IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellant, vs. WESTLAND LIBERTY VILLAGE, LLC, a Nevada limited liability company; and WESTLAND VILLAGE SQUARE, LLC, a Nevada limited liability company, Respondents.	Supreme Court Case No. 82174 District Court Case No. A-20-819412-B

APPEAL
From the Eighth Judicial District Court
The Honorable Kerry Earley/ The Honorable Mark Denton[1]

EXPEDITED MOTION TO STAY PENDING APPEAL

(Relief Requested by February 11, 2021)

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[1] This challenged order in this matter was issued by Judge Kerry Earley after the case had been transferred to Judge Mark Denton.

Corporate Disclosure Statement

Federal National Mortgage Association ("Fannie Mae") states that it is a government-sponsored enterprise chartered by the United States Congress, does not have parent corporations, and is currently under conservatorship under the direction of the Federal Housing Finance Agency; according to SEC filings, no publicly held corporation owns more than 10% of Fannie Mae's common (voting) stock.

Snell & Wilmer, LLP has represented Fannie Mae since the inception of this case in August 2020.

NRAP 27(e) Declaration[2]

The undersigned counsel for Appellant hereby certifies as follows:

1. I am a partner at Snell & Wilmer L.L.P. and am one of the attorneys representing Appellant, Fannie Mae, in this action. I submit this declaration in support of its Expedited Motion to Stay. I have personal knowledge of the facts stated herein, and I can testify competently to them if called upon to do so.

2. The underlying dispute involves Fannie Mae's application for a receiver and the opposition and countermotion of Respondents, Westland Liberty Village, LLC and Westland Village Square, LLC (together, "Westland") for injunctive relief.

3. On November 20, 2020, the district court issued an Order Granting the Motion for Preliminary Injunction filed by Respondents, Westland Liberty Village, LLC and Westland Village Square, LLC (together, "Westland") and Denying Fannie Mae's Application for Appointment of Receiver (the "Order"). The Order imposed many mandatory obligations upon Fannie Mae that were not requested in Westland's moving papers, were not requested or otherwise discussed at the hearing, and were not ordered by the district court at the hearing.

[2] While this Motion is not technically an emergency as defined in NRAP 27(e) because it does not seek relief in fewer than 14 days, Fannie Mae nonetheless includes the above declaration because it seeks expedited relief by a date certain.

4. Through their out-of-state, in-house counsel, John Hofsaess, Westland took immediate action to enforce portions of the Order.

5. Westland first sought to enforce the unsupported mandatory provisions in the Order in an email and attached letter sent on November 25, 2020 at 8:36 pm to Nathan Kanute and Michael Woolf.[3] The email was sent before Westland posted the $1,000.00 bond and demanded disbursement of $1,111,533.77.

6. Mr. Hofsaess subsequently sent an email and letter dated December 2, 2020 to Mr. Kanute, Joseph Went and Mr. Woolf, demanding that Fannie Mae: (a) rescind the Two Notices of Default and Election to Sell that Fannie Mae caused to be recorded; (b) deliver monthly debt service invoices to Defendants; (c) process loan payments inconsistent with the terms of the loan agreement including returning to the "ordinary practice of auto-debiting Westland's account for the amount of the non-default normal monthly debt service payment each month"; and (d) return over-payments Defendants voluntarily made to Fannie Mae. Mr. Hofsaess's December 2 letter explicitly states Westland's intention to seek relief from the district court by December 8, 2020 if Fannie Mae and Grandbridge did not immediately comply with their demands, and with the Order, including by disbursing $1,111,533.77 to Westland.

[3] Michael Woolf is an employee of Grandbridge. Mr. Hofsaess elected to contact Mr. Woolf directly in violation of NRPC 4.2.

7. As Westland made their intentions explicit to seek contempt sanctions or other relief if Fannie Mae did not immediately comply with their demands, Fannie Mae moved for a stay pending appeal before the district court on December 8, 2020 on an order shortening time.

8. As discussed below, Fannie Mae did not seek to stay the portion of the Order enjoining the foreclosure sale, but only the mandatory injunction provisions that would require Fannie Mae to, *inter alia*, rescind the two Notices of Default and Election to Sell that Fannie Mae caused to be recorded, return over-payments Westland voluntarily made to Fannie Mae, disburse more than $1.1 million from the Reserve Account, and give Westland and its affiliates preferential lending terms with respect to unrelated, unspecified, future loans.

9. On December 22, 2020 the district court issued an Order granting Fannie Mae a temporary stay of the mandatory injunction provisions it sought to expire 45 days from the Notice of Entry of that Order. The Notice of Entry of the Order was filed on Monday, December 28, 2020, immediately following the holiday weekend.

10. By its terms, the stay granted by the district court expires on Thursday, February 11, 2021.

11. Absent a stay, and as discussed in the Motion, Fannie Mae will be forced to immediately disburse close to $1.5 million from a combination of the

Reserve Account and Westland's overpayments, or face contempt proceedings. Nor is this a hypothetical possibility, as Westland's counsel had already made such demands and indicated their intention to pursue contempt in the district court.

12. Absent a stay, under the threat of contempt, Fannie Mae will be under an Order that requires it to treat favorably "any Westland entity in relation to other loans," and not "discriminate against or blacklist any Westland entity on new loan or loan refinancing applications." In other words, Fannie Mae's lending decisions concerning loans that are *not the subject of this litigation* will be affected by the district court order in this case.

13. Accordingly, Fannie Mae requests relief from this Court no later than close of business on **February 11, 2021** to avoid these Hobson's choices or face potential contempt proceedings in the district court.

14. I certify that this motion for emergency relief under NRAP 27(e)(1) was filed at the earliest possible time following the denial of the stay in the district court, particularly in light of the intervening holiday, complexity of the issues, and size of the record.

15. Fannie Mae's emergency motion to stay is being electronically filed and served.

16. Upon information and belief, the telephone numbers and office addresses for the attorneys for all parties are as follows:

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January 8, 2021 *s/ Kelly H. Dove*

Counsel for Federal National Mortgage Association

Introduction

Federal National Mortgage Association ("Fannie Mae") appeals from the district court's Order Granting Westland's Motion for Preliminary Injunction and Denying Application for Appointment of Receiver (the "Order"). In addition to denying Fannie Mae's application for appointment of a receiver and enjoining the foreclosure sale of the subject properties, the Order grants various and sweeping injunctive relief in favor of Westland, which was neither part of Westland's motion nor the court's hearing. Those provisions, added by virtue of Westland's including them in the proposed order they submitted to the district court, impose a wide-ranging host of affirmative obligations on Fannie Mae, including ordering it to rescind Notices of Default, withdraw Notices of Demand, disburse more than $1.1 million to Westland, and give Westland and their affiliates preferential lending status with respect to unrelated and future loans.

Fannie Mae now seeks a limited stay of these provisions pending appeal. Notably, it does not seek a stay of the foreclosure sale injunction but only a stay of the multitude of affirmative injunctive relief provisions that made their first appearance in the Order, that are impermissibly mandatory, and do not satisfy the applicable standards to impose such extraordinary relief. Fannie Mae's limited request is sound, reasonable, and supported by the law.

Relevant Factual Background

I. The Loan Documents and Related Agreements

On November 2, 2017, Westland Village Square's predecessor-in-interest and Fannie Mae's predecessor-in-interest (SunTrust Bank) entered the "Village Square Loan Agreement" setting forth the terms of a mortgage loan of $9,366,00.00. APP002, APP016-158. The loan also included the "Village Square Note" in that amount, together with interest and the "Village Square Deed of Trust"[4] to secure repayment. The Village Square Deed of Trust encumbers the "Village Square Property," which includes an apartment complex known as the "Village Square Apartments." APP002, APP160-193.

On the same date, Westland Liberty Village's predecessor-in-interest and Fannie Mae's predecessor-in-interest (again, SunTrust) executed the "Liberty Village Loan Agreement" for a mortgage loan of $29,000,000.00. APP 003, APP220-420. The loan also included the "Liberty Village Note" that amount, together with interest, and the "Liberty Village Deed of Trust" [5] to secure repayment. APP004, APP421-27. The Liberty Village Deed of Trust encumbers

[4] The Village Square Loan Agreement, the Village Square Note, the Village Square Deed of Trust, and the documents related thereto are hereinafter collectively referred to as the "Village Square Loan Documents."

[5] The Liberty Village Loan Agreement, the Liberty Village Note, the Liberty Village Deed of Trust, and the documents related thereto are hereinafter collectively referred to as the "Liberty Village Loan Documents."

the "Liberty Village Property," which includes an apartment complex known as the "Liberty Village Apartments." APP004, APP428-56. SunTrust assigned both Loans to Fannie Mae, and Westland subsequently assumed the obligations under the Village Square and Liberty Village Loan Documents. APP4-5, APP462-82.

II. Westland's Defaults and Fannie Mae's Rights Under the Loan

Following Westland's assumption, Fannie Mae noticed a dramatic drop in the occupancy rates at the Village Square Property and Liberty Village Property (collectively the "Properties"). APP1447 (noting the drop in occupancy from approximately 80% to 45% during the year that Westland managed the Properties). Westland admitted that the occupancy rates had declined and that their affiliates had to inject substantial money into the Properties to cover their monthly debt service obligations due to low occupancy. APP1304-05. As such, Fannie Mae requested inspection of the Properties in July 2019 pursuant to its right under Section § 6.02(d)[6] of the Loan Agreements. APP1447.

Based on the July 2019 inspections, Fannie Mae determined that property

[6] Section 6.02(d) of the Loan Agreements provide that the "Borrower shall permit Lender, its agents, representatives, and designees to enter upon and inspect the Mortgaged Property (including in connection with any Preplacement or Repair, … and shall cooperate and provide access to all areas of the Mortgage Property (subject to the rights of tenants under the Leases). APP052-53, 256-57.

condition assessments ("PCAs")[7] were necessary to determine the extent of the Properties' deterioration. Fannie Mae requested access to the Properties to perform the PCAs, which Westland granted to Fannie Mae and its expert, f3, Inc. ("f3"). APP483-1254. The PCAs established the need for immediate repairs totaling $2,845,980 ($1,092,835 for Village Square and $1,753,145 for Liberty Village), many of which involved safety issues. APP493, 801.

Due to the substantial repairs needed, the cost of those repairs, and the fact that the repair escrow accounts held only $106,217 (Village Square) and $246,047 (Liberty Village) respectively, to cover the cost, Fannie Mae delivered the PCAs to Westland, together with an October 18, 2019 Notice of Demand for each Property, outlining Westland's obligations to make the repairs and to deposit a total of $2,845,980 ($1,092,835 for Village Square and $1,753,145 for Liberty Village) into certain repair and replacement accounts within the thirty (30) days required by the Loan Agreements.[8] APP 1255-68. The Notice of Demand also advised that the

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[7] PCAs are provided for in section 6.03(c) of the Loan Agreements which provide: "***If, in connection with any inspection of the Mortgaged Property, Lender determines that the condition of the Mortgaged Property has deteriorated*** (ordinary wear and tear excepted) since the Effective Date, ***Lender may obtain, at Borrower's expense, a property condition assessment of the Mortgaged Property***." *See* APP052, 256 (emphasis added).

[8] Section 13.02(a)(4) of the Loan Agreements provide in relevant part:

> **(4) Insufficient Funds.** Lender may, ***upon thirty (30) days' prior written notice to Borrower***, require an additional deposit(s) to the Replacement Reserve Account or Repairs Escrow Account, or an increase in the amount of the Monthly Replacement Reserve Deposit,

Monthly Replacement Reserve Deposits were being increased effective December 1, 2019 by $8,160 per month to $26,760 for Liberty Village and by $1,397.42 per month to $11,656.50 for Village Square. APP1257, 1264. Westland's deadline to make efforts to complete the repairs and to deposit the funds in the respective accounts was November 17, 2019.

It is Fannie Mae's position that Westland failed to meet their obligations under the Loan Documents by failing to make adequate repairs and refusing to fund the repair and replacement accounts, instead attempting to unilaterally modify their obligations by replacing the requirement that they pay into the Reserve Accounts approximately $2.845 million with merely submitting a strategic improvement plan – essentially, a proposal for making repairs. APP1409-18. In doing so, Westland admitted that the Properties needed repairs of at least $1,218,125.12. APP1415. Westland has not funded the Reserve Accounts pursuant to the October 18, 2019

> if Lender determines that the amounts on deposit in either the Replacement Reserve Account or the Repairs Escrow Account are not sufficient to cover the costs for Required Repairs or Required Replacements, or, pursuant to the terms of Section 13.02(a)(9), not sufficient to cover the costs for Borrower Requested Repairs, Additional Lender Repairs, Borrower Requested Replacements, or Additional Lender Replacements….

APP085, 289 (§ 13.02(a)(4) – emphasis added).

Notice of Demand, which constitutes an event of default.[9] Westland has also refused to permit Fannie Mae to inspect the Properties to confirm the repairs they claim they completed, which is necessary to determine the Properties' condition. Westland's refusal to permit inspection forced Fannie Mae to initiate this action.

Westland Liberty Village now seeks to compel Fannie Mae to deliver $1,111,533.77 to reimburse it for repairs that were made to fire-damaged apartment units even though it is in breach of the Loan Agreements by failing to fund the required $2.845 million into the various reserve accounts and has refused to allow inspection. But Westland's monetary defaults permit Fannie Mae to withhold any disbursements from the certain collateral accounts, including the Restoration Reserve Account. Section 14.02(b) of the Liberty Village Loan Agreement states, "[i]f an Event of Default has occurred and is continuing, Borrower shall immediately lose all of its rights to receive disbursements from . . . any Collateral Accounts." APP094-95, 298-99, 374, 389 (§§ 14.02(b) and 17.03(a)(1)).] Section 17.03(a)(1) provides that Fannie Mae is not "obligated to disburse funds from the Restoration

[9] (a) **Automatic Events of Default**. Any of the following shall constitute an automatic Event of Default: (1) any failure by Borrower to pay or deposit when due any amount required by the Note, this Loan Agreement or any other Loan Document.
-and-
(b) … any failure by Borrower to perform any obligations under this Loan Agreement or any Loan Document that is subject to a specified written notice and cure period, which failure continues beyond such specified written notice and cure period as set forth herein or in the applicable Loan Document. APP092-93, 296-97.

Reserve Account if an Event of Default has occurred and is continuing. *Id.* Because the Events of Default are continuing,[10] Westland is not entitled to disbursement of funds from in the Restoration Reserve Account.

A. Procedural History

Fannie Mae filed its Application for Appointment of Receiver on August 12, 2020, requesting that a receiver be appointed over the Properties based on Westland's default. On August 31, 2020, Westland opposed the Application and filed a Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction ("Countermotion") seeking to prevent Fannie Mae from proceeding with its foreclosures of the Properties. APP1291-1324. Specifically, Westland requested that the court "***prevent***[] ***and enjoin***[] ***Plaintiff from conducting any foreclosure proceedings, foreclosure sale, or appointing a receiver related to the Properties pending a determination of the rights and obligations of the parties pursuant to the Loan Agreements***." APP1324.

The district court held a hearing on October 13, 2020 and held:

> Here is my ruling on the Plaintiff's Motion for Appointment of Receiver. I feel there is a ***factual dispute*** on whether there is a default by defendant [sic] in this case, so there is no mandatory statute that says I must … appoint a receiver, as I feel ***there is a dispute, a factual dispute whether there is or is not a default***…. I'm denying it.

[10] Westland disputes the default, and the district court found that there was a "question of fact" as to whether there is a default. As discussed below, Fannie Mae does not need to establish the fact of default to justify its requested stay.

> As far as the Defendants' Countermotion for a Preliminary Injunction Regarding the Notice of the Foreclosure, I applied the 65 standard as well as the NRS -- what's the other one? I always -- 33.010 standard. I do find that, at this point, ***there is irreparable harm*** and ***that standard is met because it is property***. I also find that there is a reasonable probability of success on the merits as far as what -- ***there's a question of fact*** as to whether there was a default, etcetera." (emphases added).

APP1497-98. The court clarified that its ruling would only prohibit Fannie Mae from recording a Notice of Sale: "I'm stopping Fannie Mae from going forward with anything…." APP1499. The district court declined to make factual findings or legal conclusions when there was a factual dispute on the record. APP1498.

Despite the limited scope of the ruling at the hearing, the court entered Westland's form of order, which granted expansive relief not sought in their motion nor addressed at the hearing. In addition to the ruling the district court had announced, denying the appointment of a receiver and granting Westland's request to enjoin the foreclosure sale, the written order also included a litany of injunctive relief – most of which impose affirmative burdens on Fannie Mae and others that Westland never requested. Specifically, the Order directed Fannie Mae to "remove from title" of the Properties the Notices of Default and Election to Sell that had been recorded on July 8, 2020; to service the loans in particular ways (turn over to Westland the monthly debt service invoices for the Property, process loan payments consistent with the terms of the loan agreement); return funds Westland voluntarily paid in excess of the non-default monthly debt service payments, which excess funds

Westland paid between February 2020 and the present; disburse funds currently held in the Restoration Reserve Account, which total more than $1.1 million; retract or strike the Notice of Demand; rescind the Notices of Default and Acceleration of Note, dated December 17, 2019; and to treat unspecified Westland entities favorably in relation to other or new loans, including by not "blacklisting"[11] any Westland entity on new loan or loan refinancing applications, not adding a fee to any loan quoted and not adding an interest rate surcharge to such applications. The district court set a bond in the *de minimis* sum of $1,000.00. Fannie Mae timely appealed on November 30, 2020. Westland posted their $1,000 bond on December 1, 2020.

Argument

I. Fannie Mae Seeks Only a Stay of the Additional Injunction Provisions, Which Are Mandatory and as Such Justify a Stay Pending Appeal.

As Fannie Mae noted above, it does not currently seek a stay of the Order denying the application to appoint a receiver nor of the order's enjoining of further foreclosure proceedings, including recording Notices of Sale. Notably, this was precisely (and solely) the relief Westland sought in its motion. Rather, Fannie Mae

[11] The Order provides that Fannie Mae may not "take any adverse action against any Westland entity in relation to other loans, discriminate against or blacklist any Westland entity on new loan or loan refinancing applications." Notably "blacklist" is not a term of art but hyperbole aimed at requiring Fannie Mae to enter into loans with separate entities claiming to be Westland affiliates on favorable terms.

seeks only a stay of the order's expansive list of "enjoined activities,"[12] which impose substantial, affirmative obligations without basis.

A. The Injunctive Relief Fannie Mae Seeks to Stay Is Mandatory and Disfavored.

A preliminary injunction can take two forms – prohibitory or mandatory. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009). A prohibitory injunction – the most common type – prohibits a party from taking action and "merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983). The purpose is to preserve the status quo. *N.D. ex rel. Parents v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010). In contrast, a mandatory injunction is one that goes beyond maintaining the status quo and "orders a responsible party to take action." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015); *Dodge Bros. v. Gen. Petroleum Corp. of Nev.*, 54 Nev. 245, 10 P.2d 341, 342 (1932) (recognizing that a "mandatory injunction" is one that requires an individual to do a particular act, such as compel performance of a contract); *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996) (holding that a mandatory injunction "orders a responsible party to 'take action.'"). Indeed, restoring, rather than merely maintaining the status quo, requires

[12] Fannie Mae seeks a stay of paragraphs (2), (3), and (4) on page 7 of the Order, and paragraphs (5)(b)-(o).

a mandatory injunction. *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Mem'l Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 124 (1972).

For example, in *Marlyn Nutraceuticals*, the district court had ordered the defendant to stop manufacturing and distributing the challenged product and to recall its already-distributed products. 571 F.3d at 879. The Ninth Circuit vacated the recall aspect of the order, ruling that enjoining the defendant to recall products it had already distributed was mandatory because it "went beyond the status quo pending litigation" and instead required the defendant to take an "affirmative step." *Id.*; *see also, e.g., Garcia*, 786 F.3d at 740 (requiring Google to take the affirmative action to remove and keep removing a particular video whenever it was uploaded was an impermissible mandatory injunction); *State v. Ducker*, 35 Nev. 214, 127 P. 990, 994 (1912) (reversing injunction requiring the delivery of water in the possession and under the control of defendants to the plaintiffs was a mandatory injunction); *Elliott v. Denton & Denton*, 109 Nev. 979, 982, 860 P.2d 725, 727 (1993) (vacating mandatory injunction requiring the return of an impounded car).

Mandatory injunctions are "particularly disfavored" and carry a higher burden – they should be denied "unless the ***facts and law clearly favor*** the moving party." *Garcia*, 786 F.3d at 740 (emphasis added); *Leonard v. Stoebling*, 102 Nev. 543, 551, 728 P.2d 1358, 1363 (1986) (holding that a court should "exercise restraint and caution in providing this type of equitable relief."). They are permissible only when

"extreme or very serious damage will result" that is not "capable of compensation in damages," and the merits of the case are not "doubtful." *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017).

For reasons addressed later in the Motion, the district court gravely erred in issuing such expansive and sweeping mandatory injunctive relief because injunctions of that type did not satisfy (or even purport to satisfy) this exacting standard. With respect to Fannie Mae's request for a stay of the mandatory injunction pending appeal, the fact that the injunction is mandatory by itself supports the granting of a stay. *See Kress v. Corey*, 65 Nev. 1, 20, 189 P.2d 352, 361 (1948). The aspects of the Order Fannie Mae seeks to stay are unquestionably mandatory. These provisions: (1) vacate Westland's default by requiring that Fannie Mae rescind the Notices of Demand and Notices of Default even though the district court merely found that there was question of fact as to the default; (2) require Fannie Mae to disburse more than $1.1 million to Westland upon a finding that Westland "may" ultimately be able to show a breach of contract, effectively awarding the equivalent of a pre-judgement writ of attachment without any compliance with NRS Chapter 31; (3) reverse Fannie Mae's prior foreclosure activity rather than simply halt it; and (4) force Fannie Mae to make undisclosed and unspecified financial accommodations to Westland's affiliates, who are unidentified non-parties, by requiring that Fannie Mae treat them favorably with respect to future lending activity

unrelated to the present case. In sum, the injunction provisions purport to compel specific performance of a wish list Westland will almost certainly attempt to enforce with the court's contempt powers. None of these activities merely maintains the status quo but instead direct a broad array of affirmative activity. These provisions of the order should be stayed pending appeal.

B. Fannie Mae Is Entitled to a Stay of these Mandatory Injunction Provisions Pending Appeal.

Consistent with the disfavor ascribed to mandatory injunctions, courts widely endorse staying the burdens of mandatory injunctive relief pending appeal. This Court has explicitly and consistently recognized the distinction between prohibitory (or preventive) injunctive relief and mandatory, holding that a stay is appropriate when appealing a mandatory injunction. *Kress*, 65 Nev. at 20, 189 P.2d at 361. This is in keeping with longstanding jurisprudence favoring stays pending for challenges to mandatory injunctions. *See Agric. Labor Bd. v. Sup. Court*, 196 Cal. Rptr. 920, 922 (Cal. Ct. App. 1983) (recognizing that mandatory injunctions are automatically stayed on appeal); *Ironridge Glob. IV, Ltd. v. ScripsAmerica, Inc.*, 189 Cal. Rptr. 3d 583, 587 (2015) (holding that where an injunction includes both mandatory and prohibitory relief, the mandatory injunctive relief is stayed pending appeal); *Tomasso Bros. v. Oct. Twenty-Four, Inc.*, 646 A.2d 133, 141 (Conn. 1994) (recognizing a presumption in favor of staying mandatory injunctions pending appeal and "reflects the burden imposed by a mandatory injunctive order"). Because

Fannie Mae requests to stay provisions of mandatory injunctive relief, the Court should grant a stay.

II. NRAP 8 Equally Supports Fannie Mae's Requested Stay.

Fannie Mae alternatively satisfies the standard for stay relief under NRAP 8. Under NRAP 8(c), the Court should consider: (1) whether the object of the appeal will be defeated absent a stay; (2) whether Fannie Mae will suffer irreparable or serious injury absent a stay; (3) whether Westland will suffer irreparable or serious injury if the stay is granted; and (4) whether Fannie Mae is likely to prevail on the merits. Not all factors need be weighed equally and, depending on the type of appeal, the first factor may be especially strong and counterbalance other factors. *State v. Robles-Nieves*, 129 Nev. 537, 542, 306 P.3d 399, 403 (2013).

A. The Appeal Will Be Substantially Defeated Absent a Stay.

Fannie Mae seeks a stay of the Order's injunctive provisions that require it to perform a host of affirmative activity, including rescinding Notices of Default and Demand, disbursing more than $1.1 million, and extending credit to Westland's undisclosed affiliates. Without a stay, Fannie Mae's appeal with respect to these provisions will be substantially defeated. Fannie Mae will have rescinded Notices of Default and Election to Sell. In addition to not moving forward with the

foreclosure sale, the Order requires the rescission of the Notice of Default.[13] This would force Fannie Mae to start foreclosure proceedings over, and a delay of months, even if it fully prevails in this case. Likewise, if Fannie Mae is forced to disburse $1.1 million to Westfield despite their default, and that aspect of the injunction is reversed on appeal, any victory would be hollow if it cannot recover that money. Similarly, prevailing on appeal would be severely undermined if, in the meantime, Fannie Mae were forced to enter lending relationships and extend millions in credit to Westland's undisclosed affiliates. This factor favors a stay.

B. Fannie Mae Will Suffer Irreparable or Serious Injury.

For similar reasons, Fannie Mae will be seriously injured in numerous respects absent a stay. For example, the injunction currently requires Fannie Mae to disburse to Westland the more than $1.1 million held in the Restoration Reserve Account on just ten days' notice. If Fannie Mae prevails on appeal and ultimately is entitled to those funds, it is unlikely to recover them in light of Westland's financial position and the fact that the injunction is secured by a grossly inadequate $1,000 bond. It also ignores Fannie Mae's recoupment rights.[14] Fannie Mae claims that

[13] A preliminary injunction halting a foreclosure almost never also requires a rescission of the foreclosure notices recorded or issued to date, particularly absent an affirmative showing that there is no default.

[14] Recoupment, is "[a]right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reasons that plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract." *Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 275 P.3d 933 (2012).

Westland is in monetary default and the amounts due under the Loan Documents, roughly $40 million in principal, are accelerated. If the court were ultimately to determine that Westland is in default, but not stay the $1.1 million disbursement, that amount would be unavailable to recoup against the amounts owed.

Section (o) requires that Fannie Mae treat Defendants ***and related entities*** in specific ways, including what fees or interest Fannie Mae can charge ***in relation to new and other loans***, *i.e.*, not the loans at issue in this case. In addition to what a stunning overreach that relief is, Fannie Mae faces serious and irreparable injury as a result of being forced to enter future contracts with Westland and related entities under terms mandated in the Order. Fannie Mae should not be under such court-ordered restrictions in how it decides to engage in future lending activity, which it could be embroiled in for years to come even if it prevails on appeal. If the future or other loans are similar to this case, the Order requires Fannie Mae to lend Westland and their alleged affiliates millions of dollars on favorable terms and enter additional multi-year loan agreements with them that could lead to future litigation and loss in the event of default. In addition to the serious and irreparable harm Fannie Mae faces under this injunction, it also faces contempt sanctions based on its treatment of future lending opportunities with Westland, all of which are otherwise business decisions and none of which are at issue in this litigation.

Sections (k) through (m) require Fannie Mae to retract and strike Notices of Demand even though the district court only found that there was a question of fact regarding the fact of Westland's defaults. Fannie Mae will be harmed by initiating default proceedings anew if it prevails.

Section (g) requires Fannie Mae to disgorge payments Westland voluntarily paid to Fannie Mae because Defendants elected to pay more than the amount required by the Loan Agreements following their default. Fannie Mae has no obligation to pay these funds under the "Voluntary Payment Doctrine." *Nevada Association Services, Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. 949, 338 P.3d 1250 (2014). Fannie Mae is also unlikely to have this money returned if it prevails. Sections (e), (f), (i), and (j) affirmatively require Fannie Mae to administer the loan in particular ways. By issuing an injunction to compel performance of contract-based actions, such as responding to requests within ten days, it impermissibly makes an overwhelming amount of activity that would at best be redressable by contract remedies instead subject to court supervision, and contempt proceedings.

C. Westland Will Not Suffer Irreparable or Serious Injury Absent a Stay, Particularly as Fannie Mae Does Not Seek to Foreclose During the Pendency of the Appeal.

Westland will not be seriously injured by a stay, particularly because Fannie Mae does not seek to proceed with the foreclosure sale or the appointment of a

receiver pending its appeal.[15] Westland will not face either threat during the appeal. As Westland did not affirmatively move for any other relief, they cannot credibly claim that a stay of these other provisions would cause irreparable injury.

D. Fannie Mae Is Likely to Succeed on the Merits, or At Least Has Raised a Substantial and Difficult Question on Appeal.

Fannie Mae satisfies this factor for three independently sufficient reasons: (1) a denial of a stay will undermine the appeal and, as such, it only requires a showing that the appeal is not frivolous; (2) the appeal raises a substantial and difficult question; and/ or (3) it is likely to be successful on appeal.

a. *Because Denying a Stay Would Undermine the Appeal, Fannie Mae Need Only Show that Its Appeal Is Not Frivolous.*

In circumstances where denying a stay would substantially defeat the appeal, the last stay factor (likelihood of success on the merits) is "far less significant" than the first stay factor (whether the object of the appeal will be defeated if the stay is denied). *See Robles-Nieves*, 129 Nev. at 546 (finding that the first stay factor took on added significance because denying a stay would effectively eliminate the right to appeal afforded by the statute); *see also Mikohn Gaming Corp.*, 120 Nev. at 253 (finding that the last stay factor was less significant where the object of an appeal would be defeated if a stay was denied). In these circumstances, the last stay factor

[15] The "quiet enjoyment" provision is addressed separately below.

"will counterbalance the first factor only when the appeal appears frivolous or the stay [is] sought purely for dilatory purposes." *Id.* For example, in *Mikohn*, the Court held that "[b]ecause the object of an appeal … will be defeated if a stay is denied, and irreparable harm will seldom figure into the analysis, a stay is generally warranted" absent a showing the appeal is frivolous. 120 Nev. at 253.

Here, where it cannot reasonably be disputed that denial of a stay would substantially defeat the appeal, the likelihood of success is of minimal relevance, and only matters to evaluate frivolousness. The Order effectively gives Westland an immediate victory on every issue in the case based on a mere finding that there was "a question of fact" as to Westland's default and that Westland "may" be able to prevail on its counterclaims. Fannie Mae's appeal is not frivolous.

b. *The Appeal Raises Substantial Legal Questions.*

Alternatively, a stay pending appeal is appropriate when the court has ruled on a "difficult legal question" or "a novel interpretation of law." *Andrews v. Countrywide Bank NA*, 2015 WL 1599662, at *2 (W.D. Wash. Apr. 9, 2015). The nature of this dispute and the wide-ranging effect of its Order should warrant a stay pending the appeal. *See, e.g., Andrews*, 2015 WL 1599662, at *2 (W.D. Wash. Apr. 9, 2015); *Gray v. Golden Gate Nat. Recreational Area*, 2011 WL 6934433, at *1-2 (N.D. Cal. Dec. 29, 2011). A "showing that serious legal questions have been raised on appeal will satisfy the likelihood of success on the merits" prong. *Gray*, 2011

WL 6934433, at *2.[16]

c. *Fannie Mae Is Likely to Succeed on Appeal.*

i. The mandatory provisions of the injunction Fannie Mae seeks to stay are unsupported and thus likely to be reversed on appeal.

The aspects of the injunction Fannie Mae seeks to stay are mandatory, and thus are subject to a higher standard. The "already high standard for granting a TRO or preliminary injunction is further heightened when the type of injunction sought is a 'mandatory injunction.'" *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1156–57 (D. Or. 2018) (citing *Garcia*, 786 F.3d at 740). The burden to support a mandatory injunction is "doubly demanding" and should be denied "***unless the facts and law clearly favor*** the moving party." *Garcia*, 786 F.3d at 740 (emphasis added); *Leonard*, 102 Nev. at 551, 728 P.2d at 1363. They are permissible only when "extreme or very serious damage will result" and the merits of the case are not "doubtful." *Hernandez*, 872 F.3d at 999.

Here, the district court did not conclude that the facts and the law "clearly favored" Westland with respect to the relief it afforded. Rather, it stated: "I feel there is a ***factual dispute*** on whether there is a default." APP1497. With respect to Westland's request for injunctive relief, the district court held that it "applied the 65

[16] In addition to the multitude of problems with the aspects of the Order addressed by this Motion, the challenged provisions also likely violate the Housing and Economic Recovery Act ("HERA"). *See* 12 U.S.C. § 4617.

standard as well as the NRS … 33.010 standard" and found that there was the potential for "irreparable harm and that standard is met because it is property." APP1498. This irreparable harm clearly refers only to the prospective sale of the Properties. The district court further stated that there was "a reasonable probability of success on the merits as far as what -- there's a question of fact as to whether there was a default." Indeed, even the problematic written order that Westland prepared and the district court signed concluded only that "there are substantial factual disputes related to whether any default occurred" and that Fannie Mae's pursuit of foreclosure "***may*** amount to a breach of contract, failure to service the loan in good faith, and ***may*** support the other claims and damages in Westland's Counterclaim." Order at 5 (emphasis added). The court at no time made any findings with respect to provisions challenged here sufficient to support the array of mandatory injunctive relief it ordered – disbursing $1.1 million, making new loans, and rescinding Notices of Default and refunding payments Westland voluntarily paid. The Order, particularly the aspects Fannie Mae seeks to stay, will not withstand scrutiny.

ii. *The Provisions of the Injunction Fannie Mae Seeks to Stay Do Not Satisfy Even the Prohibitory Injunction Standard and Should Be Reversed on Appeal.*

Even if the Court were to treat these injunction provisions as merely prohibitory, which they are not, the injunction does not pass muster. Finding that

there are issues of fact as to the parties' claims does not by any standard support the sweeping mandatory injunctive relief the district court ordered in Westland's favor.

A preliminary injunction is available upon a showing that the party seeking the injunction enjoys a "reasonable probability of success on the merits" and that the non-moving party's "conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy." *Sobol v. Capital Mgmt. Consultants*, 102 Nev. 444, 446, 726 P.2d 335, 336 (1986). The Court "may also weigh the public interest and relative hardships of the parties ..." *Id.* The ultimate purpose of the preliminary injunction is to preserve the status quo so as to prevent irreparable harm. *Dixon v. Thatcher et al*., 103 Nev. 414, 415, 742 P2d 1029 (1987). The irreparable harm must be articulated in specific terms by the issuing order. *Dep't of Conservation v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005).

Here, the district court did not rule on each legal element underlying the injunction. Specifically, it concluded that Westland faced irreparable harm if the foreclosure sale was to proceed because of the potential loss of property. Order at 6; Trans. at 50. However, the court did ***not*** make any findings as to Westland's probability of success with respect to *their* Counterclaim, or that any aspect of the injunction – except the foreclosure sale – constituted irreparable harm prong.

While the district court concluded that there were "questions of fact"[17]

[17] This is not the applicable standard.

regarding Westland's default such that it did not appoint a receiver or allow foreclosure to proceed, it made no affirmative findings or conclusions in favor of Westland's Counterclaim, noting only that they "may" be able to demonstrate a breach. Order at 5. Likewise, the court did not find whether the alleged harms to Westland outweighed the alleged harms to Fannie Mae with respect to the "enjoined activities" other than the foreclosure. Moreover, while the stated purpose of the preliminary injunction is to maintain the status quo, the Order in fact imposed upon Fannie Mae a host of affirmative obligations, none of which are supported in the Order. Instead, the Order effectively gives Westland their best day in court after merely concluding that they "may" be able to support their claims.

E. The Court Should Stay the "Quiet Enjoyment" Injunction.

The Order also provides that Fannie Mae "may not interfere with Westland's enjoyment of the Properties…." But no allegations or evidence show that Fannie Mae has interfered with Westland's enjoyment of the Properties or threatens to. As such, Westland had no basis to seek and the court had no basis to issue an injunction concerning quiet enjoyment. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 105 (1983) (holding that a party seeking injunctive relief must establish that it is "likely to suffer future injury"). The meaning of this provision is also entirely unclear. *Ojeda-Enriquez v. Warden*, 2017 WL 7915501, at *1 (Nev. App. Dec. 14, 2017) (holding that because the violation of an injunction is subject to punishment, an

injunction must provide explicit notice of precisely what conduct is outlawed). Here, the Order fails to put Fannie Mae on appropriate notice of what activity is enjoined. Indeed, "quiet enjoyment" does not apply to the parties' relationship, but is rather an obligation of a landlord to tenants. *See Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008); *L.V. Oriental v. Sabella's*, 97 Nev. 311, 313, 630 P.2d 255, 256 (1981).[18] Finally, if Westland's intention in including this provision is to prevent Fannie Mae from inspecting the Properties, it is wholly improper. The Loan Agreements unambiguously entitle Fannie Mae to inspect the Properties, and this is now also an issue that will be addressed in discovery. Indeed, because Westland's evidence of recent repairs is directly relevant to their default status, Fannie Mae must be permitted access to confirm that repairs were made and ascertain their quality.

III. The Bond Is Grossly Inadequate.

The purpose of posting a security bond is to protect a party from damages incurred as a result of a wrongful injunction. *Am. Bonding Co. v. Roggen Enterprises*, 109 Nev. 588, 591, 854 P.2d 868, 870 (1993). Recovery for damages is generally limited to the amount of the bond. *Tracy v. Capozzi*, 98 Nev. 120, 125, 642 P.2d 591, 594 (1982). Here, Fannie Mae contends that Westland is in default and was required to cure by, *inter alia*, depositing approximately $2.845 million into the

[18] If Westland meant by this provision to enjoin the foreclosure, it is entirely duplicative of the prior provision which explicitly enjoins foreclosure, which Fannie Mae does not seek to stay.

Repair Escrow Account. Yet the Order requires Fannie Mae to disburse more than $1.1 million to Westland and refund payments Westland voluntarily made to Fannie Mae. Despite these actual amounts in issue exceeding $3.9 million, the district court ordered only $1,000 as a bond to secure the injunction. The disparity between the losses Fannie Mae stands to suffer and the unfair windfall Westland stands to receive is entirely without basis. The de minimis bond is insufficient and provides an additional reason to grant the requested stay.

Conclusion

This Court should grant Fannie Mae's request for a stay pending appeal of paragraphs (2), (3), and (4) and paragraphs (5)(b)-(o) of the Order.

DATED: January 8, 2021

SNELL & WILMER L.L.P.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On January 8, 2021, I caused to be served a true and correct copy of the foregoing **EXPEDITED MOTION TO STAY PENDING APPEAL** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Maricris Williams
An Employee of SNELL & WILMER L.L.P.

4820-8497-1476