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.	Electronically Filed Feb 05 2021 05:00 p.m. Elizabeth A. Brown Clerk of Supreme Court 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]

REPLY IN SUPPORT OF 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.

Introduction

Fannie Mae seeks to stay injunctive relief mandating that it give preferential status to Westland's affiliates in unrelated, future lending transactions; immediately disburse more than $1.1 million to Westland without meaningful security; and rescind all notices of demand or default, so that it must start over even if it prevails on appeal. These aspects of the injunction are mandatory in nature and required the district court to find that the "facts and law clearly favor the moving party." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). The district court made no such findings here and declined to reach any firm conclusions about the default.

Westland's Opposition now improperly asks this Court to find in the first instance that the default was wrongful and on that basis decline to stay any of the mandatory injunction provisions. They argue that the injunction prevents harms that "flow from" the wrongful default even though the district court never found the default to be wrongful. Nor are Westland's professed harms supported by any evidence either now or in the district court. The Court should decline to be a finder of fact and instead temporarily stay the deeply problematic mandatory injunction provisions that will seriously harm Fannie Mae and lack any sufficient basis.

Argument

I. The District Court Made No Findings About the Default other than the Existence of a Question of Fact, and Erred by Disregarding the Contract.

The district court did not conclude one way or another whether Westland

defaulted and instead left that question for another day. Fannie Mae now seeks a stay of certain portions of the injunction pending the appeal that were not justified by the district court's narrow default ruling. But Westland's Opposition asks the Court to go beyond the district court's ruling to find that the default was wrongful and on that basis decline to stay several of the most overreaching injunction provisions. This Court should decline to do so and instead temporarily stay those provisions pending appeal, particularly where the district court made no findings or conclusions that justify the sweeping relief it issued by signing Westland's form of order.

Moreover, the district court's declining to find a default disregarded the parties' contract. The Loan Documents empower Fannie Mae to: (1) inspect the Properties; and (2) require Westland to make additional deposits as needed. APP085, 289 (§ 13.02(a)(4)). Failure to pay or deposit the additional funds is an automatic Event of Default, and a payment default. APP092-93, 296-97. Fannie Mae inspected the Properties in 2019 following an almost 50% drop in the occupancy rate, which signaled deterioration and raised concerns as to whether the Properties were furthering Fannie Mae's mission to provide affordable, safe housing to low- and moderate-income individuals. APP1447. The inspections showed that immediate repairs totaling $2,845,980 were needed, many of which involved health and safety issues. APP493, 801. Because the Accounts only contained a fraction of that amount. Fannie Mae demanded that Westland deposit the amount needed for repairs pursuant

to § 13.02(a)(4). APP085, 289, 1447-48. In lieu of making the required deposit, Westland sent Fannie Mae a "Strategic Improvement Plan" outlining their plan to rehabilitate the Properties and implicitly conceding that the Properties were in need of substantial repair. APP1408-18. Westland's apparent position is that this proposal replaced their clear contractual obligations to deposit the funds.[2] But Fannie Mae never agreed to this alternative, which has been further complicated by Westland's refusal to allow Fannie Mae to inspect the Properties to confirm the alleged repairs.

Indeed, Westland's arguments that its unconfirmed repairs should be considered as alternative compliance led the district court astray. Instead of analyzing the parties' rights and obligations under the Loan Documents, the district court instead stated that she spent hours comparing work orders Westland provided to the necessary repairs listed in the PCAs, and ultimately could not determine how much of the repair work had been completed. On that basis, she concluded that there was a "question of fact" as to whether there was a default.

This was error, however, because the Loan Documents make clear that Fannie Mae was entitled to inspect the Properties, demand the deposit of sufficient funds,

[2] Westland argues that because they were current on their monthly loan payments, this is not a "payment default." But this argument ignores the Loan Documents; their failure to deposit the repair funds is a payment default. APP092 (§ 14.01(a)(1) (providing that the failure to pay the amounts demanded in the Notices of Demand is an automatic payment default).

and that failure to deposit the demanded funds is an Event of Default. Westland did not comply with their contractual obligations by depositing the funds and the unconfirmed repairs do not excuse or cure their default under the contract.

Finally, and importantly, Westland has refused to allow inspection of the Properties, making it impossible to evaluate their claims of repairs. Inexplicably, Westland's Opposition criticizes Fannie Mae's "failure" to reinspect, asserting that Fannie Mae "ignor[ed] Westland's improvements to the Properties" and did not "seek to reinspect the Properties." (Opp'n at 9.) This is wildly, demonstrably false – Westland has refused Fannie Mae's continued requests for an inspection and continues to fight vigorously to prevent one. Indeed, Fannie Mae has been forced to move to compel inspection, a motion Westland opposed and which is scheduled for hearing on February 16, 2021. (*See* Ex. A.) In other words, though Westland claims to have made costly repairs, they refuse to allow Fannie Mae to inspect the Properties to confirm the repairs. As such, even if the Court were sympathetic to Westland's claims that they completed extensive repairs, it should decline to credit their claims while they simultaneously obstruct any inspection and confirmation by Fannie Mae.

II. A Stay of the Mandatory Injunction Provisions Is Warranted.

Westland's Opposition depends on myriad assertions that are unsupported by evidence and were never before raised. For example, Westland argues that it sought to preserve the *status quo ante litem*, while it had only sought to enjoin the sale and

never even used that phrase until opposing Fannie Mae's request for a stay. Westland also now claims that injunctive relief is necessary to avoid harm to their credit and reputation but cited absolutely no evidentiary support of such harm, either now or in the district court. (Opp'n at 20, 23.) Finally, the injunction orders that Fannie Mae must treat Westland and its affiliates favorably and not "blacklist any Westland entity on new loan or loan refinancing applications." Yet this provision was not supported by any evidence or findings by the district court. Indeed, Westland's Opposition asserts, again without citation to any evidence, that Fannie Mae has designated Westland as "A-check." Nor is there any hint that the district court even considered this claim, let alone that it made appropriate findings. Yet absent a stay, Westland's affiliates could exploit this provision in an effort to force Fannie Mae to extend potentially hundreds of millions of dollars of credit to their affiliates upon penalty of contempt. It also violates Fannie Mae's freedom to contract – or not to contract. Fannie Mae faces irreparable harm if not permitted to enter lending relationships in accordance with its mission.

DATED: February 5, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove
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Attorneys for Appellant Federal National Mortgage Association

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 February 5, 2021, I caused to be served a true and correct copy of the foregoing **REPLY IN SUPPORT OF 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:

Eleissa C. Lavelle
3800 Howard Hughes Pkwy. 11th Floor
Las Vegas, NV 89169

/s/ Kelly H. Dove
An Employee of SNELL & WILMER L.L.P.

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DISTRICT COURT

CLARK COUNTY, NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff, vs. WESTLAND LIBERTY VILLAGE, LLC, and WESTLAND VILLAGE SQUARE, LLC, Defendants.	Case No. A-20-819412-B Dept No. 13 **MOTION TO COMPEL DEFENDANTS TO PERMIT PLAINTIFF'S RULE 34 REQUESTS FOR ENTRY UPON LAND FOR INSPECTION, MOTION TO STRIKE DEFENDANTS' OBJECTIONS, AND MOTION FOR SANCTIONS ON AN ORDER SHORTENING TIME** **HEARING REQUESTED**
AND ALL RELATED ACTIONS.	

Plaintiff Federal National Mortgage Association ("Fannie Mae"), by and through its counsel, Snell & Wilmer L.L.P., hereby submits this Motion to Compel Defendants to Permit Plaintiff's Rule 34 Requests For Entry Upon Land For Inspection, Motion To Strike Defendants' Objections, And Motion For Sanctions ("Motion").

This Motion is based on the following Memorandum of Points and Authorities, Nevada Rules of Civil Procedure 26, 34, and 37, the Declaration of Chris W. Davis in support of the Motion ("f3 Declaration"), attached as **Exhibit 1**, the Declaration of Keith Harper in support of the Motion

("Harper Declaration"), attached as **Exhibit 2**, all pleadings and papers of record, and any evidence or oral argument the Court entertains at the hearing in this matter.

Dated: January 12, 2021

SNELL & WILMER L.L.P.

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DECLARATION OF NATHAN KANUTE IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DEFENDANTS TO PERMIT PLAINTIFF'S RULE 34 REQUESTS FOR ENTRY UPON LAND FOR INSPECTION ON AN ORDER SHORTENING TIME

I, Nathan G. Kanute, Esq., declare as follows:

1. I am an attorney at the law firm of Snell & Wilmer L.L.P. and represent Fannie Mae in this matter. I have personal knowledge of the facts stated in this declaration, and I can competently testify to them and make this declaration under the penalty of perjury.

2. I make this declaration in compliance with EDCR 2.34(d) and NRCP 37(a)(1) and to support Fannie Mae's Motion to Compel Defendants to Permit Plaintiff's Rule 34 Requests for Entry Upon Land Inspection on an Order Shortening Time.

3. I have been in communications with Defendants Westland Village Square, LLC ("Village Square") and Westland Liberty Village, LLC ("Liberty Village" and, collectively, "Defendants") before the filing of this case about Fannie Mae, and its designee, gaining access to inspect the Village Square Apartments (the "Village Square Property") and the Liberty Village Apartments (the "Liberty Village Property" and, collectively, the "Properties").

4. In initial conversations with in-house counsel for Defendants in the Spring and Summer of 2020, I stated that Fannie Mae would need access to the Properties to be able to verify Defendants' claims of repairs to the Properties that Defendants purportedly completed after the September 2019 property condition assessments ("PCAs").

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5. It was not until after Fannie Mae filed its complaint for appointment of a receiver that Defendants' in-house counsel provided me with Defendants' purported evidence of those repairs.

6. On September 2, 2020, Defendants, Fannie Mae, and their respective counsel participated in a call where Fannie Mae again requested access to the Properties to verify the Defendants' purported repairs.[1]

7. On September 8, 2020, Fannie Mae followed up with in-house counsel by email requesting contact information for one of Defendants' employees to set up the inspection of the Properties. *See* September 8, 2020 email from Nathan Kanute to John Hofsaess, attached as **Exhibit 3**.

8. On September 10, 2020, Defendants' in-house counsel sent Fannie Mae a letter, that, among other things, offered Fannie Mae access to the Properties to conduct updated PCAs, but conditioned those PCAs on, among other things, Fannie Mae not using its expert of choice, f3, and limiting the inspection to only certain conditions and limited portions of the Properties. *See* Redacted Letter from John W. Hofsaess, dated September 10, 2020, attached as **Exhibit 4**.[2]

9. Fannie Mae initially responded by requesting contact information at the Properties to schedule the PCAs. Defendants' in-house counsel responded by saying that Defendants were willing to "immediately arrange for any access that is necessary for the vendor with onsite employees", but only if Fannie Mae would agree to Defendants' conditions (e.g. dropping its demand for additional reserve deposits, reimbursing Defendants' reserve reimbursement requests withheld due to default, not using Fannie Mae's preferred expert, etc.). *See* Redacted Emails between Nathan G. Kanute and John W. Hofsaess, dated September 10-14, 2020, attached as **Exhibit 5**.[3]

10. On September 15, 2020, Fannie Mae sent Defendants' in-house counsel a formal response to Defendants' September 10th letter. In it, Fannie Mae notified Defendants that the refusal

[1] Although the September 2, 2020 call was a confidential settlement discussion, Fannie Mae is not offering any statements relating specifically to liability or any offer to compromise. Fannie Mae offers this only as context for the Court on Fannie Mae's attempts to access the Properties pursuant to the Loan Documents and, now, Nev.R.Civ.P. 34.
[2] Redacted to remove communication unrelated to access.
[3] Redacted to remove communication unrelated to access.

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to allow Fannie Mae, or its designees, to inspect the Properties was an event of default under the Loan Documents and again requested access. *See* Redacted Email from Nathan G. Kanute to John Hofsaess, dated September 15, 2020, attached as **Exhibit 6**.[4]

11. On September 18, 2020, Defendants replied to Fannie Mae's communication stating that Defendants would permit access for Fannie Mae to conduct an inspection of the Properties and "would not only have a representative available to facilitate the same, it would encourage such an inspection so that Fannie Mae would be able to see the progress that has been made at the Properties." *See* Emails between Nathan G. Kanute and John W. Hofsaess, dated September 18-October 15, 2020, attached as **Exhibit 7**.

12. On September 24, 2020, Fannie Mae responded by stating it would have f3 inspect the vacant units at the Properties and requested rent rolls to identify which vacant units could be inspected. *Id.* After not receiving a response, Fannie Mae followed up on the request for the rent rolls and contact information for access. *Id.*

13. On September 30, 2020, Defendants responded by again denying Fannie Mae access to the Properties through f3 and, for the first time, suggested that Fannie Mae conduct a "non-contact virtual inspection." *Id.*

14. On October 3, 2020, Fannie Mae responded to Defendants' denial of access to the Properties. *Id.* Fannie Mae reiterated that the denial of access for the inspection by Fannie Mae's designee was a breach of the Loan Documents. *Id.* Fannie Mae also informed Defendants that it chose f3 to conduct the inspections because it was the best entity to confirm the purported repairs since f3 performed the PCAs at the Properties. *Id.* Further, Fannie Mae confirmed that f3 would take all required COVID-19 precautions during the inspection and that the inspection would not include occupied units. *Id.*

15. On October 7, 2020, Defendants responded by sending an email that largely consisted of argumentative rhetoric and accusations rather than a good faith response: "[s]imply stated, the Sixth Amendment, Fourteenth Amendment and First Amendment protect the right to a "public trial" and court proceedings, but it is my understanding that much of the Court's work is

[4] Redacted to remove communication unrelated to access.

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currently being performed virtually in Nevada. Is Fannie Mae's position really that conducting a property condition assessment is more paramount than the constitutionally protected right to public court proceedings?" Defendants concluded the email by unambiguously refusing to allow Fannie Mae to conduct inspections or PCAs without agreeing to Defendants' new list of conditions, described below. *Id.*

16. For example, Defendants demanded that Fannie Mae provide new information before it would permit Fannie Mae access: (1) the length of time for the inspections; (2) the number of individuals attending the inspections; (3) the inspectors' "designations", the entity they work for, their contact information; and (4) "confirmation that all costs will be covered" by Fannie Mae. *Id.* Defendants also provided the following condition: "please note the person(s) should not have a primary function of performing biased 'property condition assessments,' even if Fannie Mae's opinion is that the 'best entity' to do a PCA". *Id.*

17. On October 8, 2020, Fannie Mae responded by reiterating its right to inspect the Properties regardless of Defendants' demands. *Id.* Fannie Mae also provided detailed assurances that its experts would "take appropriate COVID-19 precautions" during inspections. *Id.* Further, Fannie Mae offered to provide the following: (1) an estimate for the amount of time needed for inspections; (2) the number of inspectors needed; and (3) the names of those inspectors. *Id.*

18. On October 13, 2020, after not receiving a response from Defendants, Fannie Mae provided the information that Defendants had requested as to 1) the estimate of time for the inspection, 2) the number of inspectors (two), and 3) that they would be f3 employees. *Id.* Fannie Mae also provided proposed dates and times for the inspections. *Id.* Fannie Mae noted that each inspector could view a separate vacant unit to make the inspection more efficient, while simultaneously limiting the number of people traveling together at the Properties. *Id.* Again, Fannie Mae reiterated that f3 would comply with appropriate COVID-19 protocol. *Id.*

19. On October 15, 2020, Defendants responded by offering to permit Fannie Mae "access for a **standard inspection**" (emphasis in original) but refused to permit Fannie Mae to use f3 to perform the inspections. *Id.* Defendants again suggested a virtual inspection of the Properties, but did not refuse physical access. *Id.* Defendants stated that "to the extent that Fannie Mae remains

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steadfast in its belief that only a PCA by f3 is acceptable, then consistent with Judge Earley's statements you will be free to seek such access in the course of discovery." *Id.*

20. Accordingly, on November 9, 2020, Fannie Mae served each Defendant, Plaintiff Federal National Mortgage Association's Rule 34 Request for Entry Upon Land for Inspection (the "Rule 34 Requests") requesting to inspect each Defendants' Property through f3 and to allow an appraiser to evaluate the Properties. The Rule 34 Requests are attached as **Exhibits 8 and 9**.

21. On December 10, 2020, Defendants filed responses to the Rule 34 requests, which contained improper objections to physical inspection of the Properties. *See* Responses to Rule 34 Requests, attached as **Exhibit 10**.

22. I immediately contacted Mr. Benedict to conduct a meet and confer. *See* Email from Nathan G. Kanute, Esq. to John Benedict, Esq., dated December 10, 2020, attached as **Exhibit 11**.

23. On December 14, 2020, I participated in a meet and confer call regarding the Rule 34 Requests and access to the Properties. Mr. Benedict, Bob Olson from my office, and Joe Went, counsel for Grandbridge Real Estate Capital, LLC ("Grandbridge"), were also on the call.

24. In an effort to resolve the dispute without court intervention, Mr. Olson and I reiterated to Mr. Benedict that, as had previously been explained to Defendants, Fannie Mae was only seeking to have f3 and its appraiser inspect vacant units and other unoccupied or outdoor portions of the property.

25. In addition, we informed Mr. Benedict that for the majority of the inspection, it would likely be only one f3 inspector and one employee of the relevant Defendant at each Property. Fannie Mae and Grandbridge would plan to send attorneys at the start of the inspections, but to the extent the attorneys needed to remain on the property, Fannie Mae's attorney would remain physically distant, wear a mask, and would not need to enter any of the vacant units. In addition, Fannie Mae's appraiser would likely only need to be present on the Properties for a limited period of time.

26. Mr. Benedict was also informed that f3 and Fannie Mae's appraiser would follow appropriate COVID-19 protocols, including physical distancing and masks, to limit Defendants' employees' exposure.

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27. No agreement on access to the Properties was reached at the parties' meet and confer.

28. The most Defendants would offer was a "virtual inspection" of the Properties, which is not sufficient for the items that need to be inspected and verified by Fannie Mae's inspectors and appraiser.

29. As of the date of this Motion, Defendants have not permitted Fannie Mae to inspect the Properties, the conditions of which are central to determining the veracity of each parties' claims and defenses in this matter.

30. This request to compel Defendants to permit reasonable inspections of the subject Properties is made in good faith and not for any improper purpose or delay.

31. Fannie Mae has good cause to request that the Court consider this Motion on an Order Shortening Time because further delay of discovery in this matter severely prejudices Fannie Mae's ability to assess the status of its claims and Defendants' counterclaims. The current deadline for expert disclosure is April 20, 2021. Given the time needed to get the inspectors out to the property and to prepare their reports, it may not be possible if the hearing is held in the ordinary course. Further, Defendants' continued delay impedes Fannie Mae's right to determine the condition of the subject Properties, which is a key issue in this litigation. Finally, hearing this matter on shortened time will also assist all parties by potentially resolving a key issue at stake, which can mitigate further expenses associated with continued litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2021 */s/ Nathan Kanute*

Nathan G. Kanute, Esq.

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ORDER SHORTENING TIME

Good cause appearing therefore, it is hereby ordered that the time for hearing of the foregoing **MOTION TO COMPEL DEFENDANTS TO PERMIT PLAINTIFF'S RULE 34 REQUESTS FOR ENTRY UPON LAND FOR INSPECTION, MOTION TO STRIKE DEFENDANTS' OBJECTIONS, AND MOTION FOR SANCTIONS ON AN ORDER SHORTENING TIME** be, and the same will be heard on the _____ day of _____, 2021, at the hour of _____a.m./p.m., in Department XIII, in the above-mentioned Court.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:
SNELL & WILMER L.L.P.

By: /s/Nathan G. Kanute_____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Fannie Mae initiated this litigation following Defendants' payment defaults to Fannie Mae arising from their refusal to fund approximately $2.846 million in required repair reserve accounts to secure payment of necessary repairs at the Properties.[5] Defendants allege that they are not in default under the Loan Agreements[6] because, among other reasons, they have repaired the Properties. Specifically, Defendants allege they have made an aggregate of $3.5 million of repairs to the Properties—$1.7 million of which were allegedly made after Fannie Mae demanded the

[5] *See generally* Verified Compl.
[6] "Loan Agreements" refers to the Village Square Multifamily Loan and Security Agreement and the Liberty Village Multifamily Loan and Security Agreement, attached as **Exhibit 12**.

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$2.846 million from Defendants.[7]

Fannie Mae has made multiple requests to Defendants to allow Fannie Mae to inspect the Properties, which is an undisputed contract right, both before and after commencement of discovery in this case, to confirm Defendants' claims and to obtain a current appraisal of the Properties. Defendants, however, have either denied Fannie Mae's requests and/or refused to do so without unreasonable and unjustified conditions. Defendant's refusal to provide access to the Properties has prevented Fannie Mae from confirming that Defendants made their alleged repairs to the Properties. It also prevents Fannie Mae from obtaining a non-biased appraisal to support any claims for damages. Now, Defendants are attempting to avoid the inspections because of the COVID-19 pandemic, despite Fannie Mae's repeated offers to inspect the Properties with all appropriate COVID-19 safeguards observed.

Perhaps the primary issue in this case is whether the Defendants have actually made repairs to the Properties.[8] While repairs would not cure all of Defendants' defaults under the Loan Agreements, confirmation of substantial repairs may assist in helping resolve this matter. Defendants, however, are doing everything in their power to deny inspection and appraisal—whether because they have not made the repairs they allege, because the repairs are inadequate, or for some other reason Fannie Mae cannot now know.

Fannie Mae respectfully submits that Defendants' gamesmanship should not be tolerated. It is unjust to allow Defendants to allege affirmative defenses and counterclaims against Fannie Mae on the basis that they have made extensive repairs to the Properties and, at the same time, allow Defendants to deny Fannie Mae access to the Properties to confirm whether those repairs were in fact made. Thus, Fannie Mae requests that the Court: (1) order Defendants to make the Properties available to Fannie Mae for in person, physical inspection and appraisal on the terms and precautions set forth in Fannie Mae's emails from October 3, 8, and 13th, Ex. 7; (2) award Fannie Mae its reasonable expenses, including attorneys' fees, in bringing this Motion; and (3) prohibit Defendants from introducing into evidence in these proceedings any evidence regarding

[7] Counterclaim, p. 15, fn. 7.

[8] To be clear, even if Defendants have repaired the Properties as they allege, such repairs did not cure the default under the Loan Agreements.

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the repairs they allegedly made to the Properties if they do anything to interfere with a complete inspection of the Properties by Fannie Mae or its designees.

II. PROCEDURAL HISTORY AND RELEVANT FACTS

A. Procedural History

Fannie Mae filed its Verified Complaint on August 12, 2020, seeking equitable relief from the Court for specific performance under the Loan Agreements and for the appointment of a receiver due to Defendants' material and monetary defaults under the Loan Agreements—specifically, Defendants' refusal to pay the required $2.846 million to fund the reserve accounts.

On August 31, 2020, Defendants filed Counterclaims against Fannie Mae asserting nine causes of action: (1) two claims for breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) declaratory relief; (4) fraud in the inducement; (5) negligent misrepresentation; (6) conversion; (7) injunctive relief; and (8) equitable relief/rescission/reformation.

The parties' claims arise from the Loan Agreements and related Loan Documents,[9] as well as the parties' relationship through these contracts. Importantly, each claim, counterclaim, third party claim, and affirmative defense relies, at least in part, on the condition of the Properties and Defendants' failure to make repairs at the Properties.

B. Relevant Facts

1. Defendants' defaults under the Loan Documents.

On or about August 29, 2018, Defendants purchased the Properties and assumed the prior owners' loan obligations under the Loan Documents through two Assumption Agreements.[10] Following Defendants' assumption of the Loan Documents, Fannie Mae noticed a dramatic drop in the occupancy rates at the Properties. *See* Supplemental Noakes Declaration in support of Plaintiff's Reply in Support of Application for Appointment of Receiver on Order Shortening Time and Opposition to Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction

[9] "Loan Documents" refers to the Loan Agreements, the Assumption Agreements, the Village Square Multifamily Note, the Liberty Village Multifamily Note, a Village Square Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing, a Liberty Village Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing, a Village Square Assignment of Security Instruments, and a Liberty Village Assignment of Security Instruments.

[10] "Assumption Agreements" refers to the Village Square Assumption and Release Agreement and Liberty Village Assumption and Release Agreement.

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("Supplemental Noakes Decl."), ¶ 5-6 (noting the drop in occupancy from approximately 80% to 45% during the year that Defendants managed the properties), attached as **Exhibit 13**. Defendants admit that the occupancy rates at the Properties declined and that Defendants' affiliates had to inject substantial money into the Properties to cover their monthly debt service obligations due to low occupancy. *See* Defendants' Opposition to Application for Appointment of Receiver at 10-11. Thus, Fannie Mae rightly requested to inspect the Properties in July 2019 pursuant to its rights under Section § 6.02(d)[11] of the Loan Agreements. Supplemental Noakes Decl., ¶ 8.

Based on what Fannie Mae observed concerning the deteriorating condition of the Properties during those inspections in July 2019, Fannie Mae determined that PCAs[12] were necessary to determine the full extent of the Properties' deterioration. Fannie Mae requested access to the Properties to perform the PCAs, which Defendants granted to Fannie Mae and its expert, f3, as evidenced by the PCAs dated September 9-11, 2019. *See* PCAs, attached as **Exhibit 14**. The PCAs established the need for immediate repairs totaling $2,845,980, many of which involved issues of life and safety. *Id.* at 8 (both reports).

Due to the substantial repairs identified in the PCAs necessary to preserve the Properties, the cost of making those repairs, and the fact that the repair escrow accounts held only $106,217

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[11] Section 6.02 of the Loan Agreements provide:

> **d) Property Inspections.**
> Borrower shall:
> (1) permit Lender, its agents, representatives, and designees to enter upon and inspect the Mortgaged Property (including in connection with any Preplacement or Repair, or to conduct any Environmental Inspection pursuant to the Environmental Indemnity Agreement), and shall cooperate and provide access to all areas of the Mortgage Property (subject to the rights of tenants under the Leases);

Ex. 12, § 6.02(d).

[12] PCAs are provided for in section 6.03(c) of the Loan Agreements which provide:

> **(c) Property Condition Assessment.**
> ***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***. Lender's right to obtain a property condition assessment pursuant to this Section 6.03(c) shall be in addition to any other rights available to Lender under this Loan Agreement in connection with any such deterioration. Any such inspection or property condition assessment may result in Lender requiring Additional Lender Repairs or Additional Lender Replacements as further described in Section 13.02(a)(9)(B). (emphasis added).

Ex. 12, § 6.03(c).

(Village Square) and $246,047 (Liberty Village) to cover the cost of repairs, Fannie Mae delivered the PCAs to Defendant, together with an October 18, 2019 Notice of Demand for each Property, outlining Defendants' 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. *See* Notices of Demand, dated Oct. 18, 2019, attached as **Exhibit 15**. The Notices of Demand also advised that the Monthly Replacement Reserve Deposit for Liberty Village was being increased by $8,160.00 per month to $26,760.00 per month commencing on December 1, 2019 and the Monthly Replacement Reserve Deposit for Village Square was being increased by $1,397.42 per month to $11,656.50 per month commencing on December 1, 2019. *Id.* Defendants' deadline to begin efforts to complete the repairs and to deposit the funds in the respective accounts was November 17, 2019. Ex. 12, § 13.02(a)(4) (providing thirty days' written notice before an automatic default).

Defendants 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 of making the required repairs and payments, Defendants attempted to unilaterally modify their obligations under the Loan Agreements by replacing the requirement that they pay into the Reserve Accounts approximately $2.846 million with merely submitting an alternative strategic improvement plan – essentially, a proposal for making repairs. *See* Counterclaim, Ex. N, attached as **Exhibit 16**. Fannie Mae never consented to Defendants' attempted modification of their obligations under the Loan Agreements. However, in submitting the strategic improvement plan, Defendants admitted that the Properties needed repairs of at least $1,218,125.12, further supporting Fannie Mae's demands for repairs and funds. *Id.* Defendants have never attempted to fund the repair or replacement accounts pursuant to their obligations under the Loan Documents.

2. Defendants have continually refused Fannie Mae access to the Properties.

Shortly after Defendants filed their Counterclaims on August 30, 2020, the parties began discussions regarding Defendants' alleged repairs to the Properties and Fannie Mae's desire to confirm those repairs by performing further inspections and appraisals at the Properties.

On September 2, 2020, Defendants, Fannie Mae, and their respective counsel participated

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in a call where Fannie Mae again requested access to the Properties to verify the Defendants' purported repairs. On September 8, 2020, Fannie Mae followed up with Defendants requesting contact information for one of Defendants' employees to set up the inspection of the Properties. On September 10, 2020, Defendants' in-house counsel sent Fannie Mae a letter, that, among other things, offered Fannie Mae access to the Properties to conduct updated PCAs, but conditioned those PCAs on, among other things, Fannie Mae not using its expert of choice, f3, and limiting the inspection to only certain conditions and limited portions of the Properties. Ex. 4. Fannie Mae initially responded by requesting contact information at the Properties to schedule the PCAs and Defendants' in-house counsel responded by saying that Defendants were willing to "immediately arrange for any access that is necessary for the vendor with onsite employees", but only if Fannie Mae would agree to Defendants' conditions referenced above. Ex. 5.

On September 15, 2020, Fannie Mae sent Defendants' a formal response to the Defendants' September 10th letter. In it, Fannie Mae notified Defendants that the refusal to allow it, or its designees, to inspect the Properties was an additional event of default under the Loan Documents and again requested access. Ex. 6. On September 18, 2020, Defendants replied to Fannie Mae's communication stating that Defendants would permit access for Fannie Mae to conduct an inspection of the Properties and "would not only have a representative available to facilitate the same, it would encourage such an inspection so that Fannie Mae would be able to see the progress that has been made at the Properties." Ex. 7. Fannie Mae responded by stating it would have f3 inspect the vacant units at the Properties and requested rent rolls to identify which vacant units could be inspected. *Id.* After not receiving a response, Fannie Mae followed up on the request for the rent rolls and contact information for access. *Id.*

On September 30, 2020, Defendants responded by again denying Fannie Mae access to the Properties through f3 and, for the first time, suggested that Fannie Mae conduct a "non-contact virtual inspection." *Id.* On October 3, 2020, Fannie Mae responded to Defendants' denial of access to the Properties. *Id.* Fannie Mae reiterated that the denial of access for the inspection by Fannie Mae's designee was a breach of the Loan Documents. *Id.* Fannie Mae also informed Defendants that it chose f3 to conduct the inspections because it was the best entity to confirm the purported

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repairs since f3 performed the PCAs at the Properties. *Id.* Further, Fannie Mae confirmed that f3 would take all required COVID-19 precautions during the inspection and that the inspection would not include occupied units. *Id.*

On October 7, 2020, Defendants responded by sending an email that largely consisted of argumentative rhetoric and accusations rather than a good faith response: "[s]imply stated, the Sixth Amendment, Fourteenth Amendment and First Amendment protect the right to a "public trial" and court proceedings, but it is my understanding that much of the Court's work is currently being performed virtually in Nevada. Is Fannie Mae's position really that conducting a property condition assessment is more paramount than the constitutionally protected right to public court proceedings?" Defendants concluded the email by unambiguously refusing to allow Fannie Mae to conduct inspections or PCAs without agreeing to Defendants' new list of conditions. *Id.* For example, Defendants demanded that Fannie Mae provide new information before it would permit Fannie Mae access: (1) the length of time for the inspections; (2) the number of individuals attending the inspections; (3) the inspectors' "designations", the entity they work for, their contact information; and (4) "confirmation that all costs will be covered" by Fannie Mae. *Id.* Defendants also provided the following condition: "please note the person(s) should not have a primary function of performing biased 'property condition assessments,' even if Fannie Mae's opinion is that the 'best entity' to do a PCA". *Id.*

On October 8, 2020, Fannie Mae responded by reiterating its right to inspect the Properties regardless of Defendants' demands. *Id.* Fannie Mae also provided detailed assurances that its experts would "take appropriate COVID-19 precautions" during inspections. *Id.* Further, Fannie Mae offered to provide the following information: (1) an estimate for the amount of time needed for inspections; (2) the number of inspectors needed; and (3) the names of those inspectors. *Id.* On October 13, 2020, after not receiving a response from Defendants, Fannie Mae provided the information that Defendants had requested as to 1) the estimate of time for the inspection, 2) the number of inspectors (two), and 3) that they would be f3 employees. *Id.* Fannie Mae also provided proposed dates and times for the inspections. *Id.* Fannie Mae noted that each inspector could view a separate vacant unit to make the inspection more efficient, while simultaneously limiting the

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number of people traveling together at the Properties. *Id.* Again, Fannie Mae reiterated that f3 would comply with appropriate COVID-19 protocol. *Id.*

On October 15, 2020, Defendants responded by offering to permit Fannie Mae "access for a **standard inspection**" (emphasis in original) but refused to permit Fannie Mae to use f3 to perform in-person inspections. *Id.* Defendants again suggested a virtual inspection of the Properties but did not refuse physical access. *Id.* Defendants stated that "to the extent that Fannie Mae remains steadfast in its belief that only a PCA by f3 is acceptable, then consistent with Judge Earley's statements you will be free to seek such access in the course of discovery." *Id.*

On November 9, 2020, Fannie Mae served each Defendant Plaintiff Federal National Mortgage Association's Rule 34 Request for Entry Upon Land for Inspection (the "Rule 34 Requests") requesting to inspect and appraise each Defendants' Property. Exs. 5 and 6.

It should come as no surprise that Defendants are now willfully impeding Fannie Mae's ability to inspect and appraise the Properties—rights that Fannie Mae has under the Loan Agreements *and* pursuant to Rule 34. Such conduct is unjustifiable when considering that the condition of the Properties is relevant to one of the largest, if not the largest issue, in this case. Evidence of the condition of the Properties is relevant to each claim, counterclaim, third party claim, and affirmative defense. The appraised value of the Properties also evidences each parties' potential damage calculations. While Defendants allege that they have made substantial improvements to the Properties, they continue to refuse to permit Fannie Mae access to the Properties to confirm those assertions. Fannie Mae must be permitted to physically access the Properties to conduct Rule 34 inspections and appraisal.

Defendants' refusal to permit in-person inspections on the basis that it is unsafe due to COVID-19 defies both logic and reality. As set out above, multiple times during this pandemic Defendants have stated that there were willing to allow physical inspections of the Properties, but only if additional non-COVID related conditions were met. Fannie Mae has demonstrated that f3 will comply with all required COVID-19 protocol and interaction between f3 and Defendants' employees and current tenants will be very limited to non-existent. In addition, f3 has acknowledged that it will only inspect vacant units to further avoid interacting with current tenants

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at the Properties. These conditions are consistent with Nevada's current emergency directives.[13] Notably absent from Nevada's current emergency directives is any prohibition on in-person inspections of properties under Rule 34. Fannie Mae is also willing to follow the Centers for Disease Control and Preventions supplemental guidance on event gatherings.[14] Defendants' newest effort to stymie Fannie Mae's ability to prosecute its case by hiding behind COVID-19 is nothing more than a smokescreen.

3. An in-person inspection is necessary for this litigation.

As set out above, the PCAs noted over $2.8 million in needed repairs on the Properties. f3 Declaration, ¶ 4. Defendants' own strategic improvement plan admitted that a significant portion of those repairs were necessary. Ex. 16. Part of f3's engagement for this litigation is to inspect the currently vacant units and general areas of the Properties, some of which were inspected in September 2019, to ascertain whether repairs were actually made. f3 Declaration, ¶ 5. A "virtual" inspection, however, is not sufficient for the Properties and is not customary in the industry. *Id.* at ¶ 13.

In a "virtual" context, Fannie Mae's experts would have to rely on the principals or employees of the Defendants to accurately represent what they are displaying to f3. *Id.* at ¶ 14; Harper Declaration, ¶¶ 11-12. For example, this would require Fannie Mae's experts to assume that the Defendants are showing a representative sample of the units at the Properties rather than cherry-picking the best units. *Id.* There are vastly more opportunities for a property owner to manipulate an inspection if it is conducted remotely as it would be if conducted virtually. f3 Declaration, ¶ 14. A "virtual" inspection would also require Fannie Mae's experts to assume that Defendants are showing the portions of the Properties that are in disrepair as well as the portions of the property that are maintained. *Id.*; Harper Declaration, ¶ 12. A "virtual" inspection would serve only to

[13] *See* Emergency Declaration Directive 035, dated November 23, 2020, available at: https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_COVID19_Emergency_Declaration_Directive_035/ (last accessed on Dec. 23, 2020) (providing an exhaustive list of regulations that each limit occupancy in a defined gathering space to the lesser of 25% of the fire code capacity or 50 persons, which is different than "private residential gatherings" which "are restricted to 10 or fewer persons from no more than 2 households, whether indoors or outdoors").

[14] *See* Considerations for Events and Gatherings, available at: https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html (last accessed on Dec. 27, 2020) (encouraging social distancing, handwashing, mask compliance, and additional considerations).

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prevent Fannie Mae's experts from objectively inspecting the Properties and interferes with the ability to identify portions of the Properties that need repairs. *Id.* A "virtual" inspection would compromise the accuracy and integrity of any report that Fannie Mae's experts may prepare. f3 Declaration, ¶ 14; Harper Declaration, ¶ 13.

In addition, there are very specific details that inspectors need to assess in person that cannot be adequately represented or reviewed in a "virtual" inspection, including materials and level of workmanship on purported repairs, condition and quality of replacements, and whether repair recommendations were followed. *Id.* at ¶ 16. Fannie Mae's experts would not be able to provide opinions of interior, exterior, roof, amenities, mechanical areas, and common areas with information provided by the Properties through the "virtual" inspection because it has not been able to verify the information. *Id.* at ¶ 18. There are also conditions on the Properties that could be noticed with a physical inspection that may not appear or be shown in a "virtual" inspection, including staining indicating water damage or environmental issues, potential foundation issues, termites, or ground variance and vegetation issues that may indicate environmental issues. *Id.* at ¶ at 17.

Accordingly, Fannie Mae's experts should be given physical access to the Properties to assess the conditions of the Properties and the claimed repairs.

III. THE COURT SHOULD COMPEL DEFENDANTS TO PERMIT FANNIE MAE TO CONDUCT PROPERTY INSPECTIONS

A. Legal Standards

Parties are entitled to discover nonprivileged information that is relevant to any party's claim or defense and is proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. Nev. R. Civ. P. 26(b)(1); *In re Raggio Family Tr.*, 136 Nev., Adv. Op. 21, 460 P.3d 969, 973 (2020). As amended, Rule 26(b)(1) requires that discovery seek information "relevant to any party's claims or defenses and proportional needs of the case," departing from the past scope of "relevant to the subject matter

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involved in the pending action." *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 136 Nev. Adv. Op. 26, 467 P.3d 1, 5 (Nev. App. 2020) (citing comments in the 2019 amendments to the Nevada Rules of Civil Procedure, ADKT 0522). The factors to consider regarding proportionality are: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* (citing Fed. R. Civ. Pro. 26 advisory committee's note to 2015 amendment ("The present amendment restores the proportionality factors to their original place in defining the scope of discovery." (emphasis added))). Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015.

When a party fails to provide requested discovery, the requesting party may move to compel that discovery. Nev. R. Civ. P. 37(a) and 37(a)(3)(B)(iv) (providing that a party may move to compel a resisting party to permit inspection under Rule 34); *see also Okada v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 134 Nev. 6, 12, 408 P.3d 566, 571 (2018). "[B]road discretion is vested in the trial court to permit or deny discovery." *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).[15] The party seeking to avoid discovery bears the burden of showing why that discovery should not be permitted. *V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 306, 309 (D. Nev. 2019), *aff'd sub nom. V5 Techs., LLC v. Switch, LTD.*, No. 2:17-CV-2349-KJD-NJK, 2020 WL 1042515 (D. Nev. Mar. 3, 2020) (citations omitted). Arguments against discovery must be supported by "specific examples and articulated reasoning." *Id.* (*quoting E.E.O.C. v. Caesars Ent.*, 237 F.R.D. 428, 432 (D. Nev. 2006).

C. The Court Should Compel Defendants to Permit Fannie Mae to Conduct Property Inspections.

Rule 34(a)(2) provides that a party may serve on any other party a request within the scope

[15] *See* ADK 522, *Amendment to the Nevada Rules of Civil Procedure* (amending the Nevada Rules of Civil Procedure, in part, to better conform with the Federal Rules of Civil Procedure).

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of Rule 26(b) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. Rule 34(b)(2)(A) then provides the opposing party 30 days to respond in writing with any objections.

Here, the Rule 26(b)(1) proportionality factors weigh heavily in favor of compelling Defendants to permit Fannie Mae and its designees to inspect the Properties. *Venetian*, 136 Nev. Adv. Op. 26, 467 P.3d at 5.

1. The issues in this action are important to the parties and to the general public.

The condition of the Properties is the key issue in this litigation. The Properties secure payment of two loans held by Fannie Mae with an aggregate initial principal balance of nearly $40,000,000, which has and continues to accrue interest, fees, and costs. Fannie Mae's July 2019 visual inspection of the Properties confirmed that they were in a state of disrepair. The September 2019 PCAs confirmed that the Properties required repairs of approximately $2.846 million. Fannie Mae was contractually entitled to demand that Defendants pay $2.846 million to fund the reserve accounts to ensure payment of repairs to the Properties. Defendants allege they have spent $3.5 million repairing the Properties, roughly half allegedly spent after the PCAs. This Court cannot determine the rights of the parties in this case without considering the condition of the Properties. The value of the Properties will also matter for purposes of any purported damages claimed. Further, Fannie Mae must be able to present its case to this Court through testimony, including expert testimony.

These facts, alone, are sufficient to prove this element of proportionality. However, the general public also has a personal stake in the outcome of this litigation because Fannie Mae's mission is to provide liquidity, promote stability and affordability in U.S. housing finance.[16] As late as last year, Nevada ranked last in the nation in affordable housing.[17] Defendants' failure to adequately maintain these Properties and to permit Fannie Mae to access the Properties to inspect their alleged repairs to the Properties, weighs heavily on this community that is in desperate need

[16] https://www.fanniemae.com/about-us/who-we-are (last accessed on Dec. 11, 2020).
[17] https://lasvegassun.com/news/2019/apr/25/las-vegas-affordable-housing-shortage-at-crisis-le/ (last accessed on Dec. 11, 2020).

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of safe, affordable housing.

2. The amount in controversy is substantial.

As alleged in each parties' disclosures, the amount in controversy is high. Fannie Mae's computation of damages provides that Fannie Mae believes the extent of their damages to be at least $2,845,980.00 due to Defendants' failure to fund the reserve accounts. The amount owed to Fannie Mae which is secured by the Properties is approximately $40,000,000.00, plus interest, fees, and costs. Fannie Mae may also have damages arising from the injunction issued by the court,[18] which prevents Fannie Mae from exercising its rights under the Loan Documents.

Defendants claim to have paid over $60 million for the Properties – Properties that may be lost if the Court allows Fannie Mae to foreclose on them due to Defendants' defaults under the Loan Agreements. Defendants assert a ridiculously high damage figure totaling $295,973,449.08, not inclusive of general damages from an alleged margin call, punitive damages, or attorneys' fees and costs, none of which Fannie Mae believes the Defendants can support. *See* Defendants' First Supplemental List of Witnesses and Documents Pursuant to NRCP 16.1, pp. 12-14, attached as **Exhibit 17**. Fannie Mae, however, must be able to have its experts analyze the Properties to evaluate the damage claims.

3. Defendants are the only party who has access to the Properties.

Defendants are the only parties that have access to the Properties and the vacant units necessary to determine the condition of the Properties and assess any claims for damages. Fannie Mae cannot access the Properties without first obtaining the consent of the Defendants or an order from the Court. Without access to the Properties, Fannie Mae cannot obtain necessary evidence regarding the condition and value of the Properties.

4. The parties both have considerable resources.

Fannie Mae and Defendants have sufficient resources to bear the costs associated with inspections. Fannie Mae is a United States government sponsored enterprise with a 2019 revenue of $120.2 billion.[19] Defendants are also financially capable of bearing the costs of property

[18] Fannie Mae filed a Notice of Appeal on November 30, 2020.

[19] https://capmrkt.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2019/q42019.pdf) (last accessed on Dec. 27, 2020).

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inspections, because they are an established real estate company that has operated for more than 50 years with approximately 50,000 units of multi-family housing, residential, retail, and manufactured housing properties (10,000 in Clark County).[20] Further, they allege they have over $300 million dollars in loans from Fannie Mae alone.[21]

5. The property inspections are highly likely to help resolve the issues.

The key issue in this case is the condition of the Properties. The condition of the Properties is relevant to every claim, affirmative defense, counterclaim and third-party claim in this case. Allowing Fannie Mae access to the Properties to conduct property inspections will enable it to prepare its case for trial and to better evaluate settlement of this case. Denying Fannie Mae its right to inspect the Properties violates Fannie Mae's rights to prosecute its claims and defend against the affirmative defenses and counterclaims. Further, it leaves Fannie Mae with no option but to assert that Defendants are in monetary default under the Loan Agreements because of their refusal to pay $2.846 million to fund the reserve accounts and continue to prosecute this litigation.

6. The burden and expenses of the proposed discovery are proportionate to the issues at stake.

The burden of having Rule 34 inspections is proportionate to the needs of this case, especially in light of the minimal burdens and costs it would place on Defendants and the amount in controversy in this case. The only burden on Defendants is to have one or two members of their staffs unlock the unoccupied units and provide access to the common areas, mechanical rooms, and roofs so that Fannie Mae's expert can inspect those areas.

Defendants have objected to allowing Fannie Mae to inspect the Properties, in part, due to the ongoing pandemic. This is simply misdirection by the Defendants. Any expert of Fannie Mae that inspects the Property will not be entering any occupied or rented units—they will only be entering vacant and unrented units and open or unoccupied common areas, mechanical rooms, and roofs using appropriate health and safety measures. Hence, there is little to no risk of transmitting the COVID-19 virus to tenants at the Properties, or any other employee, representative, or counsel for any party. Fannie Mae's experts have also agreed to comply with all COVID-19 protocols

[20] Counterclaim, 17:9-11.
[21] Counterclaim, 17:17-21.

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including wearing face masks, social distancing and usage of hand sanitizer. Fannie Mae's experts have been conducting in-person inspections during this pandemic and can safely do so. *See* f3 Declaration, ¶¶ 8-12; Harper Declaration, ¶¶ . Finally, Fannie Mae's experts will not assemble in groups larger than set forth in Nevada's limitations on the size of assemblies by limiting the number of inspectors that can go into a unit at the same time to one.

D. The Court Should Issue Sanctions Under Rule 37.

Where a court grants a motion to compel discovery, it must also require the party whose conduct necessitated the motion, the attorney advising such conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney fees. Nev. R. Civ. P. 37(a)(5)(A). Such sanctions are appropriate where an unresponsive party's actions halt the adversary process. *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 900 P.2d 323 (1995) (citing *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 913 (1987)).

Fannie Mae is entitled to its reasonable expenses from bringing this Motion per Rule 37(a)(5)(A) if the Court grants the motion to compel. Defendants' refusal to allow in-person inspections halted the adversary process, prevents Fannie Mae from prosecuting its claims, and impedes Fannie Mae's right to defend itself against Defendants' counterclaims. *See GNLV Corp.*, 111 Nev. at 870. 900 P.2d at 325. Defendants' conduct forced Fannie Mae to incur significant attorney's fees and costs.

When Fannie Mae served Defendants with Rule 34 requests on November 9, 2020, Defendants were already on notice that Fannie Mae intended to perform detailed inspections of the Properties. As noted above, the Defendants have said on multiple occasions during the parties' discussions that Fannie Mae could physically access the Properties if certain unacceptable, non-COVID conditions were agreed to. Defendants now, through their objections to Fannie Mae's Rule 34 notices, rely almost exclusively on purported COVID-19 concerns. Defendants' pretext cannot be used to continue to frustrate the purposes of discovery and Fannie Mae's ability to prosecute its claims. Accordingly, Fannie Mae seeks the following sanctions: (1) an award to Fannie Mae to cover the cost of bringing the Motion, including attorney's fees, the costs associated with performing the Rule 34 inspections, and any sunken costs due to Defendants' refusal to permit in-

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person inspections incurred by Fannie Mae; and (2) an order specifying that any action taken by Defendants that impedes Fannie Mae's ability to conduct full and proper inspections, including the testing, measuring, and other assessments permitted by Rule 34, will automatically prevent Defendants from introducing any evidence of alleged repairs made to the Properties at trial.

IV. CONCLUSION

For the foregoing reasons, together with those expressed in the Motion, Fannie Mae respectfully requests that the Court grant the Motion and issue an order compelling Defendants to permit Fannie Mae to inspect and appraise the Properties pursuant to the terms expressed in its Rule 34 requests. Further, Fannie Mae requests that the Court issue monetary sanctions for the costs of bringing this Motion, including attorneys' fees and costs, and issue an order preventing Defendants from introducing any evidence of their alleged repairs at any hearing or trial in this matter if they impede Fannie Mae's right to inspect the Properties.

Dated: January 12, 2021

SNELL & WILMER L.L.P.

By: /s/ *Nathan G. Kanute*

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **MOTION TO COMPEL DEFENDANTS TO PERMIT PLAINTIFF'S RULE 34 REQUESTS FOR ENTRY UPON LAND FOR INSPECTION, MOTION TO STRIKE DEFENDANTS' OBJECTIONS, AND MOTION FOR SANCTIONS ON AN ORDER SHORTENING TIME** by the method indicated:

_____ U. S. Mail

_____ U.S. Certified Mail

_____ Facsimile Transmission

_____ Federal Express

X Electronic Service

_____ E-mail

and addressed to the following:

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DATED: January 12, 2021.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff, vs. WESTLAND LIBERTY VILLAGE, LLC, a Nevada Limited Liability Company; and WESTLAND VILLAGE SQUARE, LLC, a Nevada Limited Liability Company Defendants. AND ALL RELATED ACTIONS.	CASE NO. A-20-819412-C DEPT NO. 13 **OPPOSITION TO PLAINTIFF'S MOTIONS: TO COMPEL DEFENDANTS TO PERMIT PLAINTIFF'S RULE 34 REQUESTS FOR ENTRY UPON LAND FOR INSPECTION; TO STRIKE DEFENDANTS' OBJECTIONS; AND PLAINTIFF'S REQUEST FOR SANCTIONS** Hearing Date: February 16, 2021 Hearing Time: 9:00 AM

Defendants/Counterclaimants/Third Party Plaintiffs, Westland Liberty Village, LLC ("Liberty LLC") and Westland Village Square, LLC ("Square LLC" and in combination with Liberty LLC, "Westland"), hereby file this Opposition to Plaintiff Federal National Mortgage Association's ("Plaintiff" or "Fannie Mae") Motion to Compel Defendants to Permit Plaintiff's Rule 34 Requests for Entry upon Land for Inspection, Motion to Strike Defendants' Objections, and Motion for Sanctions on

an Order Shortening Time (the "Motion").

As set forth in greater detail herein, the Motion's requested relief that the Court enforce improper Rule 34 Requests for Entry upon Land for Inspection should be denied in its entirety based on the controlling standards of NRCP 34 and the current COVID-19 restrictions in place to protect the community. Once the Motion fails, the Court should deny the other relief Plaintiff requests – i.e., to strike Westland's objections and for monetary sanctions.

DATED this _26th_ day of January 2021.

LAW OFFICES OF JOHN BENEDICT

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Motion is about Fannie Mae trying to flex its muscles and asking this Court to err by compelling improper, overbroad, and COVID-19 restriction-violating Rule 34 Requests for Entry upon Land for Inspection (the "Requests for Inspection") of the two apartment complexes underlying this litigation. Worse yet, Plaintiff's Motion continues a pattern of overreaching conduct, despite that it lost its application for the appointment for a receiver, the Court restrained Plaintiff from further overbearing, illegal acts against Westland, and ordered that the parties be returned to the status quo that existed before Fannie Mae and Grandbridge concocted a default and filed a rogue Notice of Default and Intention to Sell (the "NOD"). In doing so, the Court intended to return the parties to the point in time just before the Lenders declared the improper default when Westland still enjoyed the protections of the contract it bargained for and the legal protections afforded a borrower under the law.

One such protection is the rent emergency orders from the State of Nevada designed to minimize the risk associated with the pending COVID-19 pandemic. Those restrictions are especially important because the demanded inspections would occur at properties in an area of Las Vegas that is one of the hardest hit by the virus and at a time when COVID had risen to the leading cause of death in Nevada (the most recent information at the time of this filing was for December 2020). Based on those real health risks, for the safety of its employees and residents, Westland objected to the in-person inspections demanded by Fannie Mae and offered virtual inspections that are consistent with the inspections that lenders, *including Fannie Mae*, have conducted at other sites.[1]

Still, despite being armed with the information contained in Westland's objection, Fannie Mae rejected Westland's offer of conducting the inspection virtually - like, for safety purposes, almost all business and events are being conducted, including this Court's business. Instead, Fannie Mae again bulldozed forward, ignoring the danger caused to the Properties' residents, Westland's employees, and even the inspectors by this overzealous and reckless demand. Rather than being reasonable, Fannie Mae again stomps its feet while demanding only its way, refused to consider the virtual inspection that was offered, and runs to Court, again on an Order Shortening Time, in what most generously can be labeled a very poorly timed plan that should be rejected out of hand.

More specifically, the Requests for Inspection, and now the Motion to compel them, seek for "Plaintiff and its agents and potential expert witnesses, including without limitation, f3, Inc. ("f3") and an appraiser to be named, to inspect and evaluate" the two Properties, thereby endangering the more than 2,000 residents and 25 staff members present at the Properties. Even without Fannie Mae's presence on site, Westland has already had several team members have to go through quarantining protocols due to contact tracing requirements. To this tinder box of COVID-19 risk, Fannie Mae demands and asks this Court to compel six individuals from Plaintiffs' side, plus the Westland's representatives who would also need to be present to provide access for the inspections and make the

[1] A copy of Westland's objection, which included the emergency orders and other COVID related information, were attached to the Motion, as Exhibit 10. Attached as Exhibit A to this Opposition is a copy of local news reports justifying Westland's concern - during the same time as Fannie Mae insisted on conducting the inspection, COVID has become and remains the leading cause of death in Nevada.

Properties available to inspect, measure, photograph and survey multiple units. Critically, Fannie Mae's Demand for Inspection did not offer any further specificity about the scope of the inspection, including what units or even how many units it demands permission to inspect. Finally, Fannie Mae demands multiple entries onto the Properties, as its proposed inspection would span over three days. This is beyond overreaching and should not be permitted for obvious health and safety reasons.

Westland served objections to each of the Requests, noting in relevant part that the requested entry and inspection was far too broad-based for the relatively narrow issues in this case, the safety requirements imposed by the current COVID-19 restrictions, that a more limited and virtual inspection would serve the purposes of the Requests and narrow the need for any future physical inspection, and that the scope of the inspections goes beyond the requirements of the underlying loan agreements and the issues upon which the Complaint is premised. Counsel thereafter met and conferred regarding the scope of the Requests, with Westland's counsel reasonably requesting a more substantive basis for the Requests and further detailing a proposed structure for the inspections to be completed.

Once again, Fannie Mae refused to compromise or to otherwise cure the Requests for Inspection's defective nature. Ultimately, Fannie Mae maintained – as stated in the supporting Declaration by its counsel to the Motion – in its view, it has a "right to inspect the Properties regardless of Defendants' demands.", Thus, despite the reasonable parameters of Westland's objections and its offer to accommodate the inspection request virtually, Fannie Mae decided it would push forward regardless just as it has with its continuing assertion of a non-existent "default."

Fannie Mae has now sought to compel an inspection through its Motion, but still fails to offer any substantive basis justifying the need for the broadly stated inspection requests, and similarly fails to refute that such inspections would violate the current governmental restrictions (and not just for Plaintiff's representatives, agents, experts, and counsel, but for the many tenants the two Properties), or offer any reason why a virtual inspection would not achieve the same purposes. Apparently recognizing it cannot validly compel relief, Fannie Mae tries to distract the Court by requesting the Court strike the reasonable objections filed by Westland and also requests sanctions against Westland. Such a result is

not warranted when Westland only ensured compliance with the Nevada Rules of Civil Procedure, the current COVID-19 restrictions, and the rights and safety of Westland's representatives and counsel, its employees, and most critically, the many tenants who live at the Properties. The health and safety of those persons who Fannie Mae seeks to interfere with should not be put at risk, and the Governor's executive order should not be violated by permitting Fannie Mae to have three days of unnecessary access to the Properties. Accordingly, as briefed in greater detail herein, the Motion should be denied in its entirety.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The Court is generally familiar with the substantive facts underlying this case. In brief, and contrary to the lengthy posturing presented in the Motion, this Court has already made a preliminary determination that rejected Fannie Mae's proposed finding of a default, and it is Westland who enjoys a likelihood of success of prevailing in this action. Again, this Court found that this case arises from Fannie Mae and its agents, including Fannie Mae's servicer Grandbridge, filing an improper Notice of Default and Intent to Sell to commence non-judicial foreclosure. This illegal conduct threatens to foreclose on Westland's two multifamily housing communities located at 4870 Nellis Oasis Lane, Las Vegas, Nevada 89115 and 5025 Nellis Oasis Lane, Las Vegas, Nevada 89115 (collectively, the "Properties") based on insupportable non-financial defaults, which, despite multiple requests by Westland, have never been substantiated, and to the contrary, were manufactured by the Lenders.

To be clear, Westland has taken and continues to undertake considerable efforts to rehabilitate the Properties and to improve their occupancy rates. Those efforts have been successful. Throughout its ownership of the Properties, Westland has made all monthly debt service payments on the subject loans. In fact, since February 2020, when Grandbridge abruptly ceased sending Westland loan statements, Westland has *overpaid* the monthly debt service obligation payments by over $300,000. Also notable is that Westland has over $20 million of equity in the Properties, yet Fannie Mae still asserts itself to be "undersecured."

Despite that security, Fannie Mae filed this action based on improper property condition assessments for both Properties. The Complaint alleges two causes of action for the appointment of a receiver and for specific performance – with a requested assignment of the rents. Upon filing its Complaint, Fannie Mae simultaneously applied for the appointment of a receiver, which request was denied by the Court. Further, the Court granted Westland's countermotion for a preliminary injunction enjoining the lenders from acting inconsistently with the non-default loan provisions and returning the parties to positions of just before the Lenders falsely declared the loans in default. The Court based its relief primarily on its finding that Westland enjoyed a likelihood of success on its Counterclaim and Third-Party Complaint that allege various contract and tort causes of action arising from Fannie Mae and Grandbridge's breaches of the loan agreements and related conduct.

Against that factual and procedural background, the Motion arises from Fannie Mae's service of the Requests for Inspection. *See* Exhibits 8 and 9 to the Motion. Those Requests for Inspection were not properly tailored to the requirements of NRCP 34 and ignored the current COVID-19 restrictions. Westland properly objected, detailing the reasonable objections (the "Objections") per NRCP 34. *See* Exhibit 10 to the Motion. Counsel thereafter met and conferred in good faith, and during that conference, Westland's counsel further elaborated upon the Objections. While Fannie Mae's counsel initially indicated a willingness to limit the inspections' scope, it never proposed any limits. Instead, it flexed its muscles by filing yet another motion, once again on an order shortening time – to have the Court use its power to force the inspections and demanding monetary sanctions for Westland's audacity to not simply capitulate to its dangerous and overreaching demand. That demand should fail.

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III. THE COURT SHOULD NOT COMPEL THE OVERLY BROAD AND INVASIVE REQUESTS FOR INSPECTION BECAUSE THE PROPOSED SCOPE VIOLATES NRCP 34 AND CURRENT COVID-19 RESTRICTIONS.

Westland has properly objected to the Requests for Inspection and offered what is far more than reasonable parameters for Fannie Mae to accomplish its goals of the inspections. Thus, the Motion should be denied in its entirety.

A. The Requests for Inspection Violate NRCP 34 and the Current COVID-19 Restrictions.

NRCP 34(a)(2) permits a party to request to enter onto land for inspection and other purposes under the additional requirements set forth therein and within the scope of Rule 26(b):

> (a) **In General.** A party may serve on any other party a request ***within the scope of Rule 26(b)***:
>
> …
>
> (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
>
> (b) **Procedure.**
>
> (1) **Contents of the Request.** ***The request:***
>
> ***(A) must describe with reasonable particularity each item or category of items to be inspected;***
>
> (B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
>
> (C) may specify the form or forms in which electronically stored information is to be produced.
>
> (2) **Responses and Objection**
>
> (C) **Objections.** ***An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.***

(italicized, bolded emphasis added).

Here, Westland properly objected per NRCP 34, detailing the reasons for the objections. After that, Westland's counsel fully participated in the meet and confer process, further detailed its objections, and offered reasonable steps to avoid the COVID restriction-violating inspections that Plaintiff was pushing for without any substantive reasoning. Continuing what has been a "we can do what we want" modus operandi, Fannie Mae rejected Westland's reasonable attempts to provide access and instead proceeded with the Motion.

In doing so, Fannie Mae surely recognizes that its Requests for Inspections fail to satisfy even the basic standards set forth in Rule 34. Specifically, Fannie Mae did not – and still has not – satisfied NRCP 34(b)(1)(A) in its requirement that the requesting party "***must*** describe with reasonable particularity each item or category of items to be inspected." (Emphasis added). Fannie Mae did not do so here, and to the contrary, could not have been broader in its Requests for Inspection. Specifically, Fannie Mae requested entry onto "the property, buildings, and improvements" at each of the Properties, but did not offer any reasonable parameters to what was being inspected in two Properties consisting of a combined 1129 apartment units, let alone the offices, other facilities, and common areas.

Likewise, the Requests for Inspection also violate current COVID-19 restrictions. While the Requests state on their face that Fannie Mae and its agents would comply with such restrictions, that is simply not possible - a fallacy confirmed during the meet and confer process and reaffirmed in the Motion itself. The Requests for Inspection facially exceed the restrictions from the State of Nevada, Clark County, and the Center for Disease Control, especially in light of the present infection surge. Effective November 24, 2020, and since extended, new statewide restrictions were put in place that limit private gatherings to ten people or fewer from no more than two households – indoors and outdoors. *See* Exhibit A attached hereto. Yet, Fannie Mae has requested an onsite inspection with six people, *none of whom is from the same household*, at the Properties for three days, all while the new statewide restrictions remain in place to limit the risk of exposure. To be clear, Fannie Mae's demand and the Motion to Compel come at a time when Nevada, including Clark County at an even higher rate, is experiencing a record-breaking number of COVID-19 hospitalizations, deaths, and test positivity rates. Over 75% of Nevada cases, a total of 202,471 cases have occurred in Clark County, and the zip code where the property to be inspected is located. Namely, the 89115 zip code is in an area designated as requiring the strictest protocol. *See* Exhibit B. Moreover, between the time that Fannie Mae requested the inspection and the present COVID-19 has become the leading cause of death in Nevada. On that basis, Westland simply seeks to protect the health and safety of its residents and employees.

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The bottom-line remains that at no time, including in the Motion, has Fannie Mae ever confirmed it would comply with Rule 34 (for example, one easy step would be for it to have amended the Requests for Inspection by giving a compliant description of the areas to be inspected with "reasonable particularity" which would provide more certainty as to the scope and manner of the inspections – as expressly required by NRCP 34). Similarly, Fannie Mae still proposes a physical inspection in violation of the COVID-19 restrictions, noting six individuals from six different households would attend on its behalf, which alone is a violation of the current restrictions, not even considering the additional people who would then be required for attendance from Westland, its onsite representatives, and its other agents. Additionally, Fannie Mae would have this Court ignore the exposure all of these people onsite causes to Westland's residents, including dozens of families and vulnerable members of the community. Westland's residents represent over 2000 people who have nothing to do with this litigation. Their interest in maintaining a safe living environment, including the common areas that they must necessarily walk through, is simply disregarded by Fannie Mae's myopic lack of vision as collateral damage. This Court should not ignore these families and innocent residents. Most are hardworking folks who do not have the luxury of "working from home" like counsel and the Court do but rather have to come and go on the Properties as they head to and from a job they need to feed their family. Finally, the Court's pumping the proverbial brakes and disallowing a *physical* inspection due to the COVID-19 restrictions (especially with the forthcoming expected vaccinations) simply will not impact Fannie Mae's rights in this case.

Counsel's rhetorical posturing that it cannot prosecute its claims for the appointment of a receiver or specific performance, or its assertion that Fannie Mae would be "forced" to [again improperly] declare a new non-monetary default under the loan agreements is simply misplaced. The same arrogant attitude led Fannie Mae to wrongfully commence this case in the first place, and the same approach that this Court expressly rejected in denying Fannie Mae's requested appointment of a receiver and granting Westland's request for a preliminary injunction. Perhaps most telling is that after the virtual inspection was offered, Fannie Mae did not even try the virtual inspection option that would adhere to the current

COVID-19 restrictions. Fannie Mae refused the virtual inspection even though during the Pandemic, Fannie Mae changed its policy and currently is having its vendors, asset managers, agent, and borrowers conduct virtual inspections and even appraisals at most properties. Clearly, virtual inspections are sufficient in Fannie Mae's eyes because the organization mandates them to avoid exposure, spread of Coronavirus, and protect the loss of life – all concerns raised by Westland but ignored by Fannie Mae. It appears when it comes to these two Properties, all of the rules are off the table, and Fannie Mae has another agenda – fueled in part by Fannie Mae's continuous efforts to find a way to force Westland to pay the cost of a dubious PCA inspection that it improperly ordered.[2] But, Fannie Mae's arrogance and disregard for the loan agreements and Westland's legal rights as a borrower play no better this second time around, and simply do not justify the risk to innocent people who should not be caught up in or become victims of Fannie Mae's callousness.

Accordingly, the Requests for Inspection are neither compliant with NRCP 34 nor the other health restrictions in place, and the Motion should be denied.

B. <u>The Requests for Inspection are also Improper Under Nevada Statutory Law and the Underlying Loan Agreements.</u>

As Fannie Mae has raised the issue that it is entitled to engage in an inspection based on the loan documents, Westland notes that the unconditional inspections sought through the Requests for Inspection are also improper under the controlling statutes related to lender inspections in conjunction with the underlying loan agreements.

First, any statutory right to an inspection is conditioned, because it may not be harassing to a property owner. *See* N.R.S. § 40.507(2). Fannie Mae should not be able to insist on access for any inspections to the extent such inspections exceed the statutory protections specifically included in N.R.S. § 40.507(2), which specifically limits when a secured lender may enter and inspect a property to

[2] As part of its request for relief, Fannie Mae seeks the cost of having its own expert, f3, Inc., perform its inspection. Based on information Fannie Mae previously disclosed, the cost of the original three (3) day f3, Inc. inspection was in excess of $20,000. Such "relief" clearly has no rational relationship to an objection to provide access for a physical inspection, because Fannie Mae's costs to have the inspection performed regardless of whether it happened on the date originally noticed or thereafter would be the same.

occasions that it is investigating the "release or presence of a hazardous substance" on real property or "[a]fter the commencement of a trustee's sale or *judicial foreclosure* proceedings against the real collateral." *Id*. Fannie Mae's current requests for access far exceeds the statutorily required limitations.[3]

Furthermore, the underlying loan agreements do not support Fannie Mae's rights to the requested inspections, and, instead, Fannie Mae fails to satisfy the express requirements for the requested inspections. *See* Exhibits C and D, the Loan Agreements. Specifically, Section 6.02(d) of the Loan Agreements govern Property Inspections and provides in pertinent part that

> Borrower shall: (1) permit Lender, its agents, representatives, and designees to enter upon and inspect the Mortgaged Property (including in connection with any Replacement or Repair, or to conduct any Environmental Inspection pursuant to the Environmental Indemnity Agreement), and shall cooperate and provide access to all areas of the Mortgaged Property (subject to the rights of tenants under the Leases): (A) during normal business hours; (B) at such other reasonable time upon reasonable notice of not less than one (1) Business Day; (C) at any time when exigent circumstances exist; or (D) at any time after an Event of Default has occurred and is continuing.

Notably, this lender inspection is limited to conditions that would be quick or similar to an inspection for hazardous substances as permitted by N.R.S. § 40.507(2). Likewise, the Loan Documents place a much more stringent standard on Property Condition Assessments, which are detailed in Section 6.03(c), and provides in pertinent part that:

> 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. Lender's right to obtain a property condition assessment pursuant to this Section 6.03(c) shall be in addition to any other rights available to Lender under this Loan Agreement *in connection with any such deterioration*. Any such inspection or property condition assessment may result

[3] Notably, Westland has not placed conditions on access that would be within the parameters of an inspection that is permitted under Nevada statutes or Section 6.02(d) of the loan agreement, and has only requested reasonable conditions under which the inspections are conducted. Westland has, thus far, only put limited conditions of such access, which is appropriate because such right of entry and inspection of real collateral is not unlimited. N.R.S. § 40.507(2); *see also* N.R.S. § 32.015. Notably, both provisions are subject to the "same limitations," including that "[a] secured lender shall not abuse the right of entry and inspection or use it to harass the debtor or tenant of the property." NRS § 40.507(2).

> in Lender requiring Additional Lender Repairs or Additional Lender Replacements as further described in Section 13.02(a)(9)(B).

See Section 6.03. (c) Property Condition Assessment (emphasis added). Tellingly, as opposed to an inspection, the Lender may not simply demand a Property Condition Assessment. Rather, as a condition precedent, the Lender must show "deterioration" in the Properties' physical condition in excess of ordinary wear and tear since the loan was taken out. This is a very limited right, and Lender has not met it or even attempted to meet it for that matter for either Property and certainly has not referenced any information on the Property's condition as of the effective date.

The deterioration condition precedent is paramount because the requirement also flows through to Fannie Mae's ability to seek reserves since the provision is also specifically incorporated by reference into Sections 13.02(a)(4) and (a)(9) of the Loan Documents. And here, Fannie Mae is not seeking access to the Properties for a legitimate inspection due to its concern for the Properties or some interest in the collateral. Rather, Fannie Mae is seeking access to attempt to obtain a supplemental Property Condition Assessment to bolster its position in this litigation. The Court needs to look no further than Fannie Mae's stated position in the Motion at 16:8 through 17:5 to confirm the same.[4] As such, it is disingenuous that Fannie Mae attempts to shift the blame to Westland for failing to cooperate with providing access to the Properties when it is Fannie Mae that filed this action for a receivership without a current Property Condition Assessment.

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[4] Notably, when Westland initially fully cooperated with Fannie Mae and Grandbridge by providing access for an inspection their banking employees in July 2019, and a subsequent PCA, Westland's cooperation led to Fannie Mae and Grandbridge engaging in bad faith actions, all of which is substantially detailed in Westland's Counterclaim and Third-Party Complaint and reinforces why Fannie Mae should not be allowed free reign in additional inspections now.

C. Westland has not Refused Fannie Mae's Right to Inspections in Compliance with NCP 34, Westland has Served Proper Objections, and there simply is no Basis for an Award of Sanctions to Fannie Mae (if Anything, Fannie Mae should be Sanctioned for Filing the Motion and Forcing Westland to Incur Attorneys' Fees to Defend Against it).

Contrary to the representations in the Motion, Westland has not refused access to the Properties or Fannie Mae's right to inspect compliance with NRCP 34 and the current COVID-19 restrictions. Specifically, Westland confirmed the same in its Objections and has otherwise consistently sought reasonable confirmation that Fannie Mae and its representatives would comply with NRCP 34 and the current restrictions. Fannie Mae has not offered such confirmation and instead has generally conveyed its same overriding attitude – reiterated in the Motion – that it will do the inspection "regardless of Defendants' demands."

And as for the Objections submitted by Westland, they speak for themselves in being in complete compliance with the procedure set forth in NRCP 34(b)(2)(C), and with Westland detailing seven specific grounds and articulating its reasoning within the Objections.

Finally, beyond the Objections themselves, Westland acted reasonably to resolve these issues, including during the meet and confer process. There respectfully is no basis for the Court to award monetary or evidentiary sanctions against Westland, and if anything, sanctions should be awarded *to* Westland according to NRCP 37(a)(5)(B) in Westland being forced to file this Opposition to ensure that the most basic obligations required by NRCP 34 are complied with by Fannie Mae, let alone the critical COVID-19 restrictions. Fannie Mae propounded the improper Requests for Inspection and continues to try to enforce those non-compliant Requests for Inspection. It is, therefore, Fannie Mae that is failing to comply with the applicable rules and restrictions. Fannie Mae – even after Westland has reasonably delineated very reasonable accommodations to cure Fannie Mae's errors – has forced Westland to incur additional fees and costs to oppose the Motion, as opposed to Fannie Mae simply amending their request with a compliant inspection request for this action.

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IV. CONCLUSION

Based on the foregoing, the relief requested in the Motion – like the motions filed by Fannie Mae before it – is simply not warranted under the controlling rules and current restrictions. The Requests for Inspection should accordingly not be compelled, the Objections thereto should be sustained, and no sanctions should be imposed against Westland for its rightful objections under NRCP 34 and its justified requests for Fannie Mae's compliance with the current COVID-19 restrictions. Accordingly, the Motion respectfully should be denied.

Dated this _26th_ day of January 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _26th_ day of January 2021, I served a true and correct copy of the foregoing **OPPOSITION TO MOTION TO COMPEL DEFENDANTS TO PERMIT PLAINTIFF'S RULE 34 REQUESTS FOR ENTRY UPON LAND FOR INSPECTION, MOTION TO STRIKE DEFENDANTS' OBJECTIONS, AND MOTION FOR SANCTIONS ON AN ORDER SHORTENING TIME** through electronic service through the Court's Electronic Filing System to:

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