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

Dist. Court Case No. A-20-819412-B

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Appeal from the Eighth Judicial District Court of the State of Nevada, in and for County of Clark

RESPONDENTS' OPPOSITION TO EXPEDITED MOTION TO STAY

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I. INTRODUCTION

This matter arises out of an overzealous lender's inexplicable attempt to punish a community-minded investor in the Las Vegas valley. Appellant Federal National Mortgage Association ("Fannie Mae") asks this Court to stay almost every aspect of the district court's well-reasoned injunction order on grounds that certain of the relief granted therein constitutes a mandatory, as opposed to a prohibitory, injunction. Not true. The district court's order merely prohibits Fannie Mae from pursuing foreclosure proceedings and related adverse actions flowing from an utterly defective default notice that would have dire and irreversible consequences on Westland's unblemished business record in the absence of an injunction.

Westland invested $60.3 million in August 2018—through the assumption of $38.4 million in loans from Fannie Mae and an additional $20-plus million in cash—to purchase two large multi-family communities with a troubled history of criminal activity and gang violence. Within the first year of ownership, Westland invested an additional $1.8 million on capital improvements to the properties, and that amount increased to $3.5 million by September 2020. Westland, moreover, did not miss a single debt service payment to Fannie Mae and, in fact, overpaid the mortgage by more than $200,000 in 2020. As a result of Westland's significant efforts and capital investment, the properties now have over 80% occupancy, a reduced crime rate and a dedicated 32-member staff, all of which have drawn commendations from a Clark

County Commissioner, the Nevada State Apartment Association, and the Las Vegas Metropolitan Police Department ("LVMPD").

Notwithstanding Westland's large investment and the absence of a monetary default, Fannie Mae improperly sought access to the properties in July 2019 to conduct a property condition assessment in violation of the parties' loan agreements and, subsequently, demanded that Westland deposit an additional $2.85 million in escrow for repairs. Fannie Mae made this demand even though the operative loan agreements locked in the repair reserves at $143,000, and Fannie Mae held more than $1 million in other escrow accounts. When Westland objected to this unreasonable demand, Fannie Mae's loan servicer, Grandbridge Real Estate Capital, LLC ("Grandbridge"), served a baseless notice of default and, thereafter, commenced the foreclosure process.

After filing the instant lawsuit, Fannie Mae moved for the appointment of a receiver. Westland counter-moved for injunctive relief to prevent the foreclosure and deleterious effects triggered by the wrongful default notice. The district court categorically rejected Fannie Mae's request for a receiver and granted Westland's counter-motion for injunctive relief, which merely sought to return the parties to the *status quo ante litem* by precluding Fannie Mae from pursuing the adverse actions ostensibly available to it had the default notice been properly issued, which it was not. More specifically, the district court prohibited Fannie Mae from foreclosing on

the properties, interfering with Westland's ownership and operation of the properties, withholding insurance funds already owed to Westland prior to the default notice, and blacklisting Westland and its affiliates in connection with other loan applications based solely on the default notice.

Fannie Mae now seeks to stay all relief other than the denial of the receivership application and the injunction against the foreclosure proceedings. Without the related relief, Westland will continue to suffer irreparable harm from Fannie Mae's self-proclaimed but baseless default. Because Fannie Mae will suffer no such harm during the pendency of this appeal, the stay request should be denied.

II. STATEMENT OF FACTS

A. Westland Purchases The Properties.

On August 29, 2018, Westland Liberty Village, LLC and Westland Village Square, LLC purchased adjoining multi-family communities located at 4870 Nellis Oasis Lane and 5025 Nellis Oasis Lane, Las Vegas, Nevada (the "Properties") for $60.3 million. SA358.[2] The Westland entities are affiliated with the decades-old Westland Real Estate Group, which employs approximately 500 people, and owns and operates over 38 communities in the Las Vegas valley. *Id*. In more than 50 years of operation, the Westland Real Estate Group and its affiliates have never defaulted on a loan. *Id.*

[2] Citations to "SA" refer to Respondents' Supplemental Appendix.

As a condition of the purchase, Westland assumed loans of $29,000,000 and $9,366,000 (the "Loans") that were issued to the prior owner by Grandbridge (the successor to SunTrust Bank), and assigned to Fannie Mae (other than for loan servicing) before Westland's purchase. *Id.*; SA687; APP016-APP158; APP220-APP420. Westland paid the remainder of the purchase price in cash such that Westland has well over $20 million of equity in the Properties. *Id*. At the time of purchase, Fannie Mae reaffirmed the sufficiency of the combined total Repair Reserve and Replacement Reserve balances of $143,319.30 based on a property condition assessment ("PCA") performed by CBRE. SA642-SA648; SA654; SA664; SA686. There is no dispute that Westland satisfied this reserve funding.

B. Westland Rehabilitates The Properties At Great Expense.

Notably, Fannie Mae agreed to the reserve amounts at the time of purchase with knowledge that the Properties had been in a distressed condition for years due to poor management, exceedingly high levels of crime, and physical disrepair. SA361-SA362; SA365-SA372; SA688-SA689; SA692-SA696. The Properties, in fact, received a nuisance abatement complaint from LVMPD due to high crime levels while the Properties were in escrow. *Id.* For that reason, Westland advised Grandbridge prior to closing that a decline in occupancy would inevitably occur as evictions were necessary to address the high crime rate and the prior owner's poor management. *Id.*

From the date of purchase in August 2018 through September 2019, Westland invested $1.8 million solely on capital improvements, spent another $1.57 million on private security, took measures to clean up crime, added a dedicated 32-employee staff, and began improving integration with local community services. SA361-SA362. Westland's efforts in this regard received plaudits from multiple leaders and government bodies in the community. *Id.*

C. The Improper Property Condition Assessment, And Fannie Mae's Demand For A $2.85 Million Reserve Deposit.

In mid-2019, Grandbridge, acting on behalf of Fannie Mae, demanded a PCA to which it was not entitled under the loan agreements. Fannie Mae acknowledged in the district court that this request was based on a reduced occupancy rate—which, again, only resulted from Westland's attempts to improve the Properties—when the loan agreements only allowed a PCA due to physical deterioration of the Properties. APP049; APP054; APP1447. The contract language notwithstanding, Grandbridge retained an out-of-state vendor, f3, Inc. ("f3"), to perform a new PCA in September 2019 even though CBRE, a local vendor, had performed a PCA at the time of purchase just a year earlier. APP006-APP007.

On October 18, 2019, Fannie Mae (through Grandbridge) served a Notice of Demand (the "Demand") based on alleged maintenance deficiencies identified in f3's PCA reports. The Demand required Westland to deposit $2.85 million in the Replacement Reserve Account forthwith. APP1256-APP1268. Because Fannie

Mae's "assessment" effectively meant the condition of the Properties deteriorated by $2.85 million in one year despite Westland's capital expenditures of $1.8 million during the same period, it was readily apparent that f3 artificially inflated the PCA by using different standards than those used by CBRE months earlier. Indeed, the PCA at the time of purchase determined that vacant units required routine maintenance without reserves whereas f3 did not categorize the same type of repair as routine maintenance and instead required $1.9 million be held in reserve for vacant units. SA021-SA288; *cf.* APP001-013; APP503; APP814. By adopting this approach, f3 caused the demanded reserves to skyrocket from $143,319.30 to $2.85 million even though the condition of the Properties had, by all accounts, dramatically improved since the initial PCA.

The loan agreements expressly prohibit Fannie Mae from making increased reserve demands on grounds the existing reserves are purportedly "insufficient." ***First***, "adjustment to deposits" for reserve schedules are permitted under Section 13.02(a)(3), but only at the time a loan is renewed or transferred, *i.e.*, at the time of purchase in August 2018 when Fannie Mae reduced the reserves. APP084-APP085.

Second, Section 13.02(a)(4) only permits increases in Required Repairs and Required Replacements that are explicitly listed in the loan schedules when the loan is issued or assumed as well as Additional Lender Repair or Additional Lender Replacements that are "*repairs of the type listed* on the Required Repair Schedule"

or "Required Replacement Schedule" but not specifically identified. APP085; APP108 (emphasis added). In this case, the scheduled items only identified a handful of minor repairs with a total value of $143,319.30 whereas Fannie Mae's $2.85 million demand requested wholesale changes far beyond that limited scope. SA642-SA648; SA654; SA664; SA688.

Third, Section 6.01(d) states the "condition of the Mortgaged Property" only applies to physical onsite conditions, including "the construction or condition of the Mortgaged Property or . . . any structural or other material defect" and "any damage other than damage which has been fully repaired." APP049. There is no mention of occupancy levels. Similarly, under Section 6.03(c), Fannie Mae can only obtain a PCA when "the *condition* of Mortgaged Property has *deteriorated* (*ordinary wear and tear excepted) since the Effective Date*" of the loan. APP054 (emphasis added). Fannie Mae, however, did not—and could not—produce any evidence establishing deterioration since the effective date of the loans as opposed to deterioration that already existed before Westland purchased the Properties. APP1429-APP1430. Put another way, the f3 report on which Fannie Mae's Demand was premised did not account for the baseline condition of the Properties at the time of purchase.[3]

[3] The f3 report similarly sought reserves for costs of routine maintenance, but Section 13.02(a)(5)(B) explicitly provides Fannie Mae "shall not disburse from the Repair Escrow Account the costs of routine maintenance." APP086. Fannie Mae, stated differently, was demanding that Westland deposit funds for routine maintenance that could never be reimbursed under the loan agreements.

Fourth, assuming *arguendo* the PCA was properly conducted and the Demand was related to a condition listed in a schedule, Fannie Mae improperly failed to provide Westland an opportunity to complete identified repairs as required by Section 6.02(b)(3)(B) & (C) before mandating a multi-million dollar deposit. APP050-APP051; *cf.* APP1256-APP1268. Additionally, the reserve increase for required repairs was duplicative of the reserve increase for monthly replacement deposits attributable to deferred maintenance. SA343-SA348.

D. Fannie Mae And Grandbridge Notice A Default And Commence Foreclosure Proceedings.

Westland responded to the Demand on November 13, 2019 by objecting on the foregoing bases, reaffirming that it had improved the Properties' condition through more than $1.8 million of renovations, and noting that Grandbridge failed to provide an opportunity to perform the alleged necessary repairs. SA343-SA348. Westland then attempted to resolve the dispute with Fannie Mae by providing its Strategic Improvement Plan for the Properties, which discussed Westland's ongoing plans to renovate the Properties, provided timelines for remaining renovations to be made, and addressed deficiencies identified by f3 that had already been corrected. SA020-SA342; SA349-SA355.

Westland's efforts to remedy the situation were summarily rebuffed when Fannie Mae's counsel forwarded a boilerplate Notice of Default and Acceleration of Note ("Default") on December 17, 2019 rejecting Westland's good-faith proposal

and ignoring Westland's improvements to the Properties. APP1270-APP1277. Nearly seven months later, on July 14, 2020, Fannie Mae filed the Notice of Default and Intent to Sell alleging a default of the Loan Agreements because Westland did not deposit nearly $3 million into the Replacement Reserve Escrow Account upon Fannie Mae's unilateral demand. Incredibly, Fannie Mae took this action without seeking to re-inspect the Properties even though Westland had (i) invested an additional $1.7 million in capital improvements during the ten months since the September 2019 PCA, and (ii) completed a large number of work orders to prepare vacant units for rental. SA359.[4] The prejudice to Westland is breathtaking.

E. Bad Faith Loan Servicing

Besides pursuing the deficient Default based on an improper PCA, Fannie Mae and Grandbridge routinely engaged in unscrupulous conduct when servicing the Loans. For example, contrary to Fannie Mae's assertions that Westland failed to disclose any improvements or repairs prior to f3's PCA or improperly denied access to the Properties, *see* Mot. at 5-6, the evidence demonstrates that Westland made numerous reserve reimbursement requests that attached detailed support for work performed before and after Fannie Mae demanded a PCA in mid-2019. SA689-

[4] Westland submitted more than 2,200 pages of work orders to the district court as evidence of these improvements. For brevity, Westland did not include this evidence in its Supplemental Appendix, *see* NRAP 30(b), but will do so should the Court request it.

SA670; SA697-SA741. Grandbridge, however, repeatedly failed to respond to Westland's requests, did not process requests in a timely manner, and refused to release Westland's funds. *Id.* Moreover, Fannie Mae did not seek access to the Properties between the time of f3's PCA and the filing of this action. SA359.

Additionally, in February 2020, Grandbridge (without notice) stopped sending loan statements and auto-debiting Westland's monthly debt service payments, which forced Westland to guess at its floating monthly payments at the risk of a financial default. SA358-SA360. To ensure that a miscalculation did not result in a default, Westland began mailing its monthly payments plus an additional ten percent (10%). SA359; SA669-SA685. As a result, Westland has now overpaid its mortgage by more than $200,000 since February 2020. *Id.* Thus, Fannie Mae's condescending retort that Westland "voluntarily . . . elected to pay more than the amount required by the Loan Agreements" conveniently disregards that the increased payments were a direct result of its bad faith loan servicing practices. *See* Mot. at 17.

The most egregious example of Fannie Mae's and Grandbridge's misconduct is their refusal to release $951,407.55 of insurance funds from the Restoration Reserve that was earmarked for reconstructing two fire-damaged buildings at the Liberty Property. Westland completed the work at its sole expense and met all conditions for the release of Restoration Reserve funds well before the spurious

Default. SA362. Fannie Mae, though, has withheld all of the insurance funds on grounds it has no obligation to release funds after a self-proclaimed event of default has occurred. *See* Mot. at 6. Setting aside that no default occurred in the first place, Westland had requested reimbursement of insurance funds on October 18, 2019—two months before Fannie Mae noticed the purported default on December 17, 2019. SA721-SA741; *cf.* APP1274. Fannie Mae, obviously, should not be permitted to manipulate the reimbursement process through unwarranted delay and the belated invocation of provisions that had no application at the time of the reimbursement request.

F. Fannie Mae Files Suit And Seeks To Appoint A Receiver.

Fannie Mae filed the instant action on August 12, 2020, and promptly moved for the appointment of a receiver.[5] In response, Westland filed its counterclaim and moved for a preliminary injunction (supported by a fully-developed record of over 3,200 pages of exhibits and three sworn affidavits) to stop all foreclosure proceedings, to negate the effects of the wrongful Default, and to restore Westland's good name in the industry. On October 13, 2020, the district court held a lengthy hearing, denied Fannie Mae's request for a receiver, and granted Westland's

[5] Fannie Mae sought expansive receivership powers as evidenced by its 17-page proposed order listing 34 different "duties, rights, and powers" as well as eight separate acts that Westland would be enjoined from performing. SA001-SA019. Much of the injunctive relief Fannie Mae now characterizes as "mandatory," simply reflects the denial of powers it sought through the receivership application.

counter-motion for a preliminary injunction.

Fannie Mae spends a great deal of time implying that Westland somehow duped the district court into signing an order that went far beyond the relief sought or ordered at the hearing. The 52-page transcript, however, establishes otherwise as Judge Earley repeatedly expressed shock at the positions espoused by Fannie Mae, stating on numerous occasions that Fannie Mae's position on holding the insurance reserve funds "makes no sense," that Fannie Mae was acting improperly by assuming a default, that Westland had performed under the contract and had "done a lot," and that the court was "stopping the Notice of Default" and anything "flowing" therefrom. APP1297; APP1475-APP1476; APP1484-APP1486; APP1493-APP1499.

The parties submitted competing orders to the district court along with the hearing transcript and voluminous letters setting forth each side's positions as to content. SA742-SA748. The district court adopted Westland's proposed order in its entirety notwithstanding Fannie Mae's present contention that the order exceeds the scope of the district court's ruling at the hearing. *See Mortimer v. Pacific States Savings & Loan*, 62 Nev. 142, 145 P.2d 733, 736 (1944) ("[The formal written order] must be taken as the best evidence of the court's decision. The fact that it was prepared by appellant is of no consequence. A court is presumed to read and know what it signs.").

In short, the district court ordered Fannie Mae to cease any punitive conduct that was premised on the specious Default, including that Fannie Mae is prohibited from clouding the title of the Properties, withholding billing statements, refusing to process reserve requests, executing a lien, refusing to service the loan payments, or taking adverse actions against Westland's affiliated entities if such actions are solely based on the purported Default.

III. ARGUMENT

A. The District Court Did Not Enter A Mandatory Injunction, And Instead Preserved The *Status Quo Ante Litem*.

Injunctive relief is meant to preserve the status quo and prevent irreparable harm pending a hearing. *Dangberg Holdings Nevada, L.L.C. v. Douglas County*, 115 Nev. 129, 146, 978 P.2d 311, 321 (1999). More specifically, "the sole purpose of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits," *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009), which is the "***last uncontested status [that] preceded the pending controversy***." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (emphasis added); *cf. Pickett v. Comanche Const., Inc.*, 108 Nev. 422, 430, 836 P.2d 42, 47 (1992) (vacating judgment and reinstating injunction enjoining foreclosure to return to last uncontested status). In this case, the last uncontested status existed prior to issuance of the Default. The district court, through its order, simply endeavored to protect Westland from the negative

consequences that "flowed" from the Default while the parties litigate the ongoing trial court proceedings and this appeal.

The district court's order prohibits Fannie Mae from: (1) proceeding with any foreclosure proceeding or foreclosure sale;[6] (2) interfering with Westland's enjoyment of the Properties, and (3) using a receiver to displace Westland. The first and third categories are self-explanatory; the second category prohibits Fannie Mae from impairing the use, marketable title, and benefits of the Properties for business. The relief prevents Fannie Mae from saddling Westland with anything other than standard fair lending practices for a non-default loan during this appeal. Thus, the injunctive relief ordered by the district court is prohibitory because—in the absence of a legitimate default—Westland is entitled to have its payments auto-debited, to receive loan statements, to maintain clean title to its property, to collect rent, and to submit reserve reimbursement requests to obtain its own funds out of escrow.[7]

This relief does not order Fannie Mae "to take action" or "restore" the status

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[6] Fannie Mae now seeks to categorize the foreclosure as a "sale," but its counsel admitted the Notices of Default and Intent to Sell were filed, which rose to the level of "foreclosure proceedings." APP1458.

[7] With respect to the insurance funds for the restoration of the two fire-damaged buildings, the injunction merely prevents Fannie Mae from blocking Westland's reimbursement requests based on the existence of the Default as there is no other reason for the money to be withheld. As such, Fannie Mae's suggestion that the district court's order amounts to a pre-judgment writ of attachment is misplaced, particularly when Westland requested reimbursement months before the Default.

quo as Fannie Mae is not required to engage in any conduct that is outside of its direct control and ordinary course of business when servicing a non-default loan. Accordingly, the legal authority submitted by Fannie Mae is clearly distinguishable. *See e.g.*, *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 124 (1972) (finding "[s]tatus quo in this case was the growing lawn, plants and trees and that could only have been accomplished by restoring the water to the land" even if the land was rendered barren "before the action is instituted"); *Elliott v. Denton & Denton*, 109 Nev. 979, 982, 860 P.2d 725, 727-28 (1993) (ordering a law firm to pay funds for return of an impounded car is mandatory); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (ordering a product recall is mandatory when the product was no longer in the producer's possession, had reached end customers, and required customers be paid restitution).

While Westland recognizes that an injunction compelling performance of a contract may be considered mandatory in certain circumstances, *see Dodge Bros. v. Gen. Petroleum Corp. of Nevada*, 54 Nev. 245, 10 P.2d 341 (1932), this is not such a case. Unlike *Dodge Bros.*— a brief, 90-year old opinion in which the underlying facts were not detailed—Westland did not seek, and the district court did not order, an injunction to prevent Fannie Mae from breaching the parties' loan agreements. To the contrary, Westland sought to enjoin the foreclosure proceedings premised on

the defective Default and the adverse consequences that could flow therefrom. That the underlying order cites examples that would constitute prohibited acts does not transform it into a mandatory injunction. *Cf. International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 835-36, 114 S.Ct. 2552, 2561 (1994) (recognizing that "injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms" and refusing to rely on such distinctions when determining whether contempt sanctions were criminal or civil).

The district court's injunction does not compel Fannie Mae to take any extraordinary action but, rather, prohibits it from punishing Westland based on the improvidently-issued Default, an act the district court plainly found lacked merit. Though Westland acknowledges that mandatory injunctions are generally stayed pending appeal, Fannie Mae's contention that the district court's order is mandatory rather than prohibitory is incorrect and, hence, renders that general principle inapplicable here.

B. Fannie Mae Is Not Entitled To A Stay Under NRAP 8.

1. The Object of the Appeal Will Not Be Defeated Without a Stay.

Fannie Mae contends it is entitled to a stay because the injunction will (i) cause a "delay of months" related to the foreclosure proceedings, (ii) prevent Fannie Mae from withholding the $951,407.55 in insurance funds as security for damages should it ultimately prevail in this action; and (iii) require Fannie Mae to extend

credit on favorable terms to Westland affiliates. Fannie Mae's concerns are unfounded.

First, Fannie Mae has acknowledged that it is not seeking to stay the injunction insofar as it enjoins the foreclosure proceedings, which renders the "delay" argument a red herring. This is particularly so given the ease with which Fannie Mae can perform the ministerial act of issuing a new default notice in the unlikely event it prevails below. Second, Fannie Mae is improperly holding the insurance proceeds in reserve even though Westland fronted the costs to rebuild the fire-damaged buildings and requested reimbursement months before the Default. Additionally, as demonstrated below, the notion that those funds are needed as security for future foreclosure proceedings is belied by the facts that Westland has over $20 million of equity in the Properties and has never missed a debt-servicing payment. Lastly, Fannie Mae's assertion the injunction would require it to lend on preferential terms is false as the district court merely ordered Fannie Mae to cease penalizing Westland affiliates based solely on the existence of the disputed Default. The object of the appeal will not be defeated in the absence of a stay.

2. Fannie Mae Will Not Suffer Irreparable or Serious Harm.

It speaks volumes that Fannie Mae's primary arguments about irreparable harm relate to potential monetary loss, *i.e.*, the insurance funds owed to Westland and the excess funds Westland paid to service the Loans. Fannie Mae's initial

contention that it is unlikely to recover the funds "in light of Westland's financial position" is both insulting and entirely specious. The evidentiary record demonstrates that Westland holds more than $20 million of equity in the Properties, and has spent at least $3.5 million to improve them in Westland's first two years of ownership. Westland has never missed a single debt service payment and, in fact, overpaid for the last 11 months, which is consistent with its exemplary course of conduct over the last 50 years. Regardless, Nevada law is clear that no irreparable harm exists where money damages are an adequate remedy. *See, e.g.*, *Number One Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 781, 587 P.2d 1329, 1331 (1978) (harm is not "irreparable" if it can be "repaired" through an award of monetary damages); *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 353, 351 P.3d 720, 723 (2015) ("Irreparable harm is an injury for which compensatory damage is an inadequate remedy.").

Next, Fannie Mae acts as if the district court ordered it to grant Westland and its affiliates "most-favored nation" status and preferential loan terms on all future loan applications. This is a gross exaggeration. The reality is that Fannie Mae has been penalizing Westland and its affiliates since December 2019. Specifically, Fannie Mae has designated Westland and its affiliates as "A-check"[8] borrowers

[8] "A-check" status effectively blacklists a borrower and its affiliates with Fannie Mae, and triggers increased mortgage rates with other lenders.

based solely on the existence of the purported Default. The injunction merely prevents Fannie Mae from considering the existence of the improper Default when assessing applications from Westland's well-qualified affiliates. Again, this aspect of the injunction prevents the harm "flowing" from the Default; it does not require Fannie Mae to take any affirmative action.

3. Westland Will Suffer Irreparable Harm If A Stay Is Granted.

"Real property implicates a broad range of potential rights, including all rights inherent in ownership, including the right to possess, use, and enjoy the property, as well as security in and title to the property." *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298-99, 183 P.3d 895, 902 (2008) (citing *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006)). Thus, "the loss of real property rights generally results in irreparable harm." *See Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (citing *Leonard v. Stoebling*, 102 Nev. 543, 728 P.2d 1358 (1986)); *Pickett*, 108 Nev. at 426; 836 P.2d at 44.

Irrespective of whether the foreclosure sale is halted, the Default recorded by Fannie Mae indisputably clouds Westland's title and impairs its rights to possess, use and enjoy the Properties. Fannie Mae's defective Default similarly impedes the marketability and transferability of Westland's interests in the Properties, as well as its ability to re-finance the Properties, free of defects in title. The Legislature has codified an owner's interest in the free transfer of real property in NRS 11.860,

which provides that "[t]he public policy of this State favors the marketability of real property and the transferability of interests in real property free of defects in title or unreasonable restraints on the alienation of real property." NRS 11.860(1). Here, Fannie Mae impaired Westland's title in the Properties by recording the Default. Granting a stay allows this irreparable harm to fester.

Westland has also suffered interference with its business and harm to its credit as a result of Fannie Mae's actions in recording the Default and seeking to impose the myriad of penalties that flow therefrom. This Court has recognized that reputational and business harms of this nature are immeasurable and cannot be adequately remedied later through a monetary judgment. *See Sobol v. Capital Mgmt. Consultants, Inc*., 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) (acts that "interfere with a business or destroy its credit or profits, may do an irreparable injury") (citing *Guion v. Terra Mktg. of Nevada, Inc.*, 90 Nev. 237, 240, 523 P.2d 847, 848 (1974)). Westland will continue to suffer irreparable harm if the injunction is stayed.

4. Fannie Mae is Not Likely to Succeed on the Merits.

"[T]he decision whether to grant a preliminary injunction is within the sound discretion of the district court, whose decision will not be disturbed on appeal absent an abuse of that discretion." *Dangberg*, 115 Nev. at 142, 978 P.2d at 319. "A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion." *Stratosphere Gaming Corp. v.*

Las Vegas, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). "Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion." *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001). Based on the voluminous record below consisting of several affidavits and 3200 pages of exhibits along with the district court's well-reasoned order, Westland respectfully submits that the chance of reversal on appeal is negligible.[9]

Contrary to Fannie Mae's depiction of the underlying ruling, the district court's order clearly states that Fannie Mae failed to prove a default based on the deterioration of the Properties and, "[i]n fact, Westland has shown the opposite at this early stage, even without any formal discovery." APP1520. The district court likewise recognized that all of the punitive actions engaged in by Fannie Mae flow from the defective Default, which Westland conclusively rebutted. APP1520-APP1521. For those reasons, the district court held that "Westland has shown a reasonable probability of success on the merits for the relief it seeks via

[9] Fannie Mae initially claims this factor is "far less significant" because the object of the appeal will be defeated in the absence of a stay. *See* Mot. at 18-19. Westland, however, plainly demonstrated that Fannie Mae's contentions on the first factor are baseless. *See supra* Section II.B.1. Fannie Mae likewise asserts that this factor is met because this matter raises a "difficult legal question" or a "novel interpretation of law." *See* Mot. at 19-20. But Fannie Mae does not meaningfully address any difficult legal questions or novel interpretations of law. Moreover, Westland contended below, and the district court agreed, that the question of whether Westland defaulted is quite simple—it did not happen.

Counterclaim in this case."[10] APP1522.

The district court likewise determined that Westland would suffer irreparable harm to its interests in real property, its personnel and its ongoing business in the absence of an injunction. APP1523. It also found that the prejudice to Westland was "much greater" than the prejudice, if any, to Fannie Mae if no injunction issued. *Id.* Because Westland easily met its "burden of proof [ ] through competent evidence," Westland respectfully submits that Fannie Mae has little chance of prevailing on an appeal. This factor favors the denial of a stay.

C. The Injunction Properly Prohibited Fannie Mae From Interfering With Westland's Enjoyment Of The Properties And Business Activities Related Thereto.

The district court ordered that the "Enjoined Parties may not interfere with Westland's enjoyment of the Properties pending a final determination" on the merits. While Fannie Mae's Motion argues that "no allegations or evidence in the record shows that Fannie Mae has interfered with Defendant's enjoyment of the Properties or threatened to," *see* Mot. at 27, Westland conclusively demonstrated that the loss

[10] This, of course, directly contradicts Fannie Mae's contention that the district court "did ***not*** make any findings as to Westland's probability of success with respect to *their* Counterclaim." *See* Mot. at 22 (emphasis in original). Similarly, Fannie Mae repeatedly distorts the district court's observation that "questions of fact" exist as to the Default. In reality, the district plainly found that "Fannie Mae failed to establish that any default has occurred, and when viewing the evidence and arguments Fannie Mae presents in the best light for it, at best for Fannie Mae there are substantial factual disputes related to whether any default occurred." APP1522. Thus, Fannie Mae's suggestion that this was a close call is revisionist history.

of real property, harm to the associated property rights, and curtailment of the business activities on the Properties constitutes irreparable harm. APP1314-APP1317; APP1523. Not only did Fannie Mae cloud Westland's title to the Properties and impede marketability, but Fannie Mae also took affirmative steps to inhibit Westland's ability to collect rents and operate its business. APP1278-APP1290.

Thus, the term "enjoyment" is sufficiently definite to be enforced by a court. *See e.g., Dangberg*, 115 Nev. at 144, 978 P.2d at 320 (injunctions are enforceable unless "the reasons for the injunction are not readily apparent elsewhere in the record, or appellate review is otherwise significantly impeded due to lack of a statement of reasons"). The restraint against interference with enjoyment of the Properties is clearly designed to prohibit conduct that would impair Westland's ability to possess, use, and receive benefits from the Properties by, *inter alia*, impairing Westland's security in and title to the Properties, curtailing Westland's business opportunities stemming from ownership, inhibiting Westland's ability to collect rents, or damaging Westland's credit and standing in the real estate investment community based on the purported Default. Because the district court clearly specified the reasons supporting injunctive relief and identified in sufficient detail the act or acts to be restrained, there is no abuse of discretion here.

D. The District Court Found A $1,000 Bond To Be Adequate Based On Westland's Substantial Collateral And The Proper Purpose Of Such Security.

Rule 65(c) contemplates the posting of a bond as security "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." The bond protects "a party from damages incurred as a result of a wrongful injunction, not from damages existing before the injunction was issued." *Am. Bonding Co. v. Roggen Enterprises*, 109 Nev. 588, 591, 854 P.2d 868, 870 (1993) (finding no bond was needed). Thus, where a party had a high likelihood of success on its claims, a minimal bond of $1,000.00 is sufficient. *V'Guara Inc. v. Dec*, 925 F. Supp. 2d 1120, 1127 (D. Nev. 2013).

Based on the foregoing authority, Westland argued below that: (1) a de minimis bond of $1,000 is more than adequate, (2) Fannie Mae will suffer no harm as it continues to receive full debt service payments on a monthly basis, and (3) Fannie Mae has more than ample security due to Westland's equity in the Properties and reserves. APP1481-APP1482. Excluding the $951,407.55 in insurance funds owed to Westland, Fannie Mae separately holds over $700,000 in reserves, which Fannie Mae is likewise increasing by $38,416.50 per month through Westland's ongoing mortgage payments. APP1257; APP1264. That sum is more than adequate to protect Fannie Mae's interests related to the effects, if any, of the injunction that merely requires routine servicing of a non-default loan.

Finally, there is no $3.9 million windfall to Westland in the absence of a stay. Assuming *arguendo* that Westland should have deposited an additional $2.85 million into the reserve accounts, those funds and the $951,407.55 of Restoration Reserves would continue to be Westland's funds, albeit held in escrow. As explained in *Am. Bonding*, these amounts would be damages related to the underlying case, not damages arising from injunctive relief. Thus, consistent with the district court's order, Fannie Mae will continue to be adequately secured by Westland's equity in the Properties, the existing (and increasing) reserve amounts, and the $1,000 bond. APP1498; APP1507; APP1511.

IV. CONCLUSION

Based on the foregoing, Westland respectfully requests that the Court deny Fannie Mae's Expedited Motion to Stay in its entirety.

Dated: January 29, 2021

CAMPBELL & WILLIAMS

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 29th day of January 2021, I caused true and correct copies of the foregoing Opposition to Expedited Motion to Stay to be delivered to the following counsel and parties:

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