IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL HOUSING FINANCE AGENCY, On its Own Behalf and as Conservator of Fannie Mae and Freddie Mac,	)	
Plaintiff,	)	
v.	)	
	)	Civil Action No.: 1:11-cv-08795
CITY OF CHICAGO, a municipal corporation,	)	Hon. Joan H. Lefkow
Defendant.	)	

PLAINTIFF'S UNOPPOSED MOTION TO EXPEDITE STATUS CONFERENCE

Plaintiff, Federal Housing Finance Authority ("FHFA" or the "Conservator"), through its undersigned counsel, hereby requests that the Court advance the status conference presently scheduled for February 23 to an earlier date of the Court's convenience. FHFA requests an expedited status conference so that it may propose that the defendant's response to the Complaint -- currently due February 17, 2012 -- be held in abeyance and that, instead, the Court permit FHFA to move promptly for summary judgment in the form attached hereto.[1]

On December 12, 2011, FHFA filed its Complaint challenging the legality of the City of Chicago's ("Defendant") vacant buildings ordinance ("Ordinance"). The issues in dispute in this case are purely legal: whether Defendant may subject the Conservator, Fannie Mae, and Freddie Mac to a regulatory and licensing regime that includes supervision, direction, taxation, and the

[1] FHFA attaches its proposed motion for summary judgment, supporting memorandum, statement of facts not in dispute, and motion for leave to exceed page limits as Exhibits 1 through 4 for the Court's reference.

imposition of fines and penalties. These matters are appropriate for summary judgment, and this dispute is ready for -- and requires -- prompt resolution. *See* FED. R. CIV. P. 56(b), Notes of Advisory Committee on 2009 Amendments (a party may move for summary judgment "as early as the commencement of the action").

Given the urgency of this matter, and the importance of the issues involved, FHFA respectfully requests a status conference at the Court's earliest convenience so that FHFA may seek permission to move for summary judgment and file the motion and supporting papers attached hereto.

Counsel for FHFA has conferred with counsel for Defendant, who does not oppose this motion for an expedited status conference but does oppose FHFA's request to move for summary judgment at this time.

Dated: January 11, 2012

Respectfully submitted,

/s/ Robert J. Emanuel

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(Pro Hac Vice Applications to be filed)

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL HOUSING FINANCE AGENCY, On its Own Behalf and as Conservator of Fannie Mae and Freddie Mac, Plaintiff, v. CITY OF CHICAGO, a municipal corporation, Defendant.	)	Civil Action No.: 1:11-cv-08795 Hon. Joan H. Lefkow

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Federal Housing Finance Authority ("FHFA"), through its undersigned counsel, hereby moves this Court to enter summary judgment in its favor and against the Defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1.

In support hereof, Plaintiff has contemporaneously filed its Memorandum of Law in Support of Its Motion for Summary Judgment and its Local Rule 56.1(a)(3) Statement in Support of Its Motion for Summary Judgment both of which are incorporated herein by reference.

WHEREFORE, for all of the reasons set forth in greater detail in the contemporaneously filed Memorandum, FHFA prays that this Court enter judgment in its favor and against Defendant on all of the counts of Plaintiff's Verified Complaint and grant such other and further relief as this Court deems just under the circumstances.

Dated: _____

Respectfully submitted,

/s/ Robert J. Emanuel

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(Pro Hac Vice Applications to be filed)

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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FEDERAL HOUSING FINANCE AGENCY On its Own Behalf and as Conservator of Fannie Mae and Freddie Mac, Plaintiff, v. CITY OF CHICAGO, a municipal corporation, Defendant.	)	Civil Action No.: 1:11-cv-08795 Hon. Joan H. Lefkow

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
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INTRODUCTION

In 2008, Congress created the Federal Housing Finance Agency ("FHFA") as an independent agency pursuant to the Housing and Economic Recovery Act of 2008, Pub L. No. 110-289, 122 Stat. 2654, codified at 12 U.S.C. § 4617 *et seq.* ("HERA"). HERA vests FHFA with exclusive authority for regulating, directing, and supervising Fannie Mae and Freddie Mac, the government sponsored enterprises (hereafter the "Enterprises") that play a central role in providing liquidity to the U.S. mortgage lending market.

On September 6, 2008, the Director of FHFA, also pursuant to HERA, placed Fannie Mae and Freddie Mac into conservatorships and appointed FHFA as Conservator. In that capacity, FHFA has the authority to exercise all rights, powers, and remedies of Fannie Mae and Freddie Mac, including, but not limited to, the right to operate and conduct all business of the Enterprises. 12 U.S.C. § 4617(b)(2). Further, HERA empowers FHFA as Conservator to "take such action as may be (i) necessary to put [the Enterprises] in a sound and solvent condition, and (ii) appropriate to . . . preserve and conserve the assets and property of [the Enterprises]," 12 U.S.C. § 4617(b)(2)(A)(i). Further, HERA provides that no agency other than FHFA may supervise or direct the FHFA as Conservator. 12 U.S.C. § 4617(a)(7).

Despite this exclusive delegation of authority to FHFA to regulate the Enterprises, and to operate them in Conservatorships, the City of Chicago recently adopted an ordinance (the "Ordinance") that subjects the Enterprises and the Conservator to the direction and supervision of the City without regard for, and in conflict with, the regulatory directives and operational discretion of the FHFA as regulator and Conservator. The Ordinance imposes a *de facto* licensing scheme, replete with registration requirements, taxes, onerous fines, and detailed regulatory directives that go to the heart of the operations of the Conservatorships. The

Ordinance regulates the Conservator and the Enterprises in their core capacity as mortgage investors and mortgagees -- obligees without title to properties -- and unilaterally imposes on them the responsibilities, burdens and liability of ownership of real property, but none of the benefits, such as the ability to sell the property. The Ordinance interferes with FHFA's oversight and exercise of discretion, as Conservator and regulator of the Enterprises, to preserve and conserve the value of collateral securing the Enterprises' credit exposures. In addition, the Ordinance imposes taxes, penalties, and fines in violation of HERA and the charters of the Enterprises.

Federal law bars application of the Ordinance to the Conservator, the Enterprises, and those acting on their behalf with regard to properties for which they do not hold title.

BACKGROUND

Fannie Mae and Freddie Mac play a central role in supporting the nation's secondary market for residential mortgages. The Enterprises, combined, own or guarantee more than $5 trillion of residential mortgages in the United States. *See* Final Rule on Conservatorship and Receivership, 76 Fed. Reg. 35,724 (June 20, 2011). In Chicago alone, the Enterprises currently own more than 250,000 mortgages, and guarantee 750,000 more. *See* Pl.'s Verified Compl. ("Compl.") ¶¶ 30, 31. The Enterprises buy mortgages in the secondary market from loan originators and thereby become mortgagees by succession or assignment, or because they have purchased a mortgage. Compl. ¶ 1.

On November 2, 2011, the Chicago City Council passed an Ordinance to amend Section 13-12-125 of the Municipal Code of Chicago governing so-called "vacant" properties. The Ordinance holds lenders and servicers, including the Enterprises, responsible for maintaining vacant buildings and lots on which these buildings are located, including in circumstances where those entities have ***not*** obtained legal possession of the properties through foreclosure. Thus, the

Ordinance regulates not only property owners, but also ***mortgagees*** with security interests in "vacant" property. The Ordinance imposes obligations on the Conservator and the Enterprises as mortgagees with respect to properties for which they do ***not*** possess title. [1]

The Ordinance requires the Conservator and the Enterprises to register "vacant" buildings -- vaguely defined -- with the Department of Buildings, pay a $500 registration fee, periodically renew the registration, and take specific actions mandated by the Ordinance, such as maintaining buildings pursuant to any current or future City standards. Indeed, the Ordinance subjects the FHFA and the Enterprises, as mere mortgagees of vacant properties, to Ordinance-prescribed standards to maintain and preserve the collateral securing mortgage loans. These requirements, together with the registration scheme, function as a licensing and supervisory regime.

The Ordinance prescribes extensive maintenance standards for lots, interiors and exteriors of buildings that will impose significant financial and management burdens on the Conservator and the Enterprises. For example, the Ordinance requires the Conservator and the Enterprises to secure vacant buildings with expensive "commercial-quality steel security panels" and in accordance "with the rules and regulations issued by the commissioner of buildings." Chicago, IL, Code § 13-12-126(b)(1) (2011). The Ordinance also mandates that the mortgagee shall "maintain all grass and weeds on the residential real estate premises, below 10 inches in height and cut and remove all dead or broken trees, tree limbs or shrubbery" and "winterize the building, which shall mean cleaning all toilets and completely draining all plumbing and heating systems." *Id.* §§ 13-12-126 (b)(2); 13-12-126 (b)(7). These specific requirements impose, without consent or consideration, a broad range of duties, obligations, and liabilities based on

[1] The Ordinance imposes requirements on the Conservator and the Enterprises directly, and also indirectly, by application to "any person designated or authorized on behalf of [the Conservator or the Enterprises]."

nothing more than the status of the Conservator and Enterprises as mortgagees. *See* Compl. ¶53; Fannie Mae Single Family 2011 Servicing Guide, Part VIII Sect. 106, p. 801-40 (available at https://www.efanniemae.com/sf/guides/ssg/svcg/svc061011.pdf). The Ordinance subjects the Conservator and the Enterprises to substantial fines and penalties for noncompliance: "Any person who violates any provision of this section or of the rules and regulations issued hereunder shall be fined not less than $500.00 and not more than $1,000.00 for each offense." Chicago, IL, Code § 13-12-126(c) (2011).

The restraints and costs that the Ordinance imposes upon FHFA in its capacity as Conservator of the Enterprises are significant. Moreover, the maintenance standards prescribed by and under the Ordinance conflict with those that the Conservator and the Enterprises have adopted in their considered judgment with regard to the appropriate manner to preserve and conserve assets, including the collateral securing credit exposures. The sheer number of properties that could fall under the requirements of the Ordinance is substantial -- as noted, the Enterprises are mortgagees of more than a quarter million properties located within the 92 zip codes that comprise the City of Chicago. Compl. ¶¶ 30, 31. In addition, through mandates requiring the Conservator and the Enterprises to act at a time when they do not possess title, the Ordinance creates legal liabilities for the Conservator and the Enterprise where none exists today.[2]

The Ordinance also levies a tax on the Conservator and the Enterprises in the form of so-called "registration fees," and creates a schedule of fines and penalties for lack of compliance.

[2] The Ordinance leaves the Conservator and the Enterprises exposed to claims that they were grossly negligent in assessing whether a property is "vacant." Chicago, IL, Code § 13-12-126(g).

The issues in dispute are purely legal: whether the City may subject the Conservator and the Enterprises to a regulatory and licensing regime that includes supervision, direction, taxation, and the imposition of fines and penalties. These matters are appropriate for summary judgment, and this dispute is ready for -- and requires -- prompt resolution.

SUMMARY JUDGMENT STANDARD

A party may file a motion for summary judgment at any time until 30 days after the close of all discovery. FED R. CIV. P. 56(b). The 2009 and 2010 amendments to the Federal Rules of Civil Procedure remove the requirement that a party wait to file a motion for summary judgment and permit the filing "as early as the commencement of the action." FED R. CIV. P. 56(b), Notes of Advisory Committee on 2009 Amendments. *See also United States v. Selenske*, 882 F.2d 220 (7th Cir. 1989) (granting summary judgment to plaintiff before defendant filed an answer). A court shall grant summary judgment if the movant shows that no genuine dispute exists as to any material fact and the movant is entitled to judgment as a matter of law. FED R. CIV. P. 56 (a). *See, e.g., Dick v. Conseco, Inc.*, 458 F.3d 573, 580 (7th Cir. 2006) ("merely fashioning as factual issues what are actually questions of law cannot forestall summary judgment"); *Local 1239, Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers v. Allsteel, Inc.*, 9 F. Supp.2d 901, 902 (N.D. Ill. 1998) (recognizing that cases involving pure legal questions are properly resolved on motions for summary judgment).

Courts have routinely held that questions of preemption, such as those presented here, are purely legal and should be decided on summary judgment. *See, e.g., Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) ("Issues of express or field preemption are generally purely legal questions, where the matter can be resolved solely on the basis of the state and federal statutes at issue."); *Burton v. Banta Global Turnkey Ltd.*, 170 Fed. Appx. 918, 925 n. 7 (5th Cir. 2006) ("Because preemption is a purely legal issue, this ruling of the district court

[granting a motion for summary judgment] is unaffected by any discovery issues."); *Borskey v. Medtronics, Inc.*, 1994 WL 585676, at *1 (E.D. La. Oct. 24, 1994) (granting a motion for summary judgment "based solely on the legal issue of whether plaintiffs' state-law claims are preempted by federal law," because "[t]his is a purely legal question raising no factual issues and requiring no discovery whatsoever.").

ARGUMENT

The Ordinance departs from existing law and customary practice, where a property owner is responsible to maintain and secure the property that he or she owns, and interferes directly with the core judgment of the Conservator and the Enterprises as to the best way to preserve the collateral securing their credit exposures. Instead, the Ordinance imposes the key responsibilities of home ownership on mortgagees -- in circumstances where a property has not been foreclosed upon and the mortgagees do not have title -- and forces mortgagees to take specifically prescribed actions with regard to the collateral securing outstanding mortgage loans. As applied to the Conservator and the Enterprises, the Ordinance conflicts with and is superseded by federal law. The Ordinance imposes a regulatory and licensing scheme that, as applied to Plaintiff, directly conflicts with the rights, powers, and immunities that Congress granted FHFA when it enacted HERA. The Ordinance interferes with the ability of the FHFA as Conservator to fulfill its congressional mandates to conserve assets and reduce costs to taxpayers at a time when they are supporting the operations of the Enterprises for certain limited and defined missions.

HERA forbids application of the Ordinance to the Conservator or the Enterprises. First, HERA preempts the Ordinance insofar as it (i) subjects the Conservator to the direction or supervision of another federal, state or local agency, and/or (ii) subjects the Enterprises to regulatory supervision by an agency other than the FHFA. Second, HERA prohibits the imposition of state or local taxes on the Conservator or the Enterprises, and therefore bars the

Ordinance's assessment of so-called "registration fees" -- in reality, a thinly disguised tax or license fee -- on the Conservator or the Enterprises. Third, HERA expressly forbids fines and penalties from being levied against the Conservator, and accordingly bars application to the Conservator of the schedule of penalties that is a key enforcement mechanism of the Ordinance.

I. HERA PREEMPTS THE ORDINANCE

Where, as here, federal law conflicts with local or state law, federal law controls and preempts application of the local or state law. Const. art. VI, cl. 2.[3] "[S]tate law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). A "conflict" between state and federal law exists if compliance with both is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), and also, more broadly, whenever a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

A. HERA Bars Any Agency From Directing or Supervising the Conservator.

HERA expressly preempts federal, state and local legislation that subjects the FHFA as Conservator to direction or supervision by another agency: "When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency." 12 U.S.C. § 4617(a)(7). The closely analogous statute in the FDIC context, 12 U.S.C.

[3] "For the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713-14 (1985). References here to federal preemption of state law therefore apply equally to federal preemption of the Ordinance.

§ 1821(c)(2)(C), provides that FDIC, "[w]hen acting as conservator or receiver . . . shall not be subject to the direction or supervision of . . . any State in the exercise of the Corporation's rights, powers, and privileges." Courts have interpreted that statute to mean "that Congress did not intend to allow the States to interfere with the [Corporation]'s specified functions." *Resolution Trust Corp. v. California*, 851 F. Supp. 1453, 1458 (C.D. Cal. 1994). Here, the Conservator's specified functions include operating the Enterprises in a safe and sound manner, preserving and conserving their assets -- including the collateral securing outstanding credit exposures -- and ensuring that the Enterprises fulfill the mandates set forth in their congressional charters. HERA provides that the Conservator is empowered to perform these functions -- without interference from any federal, state, or local agency.

The Ordinance plainly subjects FHFA as Conservator to the "direction or supervision" of the Chicago Department of Buildings, in violation of 12 U.S.C. § 4617(a)(7). The Ordinance requires the Conservator as mortgagee to register vacant buildings with the Department of Buildings, pay a $500 registration fee, and take burdensome actions to secure and maintain vacant buildings. Payment of the so-called registration fee triggers an extensive regulatory and supervisory review by the Chicago Department of Buildings.

Beginning 45 days after a default, the Ordinance requires that a mortgagee determine, on a monthly basis, if the building on the real estate subject to its mortgage is vacant. Chicago, IL, Code § 13-12-127(b) (2011). Further, the Ordinance imposes additional duties on the Conservator with respect to vacant properties, including, among other things: (a) enclosing and securing the building, including with expensive, commercial grade steel plates over windows; and (b) posting a sign with the name and contact information of a person responsible for day-to-day supervision of the building and for receiving service of process *Id.* § 13-12-126(b)(1), (9).

These actions create potential liability for the Conservator and the Enterprises that is not contemplated by their charters or considered prudent by the Conservator.[4] Moreover, the Ordinance empowers the Department of Buildings to "issue rules and regulations" regarding these duties, thus permitting expansion of the range of City-mandated obligations. *Id.* § 13-12-126(d). If the Department of Buildings is not satisfied with the state of the property, including compliance with any rules the Department may have promulgated, the Ordinance authorizes the Department of Buildings to impose fines of up to $1,000 per day. *Id.* § 13-12-126(c).

The Ordinance also requires the Conservator to take other vaguely described actions that are difficult, if not impossible, to understand and implement, including to "reasonably maintain the structural integrity" of steps and stairs along with fences and gates. *Id.* § 13-12-126(b)(5), (6). Indeed, the Ordinance's definition of a vacant building -- the triggering point for application of the Ordinance -- turns on the non-owner mortgagee's subjective assessment of whether a property is "uninhabited" and in need of maintenance. *Id.* § 13-12-126(e)(5).[5] The obligations that the Ordinance imposes on the Conservator and the Enterprises are subject to the review and supervision of the Chicago Department of Buildings, and, in fact, the Ordinance gives the Department of Buildings authority to "issue rules and regulations for the administration of this section." *Id.* § 13-12-126(d). Further, the Ordinance imposes substantial fines and penalties that

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[4] Because the Ordinance expressly exposes mortgagees such as the Conservator and the Enterprises to claims of "gross negligence" if they mistakenly characterize an inhabited property as "vacant," it is not difficult to imagine the Conservator and the Enterprises having to defend against numerous claims, including frivolous claims. *Id.* § 13-12-126(g).

[5] In addition, to assess whether a property is "vacant," the Ordinance also requires a mortgagee such as the Conservator and the Enterprises to consider other factors that are, as a practical matter, not knowable, including whether "law enforcement officials have received at least one report of trespassers … at the property in the last six months." *Id.* § 13-12-126(e)(5)(5). Further, if an empty property is in fact occupied on a "seasonal basis" -- a difficult determination that turns on whether third parties intend to return to a property during a particular season -- then the property is not "vacant." *Id.* § 13-12-126(e)(5).

increase by the day in the event of a violation of the Ordinance *or* the "rules and regulations issued hereunder." *Id.* § 13-12-126(c).

The reach of the Ordinance is broad. Together, the Enterprises in conservatorships own more than 250,000 loans secured by properties located within the City of Chicago. *See* Compl. ¶¶ 30, 31. The Ordinance requires the Conservator to determine the subjective intent of each occupant to determine whether the quarter million buildings meet the Ordinance's definition of "vacant" -- an impossible task. Further, the Ordinance requires the Conservator to maintain and secure those buildings in accordance with requirements of the City of Chicago, without regard for the Conservator's judgment and discretion concerning the safe and sound operation of the Enterprises and the best way to preserve and conserve their assets, including mortgages on any property that may be vacant.

HERA plainly bars the registration, direction, and supervision scheme that the Ordinance imposes on the Plaintiff. 12 U.S.C. § 4617(a)(7). Moreover, to the extent that FHFA determines, as Conservator, not to take the actions required by the Ordinance, HERA bars any court from acting to restrain or affect the Conservator's exercise of its powers or functions to preserve and conserve the assets of the Enterprises. *Id*., § 4617(f).

B. HERA Gives the FHFA Sole Authority to Regulate the Enterprises, and Therefore Preempts Application of the Ordinance To the Enterprises.

In directly chartering Fannie Mae and Freddie Mac, Congress explicitly identified their public missions, which include "provid[ing] stability in the secondary market for residential mortgages," and "promot[ing] access to mortgage credit throughout the Nation (including central cities, rural areas, and underserved areas)." Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. 102-550 § 1382(a), 106 Stat. 4002 (1992).

HERA established FHFA to regulate the Enterprises. 12 U.S.C. § 4511. As the statute expressly provides, the Enterprises are "subject to the supervision and regulation of the [FHFA]." *Id.* § 4511(b)(1). Furthermore, the Director of FHFA has "general regulatory authority over each regulated entity . . . and shall exercise such general regulatory authority, including such duties and authorities set forth under section 4513 . . . to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out." *Id.* § 4511(b)(2). Section 4513 empowers and requires the Director to "ensure that the operations and activities of each regulated entity foster liquid, efficient, competitive and resilient national housing finance markets," *id.* § 4513(a)(1)(B)(ii), and in doing so, "to exercise such incidental powers as may be necessary or appropriate to fulfill the duties and responsibilities of the Director in the supervision and regulation of each regulated entity." *Id.* § 4513(a)(2)(B).

Given the specific public purpose of the Enterprises, and because Congress has subjected the Enterprises to the exclusive regulatory authority of FHFA, any attempt by a state or local agency to regulate the Enterprises, as the City of Chicago seeks to do, interferes with Congress' objectives and thus conflicts with federal law. Indeed, other courts have recognized FHFA's exclusive regulatory and supervisory authority over the Enterprises. In *California ex rel. Harris v. Fed. Hous. Fin. Agency*, 2011 WL 3794942, at *16 (N.D. Cal. Aug. 26, 2011), the district court explained that "Congress has established the FHFA to serve as the primary regulatory authority supervising the Enterprises." In that case, plaintiffs alleged that the Enterprises engaged in acts that constituted unfair business practices under California law in connection with their treatment of PACE assessments.[6] *See* Amend. Compl., Case No. 4:10CV03084 (Docket

[6] PACE is the Property Assessed Clean Energy program that allows a state or local government to provide loans for a home improvement that increases energy efficiency, with such loans accorded a priority lien over an existing mortgage. The Conservator directed the

Footnote continued on next page

No. 33) (N.D. Cal. Sep. 15, 2010). In dismissing the claims, the Court explained that "Congress has established the FHFA to serve as the primary regulatory authority supervising the Enterprises . . . [e]xposure to state law claims would undermine the FHFA's ability to establish uniform and consistent standards for the regulated entities, and thwart its mandate to assure their safe and sound operation. If Plaintiffs' state claims were not preempted, liability based on these claims would create obstacles to the accomplishment of the policy goals set forth in the Safety and Soundness Act." *Harris*, 2011 WL 3794942, at *16. Thus, because state law claims for unfair business practices would thwart FHFA's role as the "primary regulatory authority supervising the Enterprises," the court found them to be preempted under federal law.

This conclusion is grounded in the understanding that, as the Supreme Court has stated with respect to other federally chartered and regulated financial institutions, the Enterprises are "instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). As such, the Enterprises may not be subjected to state or local requirements that burden the fulfillment of their mission:

> [Any] attempt by a state [or locality] to define their duties or control the conduct of their affairs is *absolutely void*, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.*

Id. (Emphasis added).

By conferring broad authority on FHFA to exercise its discretion in supervising the Enterprises, Congress directed that FHFA would be the arbiter of regulatory judgments

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Enterprises not to purchase any mortgages that are subordinate to PACE liens. *Harris*, 2011 WL 3794942, at *1-2.

governing the Enterprises, notwithstanding any conflicting state law. To allow state or local law requirements such as the Ordinance to dictate the core conduct of the Enterprises with respect to their mortgage loans -- before a property has been foreclosed upon and when the Enterprises are merely obligees on the home loans -- would undermine FHFA's congressionally-delegated authority. Moreover, allowing Chicago to impose its particular requirements on the Enterprises in these circumstances would effectively permit fifty states and 60,000 municipalities to regulate the core functions of the Enterprises as obligees of mortgage loans in accordance with their disparate goals and interests. *Cf. Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 14 (2007) ("'[state registration and licensing requirements,] if permitted to be applicable [to a national bank], might impose limitations and restrictions as various and as numerous as the States.'" (quoting *Easton v. Iowa*, 188 U.S. 220, 229 (1903))). Such a result is directly at odds with Congress' objectives that the Enterprises' operate under uniform and consistent standards prescribed by the FHFA, in order that they fulfill their mission to "promote access to mortgage credit throughout the Nation"[7] and thereby increase liquidity and improve the distribution of capital available for home mortgage financing. This direction of Congress is enhanced when the Enterprises operate in a conservatorship with taxpayer funds supporting their prescribed operations.

Under fundamental principles of conflict preemption, the Ordinance is preempted by HERA. The Ordinance impermissibly subjects the Enterprises to supervision and regulation by the City of Chicago and its Department of Buildings. The Ordinance establishes a classic licensing, regulatory, and supervisory scheme whereby the Enterprises are purportedly subject to the extensive and ongoing supervision of the Chicago Department of Buildings with respect to

[7] 12 U.S.C. § 1716.

any mortgaged property that becomes vacant. HERA bars this supervision by any agency other than FHFA, and indeed Chicago's scheme is inconsistent with FHFA's specific supervisory directives to the Enterprises.

For example, in April 2011, FHFA directed Fannie Mae and Freddie Mac to establish consistent mortgage loan servicing and delinquency management requirements for loan servicers acting on behalf of the Enterprises. Under the direction and supervision of the FHFA, the Enterprises revised their servicing guidelines. The guidelines currently provide that mortgagees and their servicers are permitted under certain circumstances, but are not required, to enter an abandoned property to make repairs and prevent waste. *See* Fannie Mae Servicing Guide, Part VIII, § 106; Freddie Mac Single Family Seller/Servicer Guide §§ 54.5, 65.29-36, 67.27, and 67.28. The Enterprises and the servicers acting on their behalf consider a number of factors when determining whether to exercise the right to enter and repair abandoned property, including the cost of repairs and the estimated impact on the property's value as security for the loan. *See* Fannie Mae Servicing Guide, Part VIII, § 106; Freddie Mac Single Family Seller/Servicer Guide §§ 67.27 and 67.28. The decision whether to enter and make such repairs is an exercise of the Enterprises' discretion as regulated entities under the supervision of FHFA.[8] Such guidance may be amended or altered at any time by the Enterprises or by the Conservator. This exercise of judgment with regard to the preservation of collateral that secures credit exposures is not subject to state action.

In disregard of the Conservator's discretion, the Ordinance purports to subject the Enterprises to a local registration and regulatory regime for vacant properties implemented under

[8] This is especially true here because the Director has placed the Enterprises in conservatorship, and under 12 U.S.C. § 4617, the Conservatorship is not subject to interference or supervision by any agency.

the supervision of the Chicago Department of Buildings. If allowed to apply to the Enterprises, the Ordinance would compel them to step in the shoes of the building owner, without a determination by the City or protection from liability, to make repairs deemed necessary by the Department of Buildings. Enforcement is to be mandated through imposition of escalating fines and penalties, restricting the discretion of the Enterprises as regulated entities to exercise their rights as mortgagees in a commercially sound and reasonable manner. This supervision directly conflicts with 12 U.S.C. §§ 4511, 4512 (subjecting Enterprises to FHFA supervision and regulation, and granting "general regulatory authority" to FHFA over Enterprises).

Because "state law that conflicts with federal law is without effect," the Ordinance is null and void as applied to the Enterprises and those acting on their behalf. *Cipollone*, 505 U.S. at 516 (internal quotation marks omitted).

II. THE REGISTRATION FEE CONSTITUTES A TAX IN VIOLATION OF HERA AND THE ENTERPRISES' STATUTORY CHARTERS

As a matter of federal law, the City of Chicago may not levy a tax upon the Conservator or the Enterprises. HERA expressly exempts the FHFA as Conservator "from all taxation imposed by any State, county, municipality, or local taxing authority…" 12 U.S.C. § 4617(j)(2). This provision applies "with respect to the Agency in any case in which the Agency is acting as a conservator or a receiver." *Id.* § 4617(j)(1). Similarly, the charters of both Fannie Mae and Freddie Mac exempt the Enterprises from taxation. *See id.* § 1723a(c)(2), § 1452(e) (providing that Fannie Mae and Freddie Mac, respectively, "shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority.").

Congress provided the tax immunities to protect the Conservator and Enterprises from attempted revenue-extractions by state and local governments. As the Supreme Court

recognized long ago, "Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized." *Pittman v. Home Owners' Loan Corp. of Washington, D.C.*, 308 U.S. 21, 32-33 (1939) (confirming immunity of Home Owners Loan Corporation established by federal government from state recording taxes). The immunity conferred on these entities is virtually identical to the federal government's constitutional immunity from state and local taxation. *Id.* at 32 (observing that a federal corporation with statutory immunity from state and local taxation was "entitled to whatever immunity attaches to [its] functions when performed by the government itself through its departments."). *See also United States v. Michigan*, 851 F.2d 803, 807 (6th Cir. 1988) (explaining that statutory immunity to state and local taxes granted to federal credit unions reflected Congress's belief that such entities "play such an important role in preserving the health of the national economy that they, like the federal government, must be free from state and local taxes which serve more narrow, parochial interests.").

To determine whether an assessment violates a federal immunity from taxation, courts "look through form and behind labels to substance." *Detroit v. Murray Corp. of America*, 355 U.S. 489, 492 (1958). The definition of a tax, as that term is understood in the context of federal immunity from state and local taxation, is "an enforced contribution to provide for the support of government." *United States v. LaFranca*, 282 U.S. 568, 572 (1931). The Ordinance requires precisely that from mortgagees, including the Conservator and Enterprise.

The Ordinance, as applied to the Conservator and Enterprises, requires the payment of a so-called registration fee of $500 per vacant property, in this case not from the owner, but from a non-owner of the property. No matter the label, this fee is, in reality, a tax. The payment is an "enforced contribution"; mortgagees have no option but to pay $500 to the City of Chicago for

each "vacant" property. Further, because the Ordinance does not earmark the proceeds from the registration fees for any particular purpose or toward any special fund, the City may use the registration monies at its discretion to promote the general welfare -- that is, for the support of government. Even if the purpose of the Ordinance is a laudable one, the means used by the City to raise revenue is barred by the immunity from state and local taxation that Congress granted to the Conservator and Enterprises.

The City cannot defeat the Conservator's and Enterprises' immunity from taxation by calling its exactions a "registration fee." It is well established that user fees are the only permissible fees that a state or local government can assess on federal entities with immunity from taxation. A city, for instance, can charge an entity exempt from local and state taxation for utility services used by such an entity. *See, e.g., United States v. City of Columbia, Missouri*, 914 F.2d 151, 155-56 (8th Cir. 1990) (concluding that local entity could charge federal government for utility services, including a profit component, because the obligation arises only from the federal government's voluntary purchase of services from the city with the city acting in its capacity as a vendor rather than a sovereign entity). When a municipality fails to directly link the services it provides with the amount of an assessment, that assessment is not a user fee. In *United States v. City of Huntington, West Virginia*, 999 F.2d 71 (4th Cir. 1993), the court addressed whether a "municipal service fee" consisting of a "fire service fee" and a "flood protection fee" imposed upon property owners in the City of Huntington, including federal agencies, was a tax upon the United States or a fee for services rendered. The court held that the municipal service fee was "a thinly disguised tax" because the federal agencies' liability for the fee "*arises from [their] status as property owners and not from their use of a City service.*" *Id.* at 74 (emphasis added).

The same analysis applies here. The $500 registration payment is not linked to any service provided to the Conservator or Enterprises. Like the fee in *City of Huntington*, the registration payment is a thinly disguised tax that applies to the Conservator and Enterprises because of their status as mortgagees, not because of their use of a City service. Moreover, unlike the fee at issue in *City of Columbia*, the fee here is ***not*** a "voluntary" one that the Plaintiff chooses to pay in return for receiving a specific good or service provided by the City.

The conclusion that the "registration fee" is actually a tax is confirmed by the consequences that flow from failing to pay this charge. "[W]hile failure to pay a tax results in civil and sometimes criminal penalties, the failure to pay a portion of a [fee] results in termination of services." *City of Columbia*, 914 F.2d at 155 (concluding that the fee at issue was not a tax because the failure to pay the utility charges would merely result in discontinuation of service). Here, the Ordinance provides for penalties and fines -- not discontinuation of any services -- in the event of non-payment: "Any person who violates any provision of this section or of the rules and regulations issued hereunder *shall be fined* not less than $500.00 and not more than $1,000.00 for each offense. Every day that a violation continues shall constitute a separate and distinct offense." Chicago, IL, Code § 13-12-126(c) (2011) (emphasis added).

In short, the registration fee prescribed in the Ordinance has every indicia of a tax. No matter what label the City uses to describe this obligation, it functions as a tax and, therefore, it cannot be applied to the Conservator, the Enterprises or those acting on their behalf.

III. THE ORDINANCE IMPOSES FINES AND PENALTIES IN VIOLATION OF HERA

HERA provides that the Conservator "shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." 12 U.S.C.

§ 4617 (j)(1), (4). "[W]hile under conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is." *Nevada v. Countrywide Home Loans Servicing, LP*, 2011 WL 4356507, at *5 (D. Nev. Sept. 16, 2011).

Despite this plain bar against the assessment of fines and penalties on the Conservator or the Enterprises, the Ordinance provides, in relevant part, "[a]ny person who violates any provision of this section or of the rules and regulations issued hereunder shall be *fined* not less than $500.00 and not more than $1,000.00 for each offense." Chicago, IL, Code § 13-12-126(c) (2011) (emphasis added). This provision of the Ordinance clearly and unambiguously levies penalties and fines. *See City of Chicago v. Elevated Properties, L.L.C.*, 840 N.E.2d 677, 686 (Ill. App. Ct. 2005) (discussing mandatory nature of penalties under § 13-12-125(d)). It cannot be applied to the Conservator or the Enterprises; HERA preempts it.

IV. THE ORDINANCE CANNOT BE APPLIED TO THE CONSERVATOR INDIRECTLY THROUGH THOSE ACTING ON ITS BEHALF

HERA preempts the Ordinance not only with respect to its direct application to the Conservator and the Enterprises, but also in its indirect application through those acting on behalf of the Conservator -- that is, the servicers with whom the Conservator and the Enterprises have contracted to service the loans. To permit application of the Ordinance to the servicers acting on behalf of the Conservator and the Enterprises would allow the City to impose its regulatory scheme, taxes, and fines indirectly. The vacant properties secured by loans held by the Conservator and the Enterprises would be subject to the direction and supervision of the Chicago Department of Buildings, whose directives may -- and do -- conflict with those of the Conservator. Such back-door regulation does not escape the doctrine of preemption. *See, e.g., State Farm Bank v Reardon*, 539 F.3d 336 (6th Cir. 2008) (holding that federal law preempts state licensing requirements as applied not only to banks but also to independent contractor

agents that the banks hired to perform on their behalf); *Pacific Capital Bank, N.A. v. Connecticut,* 542 F.3d 341 (2d Cir. 2008) ("If a state statute subjects non-bank entities to punishment for acting as agents for national banks with respect to a particular NBA-authorized activity and thereby significantly interferes with national banks' ability to carry on that activity, the state statute does not escape preemption on the theory that, on its face, it regulates only non-bank entities.").

CONCLUSION

For the reasons stated, the Court should enter summary judgment in favor of Plaintiff and against Defendant on each count of Plaintiff's complaint and grant such other further relief as this Court deems just.

Dated: _____

Respectfully submitted,

/s/ Robert J. Emanuel

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(Pro Hac Vice Applications to be filed)

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL HOUSING FINANCE AGENCY, On its Own Behalf and as Conservator of Fannie Mae and Freddie Mac, Plaintiff, v. CITY OF CHICAGO, a municipal corporation, Defendant.	)	Civil Action No.: 1:11-cv-08795 Hon. Joan H. Lefkow

PLAINTIFF'S LOCAL RULE 56.1(a)(3) STATEMENT
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

In support of its Motion for Summary Judgment, Plaintiff, Federal Housing Finance Agency ("FHFA" or the "Conservator"), on its own behalf and as Conservator of Fannie Mae and Freddie Mac (the "Enterprises"), pursuant to Federal Rule of Civil Procedure 56 and United States District Court, Northern District of Illinois, Local Rule 56.1(a)(3), submits the following statement of uncontested facts as to which there is no genuine issue that would require resolution by a trier of fact and that entitles Plaintiff to judgment as a matter of law.

PARTIES

1. Plaintiff, the Federal Housing Finance Agency, is a federal agency located at 1700 G Street, NW in Washington, D.C. FHFA was created on July 30, 2008, pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"), Pub L. No. 110-289, 122 Stat. 2654, codified at 12 U.S.C. § 4617 *et seq.*, to oversee the Enterprises and the Federal Home Loan Banks. Plaintiff's Verified Complaint ("Compl.") ¶ 15 (Docket No. 1).

2. Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress with the mission to provide liquidity, stability and affordability to the United States housing and mortgage markets. *See* 12 U.S.C. § 1716(3); 12 U.S.C.§ 1451. Fannie Mae is located at 3900 Wisconsin Avenue, NW in Washington, D.C. Freddie Mac is located at 8200 Jones Branch Drive in McLean, Virginia. Compl. ¶ 17.

3. The Defendant, City of Chicago, is a municipal corporation organized and existing under the laws of the State of Illinois. Compl. ¶ 14.

JURISDICTION AND VENUE

4. Jurisdiction of this Court is founded on 28 U.S.C. § 1345, which gives federal courts original jurisdiction over claims brought by FHFA in its capacity as conservator of Fannie Mae and conservator of Freddie Mac, as well as jurisdiction for actions brought by FHFA in its own behalf.

5. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331 because the claims asserted arise under the laws of the United States.

6. In addition, this court has jurisdiction under 12 U.S.C. § 1452(f), because the Conservator is bringing this action on behalf of Freddie Mac, and 28 U.S.C. § 1367.

7. Venue lies in the Northern District of Illinois pursuant to 28 U.S.C. § 1391 because the Defendant resides in the Northern District of Illinois, and a substantial part of the events or omissions giving rise to the claims occurred in this district.

UNCONTESTED MATERIAL FACTS

8. Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress with the mission to provide liquidity, stability and affordability to the United States housing and mortgage markets. *See* 12 U.S.C. § 1716(3); 12 U.S.C.§ 1451.

9. As part of this mission, the Enterprises regularly purchase and hold millions of mortgages throughout the United States. Compl. ¶ 17.

10. On September 6, 2008, James B. Lockhart, III, then Director of FHFA, placed the Enterprises into conservatorships and appointed FHFA as Conservator. The conservatorships exist to "reorganiz[e], rehabilitat[e] or wind[] up [the Enterprises'] affairs." 12 U.S.C. § 4617(a)(2).

11. In its capacity as Conservator, FHFA has broad authority to act in the interest of and on behalf of the Enterprises. FHFA, as Conservator, is the successor to "all rights, titles, powers, and privileges of the [Enterprises]." *Id.* § 4617(b)(2)(A). HERA also empowers the Conservator to preserve and conserve the assets and property of the Enterprises. *Id.* § 4617(b)(2)(B)(iv).

12. Congress further authorized the Conservator to exercise any "incidental powers as shall be necessary to carry out" the above powers and authorities, and to "take any action authorized by this section, which the Agency determines is in the best interest of the [Enterprises] or the Agency." *Id.* § 4617(b)(2)(J).

13. In April 2011, the FHFA issued a directive to the Enterprises to implement consistent mortgage loan servicing and delinquency management requirements. Compl. ¶ 26.

14. Subject to the supervision of FHFA, the Enterprises contract with servicers who perform activities such as collecting and delivering principal and interest payments, administering escrow accounts, monitoring and reporting delinquencies, performing default prevention activities, evaluating transfers of ownership interests, responding to requests for partial releases of security, and handling proceeds from casualty and condemnation losses. Compl. ¶ 27.

15. The Enterprise-servicer relationship is governed by agreements, including each Enterprise's Selling and Servicing Guides, which set forth obligations and responsibilities that servicers must comply with as part of their relationship with each Enterprise. Compl. ¶ 28 These requirements may be altered by the Enterprises on their own initiative or at the direction of the Conservator. *Id.*

16. On July 28, 2011, the Chicago City Council passed an Ordinance that amended Section 13-12-125 of the Municipal Code of Chicago. Compl. ¶ 18 The Ordinance imposes obligations on mortgagees -- which, as defined by the Ordinance, includes the Conservator, the Enterprises, and their servicers -- that make them responsible for maintaining vacant buildings, and lots on which these buildings are located, with respect to property subject to the mortgages they hold. *Id.*

17. The Ordinance was amended on November 2, 2011, formally published on November 9, 2011 and became effective November 19, 2011. *Id.*

18. Fannie Mae is subject to the provisions of the Ordinance because, as of October 2011, it owns approximately 156,000 mortgages that are secured by properties located in the 92 zip codes comprising the City of Chicago. Compl. ¶ 30 Fannie Mae uses approximately 200 servicers in connection with those mortgages. *Id.*

19. Freddie Mac is subject to the provisions of the Ordinance, because, as of October 2011, it owns approximately 102,000 mortgages that are secured by properties located in the 92 zip codes comprising the City of Chicago. Compl. ¶ 31 Freddie Mac uses approximately 200 servicers in connection with those mortgages. *Id.*

Dated: _____

Respectfully submitted,

/s/ Robert J. Emanuel

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(Pro Hac Vice Applications to be filed)

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL HOUSING FINANCE AGENCY, On its Own Behalf and as Conservator of Fannie Mae and Freddie Mac, Plaintiff, v. CITY OF CHICAGO, a municipal corporation, Defendant.	)	Civil Action No.: 1:11-cv-08795 Hon. Joan H. Lefkow

PLAINTIFF'S LOCAL RULE 7.1 MOTION FOR LEAVE TO FILE BRIEF IN EXCESS OF 15 PAGES

The Federal Housing Finance Agency, on its own behalf and as Conservator for Fannie Mae and Freddie Mac, ("FHFA") hereby moves this Court for leave to exceed page limits in connection with its Memorandum in Support of Motion for Summary Judgment. Specifically, FHFA seeks leave to exceed page limits by five pages.

There is good cause for this request. The underlying motion for summary judgment is dispositive and would fully resolve a case of great significance. The issues presented are critically important to the Federal conservatorships of the two largest participants in the U.S. housing market, with potentially huge economic consequences. The motion involves the interpretation of a federal statute of broad application. The length of the Memorandum -- twenty pages -- is appropriate and necessary given the nature and importance of the issues presented.

For these reasons, FHFA respectfully requests that this Court grant leave to exceed page limits and accept for filing the accompanying Memorandum in Support of Motion for Summary Judgment.

Dated: _____

Respectfully submitted,

/s/ Robert J. Emanuel

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(Pro Hac Vice Applications to be filed)