actions are in violation of the Tenth Amendment.

87. Because Defendants' Rulings and actions are beyond their constitutionally delegated powers and do not flow from an express grant of authority to Congress under Article 1 of the United States Constitution, Defendants' actions are presumptive unconstitutional interferences with New York and the Town's Tenth Amendment Rights.

88. In the alternative, Defendants' Rulings and actions encroach upon areas that Congress has expressly reserved to the states and thus, presumptively interfere with New York and the Town's Tenth Amendment rights.

89. By reason of the foregoing, Defendants have violated the sovereignty of the laws of the State of New York and/or its subdivisions and have caused significant injury and hardship to the Town.

AS AND FOR A FOURTH CAUSE OF ACTION
(TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP)

90. Plaintiff realleges and incorporates by reference the allegations of the preceding paragraphs of this Complaint as if fully set forth herein.

91. At all relevant times, Defendants were aware of the various agreements by and between the Town, residential homeowners and local contractors for benefit assessments and construction under the LIGH/PACE program ("Town Contracts").

92. Despite having no authority to do so, Defendants have undertaken actions intentionally and tortiously interfering with former, pending and future Town Contracts.

93. Such conduct was wrongful and tortious because, among other things: (a) the Town has the legal right and is an appropriate party to contracts with its residents and local contractors; (b) Defendants wrongfully and intentionally refuse to continue honoring benefit assessments priority in liens against real property to secure LIGH financing; and (c) Defendants have exerted extreme and unfair economic pressure upon individuals and entities to not purchase property in the Town due to lending restrictions in areas with PACE programs.

94. As a direct and proximate result of Defendants' conduct, the Town is less desirable to new and existing residents due to Defendants' lending restrictions concerning the LIGH program, and therefore, the Town has and will continue to lose tax revenues. Additional, significant damages caused by Defendants' actions include but are not limited to: loss of administration fees; potential reduction in number of residents; likely cessation of the LIGH program; loss of transfer mortgage taxes on the sale of properties within the Town; and interference with the Town's effort to reduce its carbon footprint. Moreover residents and prospective residents of the Town will continue to be harmed by the inability or at least increased difficulty in obtaining mortgages to purchase or refinance properties located within the Town.

RELIEF REQUESTED

WHEREFORE, The Town of Babylon respectfully requests that this Court:

A. declare that Defendants have violated the APA by failing to comply with the APA's notice and comment procedures in promulgating their Lender Letters, Statements and Directives;

B. declare that Defendants have violated the APA by arbitrarily and capriciously basing their Lender Letters, Statements and Directives on arbitrary, inaccurate, and unsubstantiated factual assertions regarding the benefits and risks associated with the LIGH program;

C. declare that Defendants have violated NEPA and the APA by failing to conduct an EIS, or otherwise determine that an EIS was not required before issuing their Lender Letters, Statements and Directives;

D. order Defendants to vacate and set aside their Lender Letters, Statements and Directives and order FHFA to instruct Fannie Mae and Freddie Mac to issue new Guidance to their Seller/Servicers reversing their Lender Letters, Statements and Directives and advising that no additional or different requirements should be initiated against any mortgagee or applicant based upon the fact that a mortgagee or applicant participates or may participate in LIGH or PACE program;

E. declare that Defendants' actions adverse to LIGH and the PACE programs must be discontinued as they are in violation of the Tenth Amendment of the United States Constitution;

F. declare that the Defendants' actions adverse to LIGH have tortiously interfered with the Town of Babylon's contractual relations and, thus, such actions must be discontinued immediately;

G. award Plaintiff its litigation costs and reasonable attorneys' fees in this action pursuant to the Equal Access of Justice Act, 28 U.S.C., § 2412 or other authority; and

H. order such other relief as the Court may deem just and proper.

Dated: Rockville Centre, New York
October 26, 2010

GOLDBERG & CONNOLLY

By: _____

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