IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellant,

vs.

WESTLAND LIBERTY VILLAGE, LLC, a Nevada limited liability company; and WESTLAND VILLAGE SQUARE, LLC, a Nevada limited liability company,

Respondents.

Supreme Court Case No. 82174

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

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

REPLY IN SUPPORT OF MOTION TO RECONSIDER

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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 appreciates that reconsideration is disfavored generally and is indeed rare with respect to a ruling on an appellate motion. Still, Fannie Mae respectfully and selectively seeks limited reconsideration to stay one injunctive provision of many based on the clear error in the district court's issuing that relief in the first instance and the gravity of the potential consequences should that provision be enforced during the pendency of the appeal. Fannie Mae's Motion explains why broadly prohibiting it and all other Enjoined Parties from "tak[ing] ***any adverse action*** against ***any Westland entity in relation to other loans***, discriminate against or blacklist any Westland entity ***on new loan or loan refinancing applications***, including by placing Westland on A-check," will present the Hobson's choice of facing contempt or entering new multi-year, multi-million-dollar lending relationships – all before the merits of the case are decided and without any findings by the district court to support this sweeping *preliminary* relief.[2] In light of the severity of its effects including its clear violation of federal law under 12 U.S.C. § 4617, even if the propriety of the provision were a close question, and it is not, the

[2] In addition to Fannie Mae, "Enjoined Parties" is defined in the offending injunction to also include "without limitation, Fannie Mae's servicers, agents, affiliates, representatives, officers, managers, directors, shareholders, members, partners, trustees, and other persons exercising or having control over the affairs of Fannie Mae" which necessarily includes Fannie Mae's conservator the Federal Housing Finance Agency ("FHFA").

Court should err on the side of staying its enforcement pending appeal.

Argument

I. Section 5(o) Improperly Restricts Lending Decisions.

Section 5(o) directs that an Enjoined Party may not

> ***take any adverse action*** against ***any Westland entity*** in relation to ***other loans***, discriminate against or blacklist any Westland entity on new loan or loan refinancing applications, ***including by placing Westland on "a-check*****," *adding a fee*** to any loan quoted or adding an interest rate surcharge to such applications, based on the purported default that arose from failing to deposit the additional $2.85 million into escrow.

APP1511. Westland argues that this provision is actually narrow because it "merely prohibits Fannie Mae from flagging Westland and its affiliates with a 'do not process' label in the ACheck system based ***solely*** on … the defective defaults." Opp'n at 5. In the next proverbial breath, however, they argue that Fannie Mae "may not refuse to lend [to Westland and its affiliates] if ***one of the reasons for doing so*** is the existence of the purported notices of defaults that are the subject of the Order." *Id.* Regardless of which interpretation Westland advocates, Fannie Mae's regulating its own lending relationships is improperly restricted by the threat that placing any non-party Westland entity on Acheck or denying any Westland entity the most favorable lending terms will be swiftly met by contempt proceedings and trials within trials about its reasons for lending decisions relating to non-party entities. Putting aside the injunction's absolute breach of governing federal law, this provision is overbroad, improper, and plagued with enforcement problems; it should

be stayed.

II. The Injunction Improperly and Expansively Applies to Countless and Unidentified Non-Party Westland Realty Group Entities.

Westland also argues that the scope of the injunction, which applies to "Westland and its affiliates," is proper, relying on case law that is wholly inapposite. Specifically, Westland cites two cases in defense of the injunction's expansively applying to non-parties: *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020) and *Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987). Both involve plaintiffs seeking to enjoin the application of a statute or government program. These cases recognize the well-established proposition that, as with nearly any dispute seeking to enjoin a statute or government program, "it is not possible to award effective relief to the plaintiffs without altering the rights of third parties." *City of Chicago*, 961 F.3d at 920-21; *see also Gill v. Whitford*, --- U.S. ----, 138 S. Ct. 1916, 1930 (2018) (holding for example, in malapportionment cases, that "the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale restructuring," thus affecting the rights of third parties). In adjudicating questions involving "universal injunctions," courts recognized that "a court may impose the equitable relief necessary to render complete relief to the plaintiff, even if that relief extends incidentally to non-parties." *Id.*

Such is not the case here. This is a dispute between three parties – Westland Liberty Village, Westland Village Square, and Fannie Mae – that does not involve a

universal injunction on behalf of any non-party Westland entity against numerous Enjoined Parties. As such, the soundbites that Westland excerpted from these cases holding that a court may issue equitable relief that "extends incidentally to non-parties" if "necessary to render complete relief" to the plaintiff do not apply here, to contractual business disputes between three distinct parties. Nothing about explicitly affording relief to countless non-party Westland "affiliates" is "incidental" or "necessary to render complete relief" to the two Westland parties. Moreover, both *City of Chicago* and *Bresgal* granted permanent – not preliminary – injunctive relief, following rulings on the merits and the "complete relief" standard does not apply where no adjudication on the merits has occurred. Instead, on a scant record and without factual findings, the district court purported to apply its injunction ruling for the benefit of unspecified, uncounted, non-party Westland Realty Group entities, many of whom are outside Nevada. Westland does not provide any authority authorizing expansive injunctive relief to non-parties in this context, and, even without any HERA constraints, the Court should decline to allow its enforcement here.

III. Reconsideration Would Be Prudent in Light of the Federal Issues Presented by FHFA's Proposed Intervention.

As the Court is aware, FHFA has moved to intervene into this appeal. In its intervention papers, FHFA stated that if permitted to intervene, it would "ask the Court to dissolve the preliminary injunction" because "12 U.S.C. § 4617(f) mandates

that 'no court may take any action to restrain or affect the exercise of powers or functions of FHFA as a conservator.'" FHFA's Mot. to Intervene at 1. Indeed, FHFA has already submitted, as an exhibit to its intervention motion, a proposed motion to dissolve the injunction. *Id*. at Ex. A. FHFA also separately filed a Petition for a Writ of Prohibition seeking substantially the same relief. *See* FHFA's Pet. for Writ of Prohibition, *FHFA v. Eighth Jud. Dist. Ct.*, No. 82666 (Nev. 2021).

Fannie Mae respectfully submits that in light of the serious issues FHFA has raised concerning the injunction's validity, staying the limited provisions Fannie Mae identified in the motion for reconsideration would be prudent.[3]

Conclusion

For the foregoing reasons, the Court should stay section 5(o) pending appeal.

DATED: April 9, 2021

SNELL & WILMER L.L.P.

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[3] By submitting this reply, Fannie Mae does not waive any rights, titles, powers or privileges of FHFA in accordance with any provision of the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110–289, 122 Stat. 2654 (codified at 12 U.S.C. § 4511 et seq.) that might affect the validity of any part of the injunction or the availability of any other relief Westland has requested or may request, or that might otherwise be relevant to this appeal or the action as a whole.

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 April 9, 2021, I caused to be served a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO RECONSIDER** upon the following by the method indicated:

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

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

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

/s/ D'Andrea Dunn
An Employee of SNELL & WILMER L.L.P.

4852-7468-8485.1