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]

APPELLANT'S APPENDIX

VOLUME IX

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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.

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Affidavit of Service [on Grandbridge Real Estate Capital, LLC]	9/16/2020	9	APP1449-APP1454
Answer to Plaintiff's Complaint, Counterclaim and Third Party Complaint	08/31/2020	8, 9	APP1326-APP1403
Answer to Third Party Complaint	10/19/2020	10	APP1508-APP1555
Appendix of Exhibits to Verified Complaint	08/12/2020	1-8	APP014-APP1290
Defendants'/Counterclaimants'/ Third Party Plaintiffs' Exhibits A through T filed in Support of Answer to Plaintiff's Complaint, Counterclaim and Third Party Complaint; and in Support of Opposition to Plaintiff's Application for Appointment of Receiver on Order Shortening Time; and in Support of Countermotion for Temporary Restraining Order and/or Preliminary Injunction	09/01/2020	9	APP1404-APP1418
Federal Housing Finance Agency's Answer to Defendants' Counterclaim	6/14/2021	11	APP1651-APP1694
Federal National Mortgage Association's Answer to Counterclaim	02/18/2021	11	APP1596-APP1650
Federal National Mortgage Association's Notice of Appeal	11/30/2020	10	APP1585-APP1587
Federal National Mortgage Association's Reply in Support	09/14/2020	9	APP1419-APP1448

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of Application for Appointment of Receiver on Order Shortening Time and Opposition to Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction			
Notice of Entry of Order	11/24/2020	10	APP1569-APP1584
Opposition to Plaintiff's Application for Appointment of Receiver on Order Shortening Time; Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction; Memorandum of Points and Authorities	08/31/2020	8	APP1291-APP1325
Order Granting Defendants' Motion for Preliminary Injunction and Denying Application for Appointment of Receiver	11/20/2020	10	APP1556-APP1568
Third Party Defendant Grandbridge Real Estate Capital, LLC's Notice of Appeal	12/04/2020	10	APP1588-APP1590
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Order Regarding: (1) Plaintiff's Motion to Stay Pending Appeal on an Order Shortening Time; (2) Third-Party Defendant's Joinder; and (3) Defendants' Counter-Motions to Compel Compliance or for Contempt	12/22/2020	10	APP1591-APP1595

DATED: June 22, 2021.

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove
Kelly H. Dove (Nevada Bar No. 10569)
Nathan G. Kanute, Esq. (Nevada Bar No. 12413)
Bob L. Olson, Esq. (Nevada Bar No. 3783)

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 June 22, 2021, I caused to be served a true and correct copy of the foregoing **APPELLANT'S APPENDIX VOLUME IX** upon the following by the method indicated:

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

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

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

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

4820-6524-4911.4

278. Upon information and belief, Grandbridge negligently misrepresented that it conducted an adequate review when setting the reserve amounts in August 2018, prior to Westland signing the loan assumption, because a short one (1) year later, it requested an additional $2.7 million be placed into escrow with no deterioration of the Properties.

279. The information and representations made by Grandbridge and Fannie Mae was false, in that unbeknownst to Westland they knew the loan did not have sufficient security, and that there was a substantial likelihood they would attempt to seek additional reserves.

280. Grandbridge and Fannie Mae supplied the information and made the representations to induce Westland to rely upon it, to act or refrain from acting in reliance upon it, and to have Westland enter into the assumption agreement.

281. Grandbridge and Fannie Mae owed Westland a duty not to make material misrepresentations.

282. Westland justifiably relied upon the information Grandbridge and Fannie Mae provided.

283. As a direct and proximate result of Fannie Mae's misstatements and omissions, Westland has suffered damages in excess of $15,000.00, the exact amount of which will be proven at trial, because, *inter alia*, this is the only default that Westland has ever suffered and it will impair Westland's credit rating and leading to long term higher borrowing costs, and it has impaired Westland's ability to re-finance its Properties at a time when interest rates are at an all-time low.

g. SEVENTH CAUSE OF ACTION (CONVERSION)

284. Counterclaimants repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs as if fully set forth herein.

285. Grandbridge processed all reserve reimbursement payment requests, both on behalf of Fannie Mae, and for its own benefit.

286. Westland has submitted several prior reserve reimbursement requests that have gone unanswered by Grandbridge, including before its November 2019 demand for additional reserve funding.

287. Westland and its predecessor submitted funds related to two fire insurance claims to Grandbridge, which earmarked funds were to be held in escrow until the two fire-damaged building were rebuilt.

288. The fire-damaged buildings were completely rebuilt with Westland's funds.

289. Westland has submitted reserve disbursement requests for the release of those funds, and other reserve disbursement requests for work that was completed, each of which was accompanied by invoices, proof of payment, and documentation showing approval of all required permits, but Grandbridge has failed to respond to those requests.

290. As such, Fannie Mae has wrongfully exerted dominion over Westland's personal property, including, without limitation, the funds that Grandbridge is holding in reserve accounts, that were earmarked for reconstruction of two fire damaged buildings at the Liberty Property, and Grandbridge has thereby wrongly converted the funds to their own use and benefit.

291. Fannie Mae's continued dominion over Westland's personal property was unauthorized and inconsistent with Westland's property rights.

292. Fannie Mae's dominion over Westland's personal property deprived Westland of all of their property rights relating thereto.

293. Fannie Mae's acts constitute conversion.

294. As a direct and proximate result of Fannie Mae's conversion, Westland has suffered damages in excess of $15,000.00, the exact amount of which will be proven at trial.

295. Further, due to the wanton, malicious, and intentional conduct of Fannie Mae, Westland is entitled to an award of exemplary and punitive damages against Fannie Mae.

296. Fannie Mae knew that by refusing to return the converted proceeds after just demand, Borrowers would have to hire counsel to have those funds returned. Thus, it was foreseeable that Borrowers would incur attorney's fees as special damages. Borrowers have incurred these fees and request same as part of their special damages for conversion.

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h. EIGHTH CAUSE OF ACTION (INJUNCTIVE RELIEF)

297. Counterclaimants repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs as if fully set forth herein.

298. On or about July 15, 2020, two NODs were filed against the Liberty Property and the Square Property and served on Westland.

299. Upon information and belief, in Nevada, the typical period for a foreclosure sale to occur after a borrower receives a NOD is 120 days.

300. As Westland has made all debt service payments, and complied with the terms of the Loan Agreements, the Properties rightfully belong to Westland.

301. Fannie Mae and Grandbridge are attempting to utilize Nevada's non-judicial foreclosure process to improperly seize and sell Westland's Liberty Property and Square Property.

302. Real property is a unique asset, and on that basis, in the event that a wrongful foreclosure sale occurs, Westland will suffer extreme hardship and actual and impending irreparable loss and damage.

303. Westland has no adequate or speedy remedy at law to prevent the sale of the Properties, and injunctive relief is therefore Westland's only means for securing relief.

304. Westland is likely to succeed in this lawsuit on the merits of its claims.

305. Based on the foregoing, Westland is entitled to temporary restraining orders and preliminary and permanent injunctive relief to preserve the status quo, to mitigate its damages, and to prevent further irreparable injury to Westland, including, without limitation by: (a) enjoining Fannie Mae and/or Grandbridge from any further attempts to foreclose on the Properties related to their baseless requests to adjust the reserve deposits, and (b) enjoining Fannie Mae and/or Grandbridge from any further attempts to coerce Westland into providing additional reserves or to pay for the expenses related to the default that Grandbridge manufactured.

306. As a further direct and proximate result of Fannie Mae's and/or Grandbridge's improper demands to adjust reserves, their filing of the NOD, and the filing of their Complaint seeking appointment of a receiver, Westland has had to hire counsel to prosecute this matter by reason of which it is entitled to reasonable attorney's fees.

i. NINTH CAUSE OF ACTION (EQUITABLE RELIEF/RESCISSION/ REFORMATION)

307. Counterclaimants repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs as if fully set forth herein.

308. On or about August 29, 2018, Westland entered into two assumption agreements for the loans applicable to the Liberty Property and the Square Property.

309. Prior to signing the assumption, Grandbridge individually, and on behalf of Fannie Mae, forwarded Westland a loan assumption agreement letter, which contained the terms under which it would permit Westland's assumption of the Liberty Loan and Square Loan.

310. By letter dated August 20, 2018, Grandbridge represented on behalf of itself and Fannie Mae to Liberty LLC that, "after a thorough review and analysis of the Proposed Borrower's [Liberty LLC's] financial and managerial capacity, the Assumption has been approved on the following terms: . . . No change to the Replacement Reserve monthly deposit or established schedule identified on Exhibit B attached hereto; No Change to the Required Repair Reserve of $39,375.00 as identified in schedule on Exhibit C attached hereto . . ." (Exhibit J.) Further, Exhibit C, Required Reserve Schedule, listed all items as completed, except for a $9,375.00 holdback for "Misc. Concrete and Fence Repairs. Sports Court Resurfacing" that was shown as having already been fully funded. (Exhibit J, at 7.)

311. By letter dated August 20, 2018, Grandbridge represented on behalf of itself and Fannie Mae to Square LLC that, "after a thorough review and analysis of the Proposed Borrower's [Square LLC's] financial and managerial capacity, the Assumption has been approved on the following terms: . . . No change to the Replacement Reserve monthly deposit or established schedule identified on Exhibit B attached hereto . . ." (Exhibit K.) Further, Exhibit C, Required Repair Reserve Schedule, simply stated "N/A" indicating that no repair reserve was required for that loan. (Exhibit K, at 7.)

312. When the loan assumption agreements were signed, the above-referenced Required Repair Reserve Schedule and Required Replacement Reserve Schedule, for each Property, were specifically included as part of the assumption agreement.

313. The statements made by Grandbridge, on behalf of itself and on behalf of Fannie Mae, were either false or amounted to a mutual mistake by both parties, because Grandbridge and Fannie Mae later attempted to obtain additional reserve payments in excess of the schedules that were provided to Westland, and those requests for additional reserve deposits included requests to deposit $2.7 million of funds related to physical conditions that were not of the same type or category as the expenses included in the schedules.

314. In making those statements, Fannie Mae and Grandbridge knew that Westland would rely upon the amounts and types of conditions requiring reserve deposits when entering into the Loan Agreements, and intended for Westland to do so, to ensure that the loans would close.

315. Westland did rely on the amounts and types of conditions requiring reserve deposits that were listed in the schedules attached to the loan assumption letters, and as such Westland justifiably relied upon the information Grandbridge and Fannie Mae provided.

316. If Grandbridge or Fannie Mae would have had f3 or other inspection company perform a PCA as thorough and with the same criteria before the assumption as it did a year later, and told Westland that an additional reserve deposit would be required, then Westland would have demanded that the Shamrock Entities met the additional reserve funding requirement prior to agreeing to assume the loan, that the terms of the purchase and/or loan assumption be amended, and/or other relief from the Shamrock Entities, Fannie Mae and/or Grandbridge, and without such relief, would not have entered into the two assumption agreements.

317. As such, to the extent that that a finding is made that the loan agreements would permit Grandbridge and Fannie Mae to demand additional reserve deposits, then the loan documents should be reformed consistent with the statements contained in the loan assumption letters and its attached reserve schedules due to irregularities in assumption process amounting to fraud, unfairness or oppression, and if not reformed, other appropriate equitable relief to rectify the inequities and unfairness of this situation, and if not, then rescinded altogether.

318. Based on the foregoing, Westland is entitled to reformation, other equitable relief, or rescission of the loan agreements consistent with Grandbridge's and Fannie Mae's statements that no additional reserve deposits were required for the loans.

319. As a further direct and proximate result of Fannie Mae's and/or Grandbridge's improper demands to adjust reserves and related actions, Westland has had to hire counsel to prosecute this matter and obtain reformation of the loan documents by reason of which it is entitled to reasonable attorney's fees.

WHEREFORE, Counterclaimants pray for judgment against Counterclaim-Defendant, as follows:

1. For declaratory relief acknowledging that no default has occurred and that Counterclaim-Defendant improperly sought a property condition assessment;
2. For injunctive relief, including without limitation, precluding any non-judicial foreclosure against either the Liberty Property or the Square Property;
3. For equitable relief as demanded herein;
4. For compensatory damages in excess of $15,000;
5. For punitive damages;
6. For prejudgment interest at the statutory rate;
7. For attorney's fees and costs of suit herein including as special damages for conversion; and
8. For such other relief as the Court deems appropriate.

Dated: August 31, 2020

LAW OFFICES OF JOHN BENEDICT

/s/ John Benedict
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Attorneys for Defendants/Counterclaimants/Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC

THIRD PARTY COMPLAINT

Defendants/Counterclaimants/Third Party Plaintiffs, Westland Liberty Village, LLC ("Liberty LLC") and Westland Village Square, LLC ("Square LLC" and in combination with Liberty LLC, "Counterclaimants" or "Westland"), through their attorneys of record, the Law Offices of John Benedict, for their Third Party Complaint against Grandbridge Real Estate Capital, LLC (formerly Cohen Financial, Suntrust Bank, and Truist Bank, but for ease of reference, regardless of the time period, it shall be referred to solely as "Grandbridge" or "Servicer")[12] hereby incorporate in full all allegations contained in Section I, Statement of Case, Section II, Parties, and Section III, Facts Common to all Causes of Action, as asserted above in the Counterclaim, and assert the following causes of action against Grandbridge as follows and maintaining the numbering from the Counterclaim for ease of reference:

V. CLAIMS FOR RELIEF

a. FIRST CAUSE OF ACTION (FOR BREACH OF CONTRACT – LIBERTY LOAN – BY WESTLAND LIBERTY VILLAGE, LLC)

320. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

321. A valid assumption agreement was entered into between Liberty LLC, on the one hand, and Fannie Mae and Grandbridge on the other hand, on August 29, 2018, specifically the Assumption and Release Agreement.

322. The assumption agreement utilized the general provisions of the Multifamily Loan and Security Agreement entered into between Liberty LLC's predecessor on the one hand, and Fannie Mae and Grandbridge on the other hand, to specify the terms that would govern the parties' practices for administration of the loan.

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[12] While the Servicer has had multiple name changes, including based on a merger with BB&T Bank, the employees "servicing" this loan have continuously remained the same regardless of the name of the entity.

323. Upon information and belief, Grandbridge assigned its interests in a portion of the Multifamily Loan and Security Agreement to Fannie Mae, but continued as Lender and Servicer on either the loan agreement or a portion of the agreements that were signed by Liberty LLC's predecessor, which obligations were assumed by Liberty LLC.

324. Separately, Grandbridge signed the closing statement, which conveyed its 1% loan assumption fee as "Lender."

325. Grandbridge signed the Liberty Loan agreements, and the assumption agreement with Westland, both on its own behalf and on behalf of Fannie Mae.

326. Liberty LLC has performed all of the duties and obligations required of it under the terms of the Loan Agreement with Fannie Mae, including timely making monthly periodic loan payment and paying the 1% loan assumption fee.

327. Liberty LLC has performed all of the duties and obligations required of it under the terms of the terms of the Loan Agreement with Grandbridge, including timely making monthly periodic loan payment and paying the 1% loan assumption fee.

328. To the extent that any duties or obligations required of Westland have not been performed, such duties or obligations have been excused because of Grandbridge's and Fannie Mae's non-performance of the Agreement.

329. Grandbridge has materially breached its agreement with Liberty LLC by failing to require adequate reserves at the time of the initial loan, requesting and performing an improper property condition assessment, utilizing that improper PCA to demand and adjustment to reserve deposits, failing to disburse funds in response to reserve disbursement requests, sending/filing improper notices, and generally violating the terms of the Multifamily Loan and Security Agreement to the point that the administration has become so one-sided that Liberty LLC had no option but to commence these proceedings.

330. That as a direct and proximate result of Grandbridge's breach of contract, Liberty LLC has been damaged in an amount in excess of $15,000.00, the exact amount of which will be determined at trial.

331. That it has been necessary for Liberty LLC to retain counsel to prosecute this action by reason of which it is entitled to reasonable attorney's fees.

b. SECOND CAUSE OF ACTION (BREACH OF CONTRACT – SQUARE LOAN – BY WESTLAND VILLAGE SQUARE, LLC)

332. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

333. A valid assumption agreement was entered into between Square LLC, on the one hand, and Fannie Mae and Grandbridge on the other hand, on August 29, 2018, specifically the Assumption and Release Agreement.

334. The assumption agreement utilized the general provisions of the Multifamily Loan and Security Agreement entered into between Liberty Square LLC's predecessor on the one hand, and Fannie Mae and Grandbridge on the other hand, to specify the terms that would govern the parties' practices for administration of the loan.

335. Upon information and belief, Grandbridge assigned its interests in a portion of the Multifamily Loan and Security Agreement to Fannie Mae, but continued as Lender and Servicer on either the loan agreement or a portion of the agreements that were signed by Square LLC's predecessor, which obligations were assumed by Square LLC.

336. Separately, Grandbridge signed the closing statement, which conveyed its 1% loan assumption fee as "Lender."

337. Grandbridge signed the Square Loan agreements, and the assumption agreement with Westland, both on its own behalf and on behalf of Fannie Mae.

338. Square LLC has performed all of the duties and obligations required of it under the terms of the Loan Agreement with Fannie Mae, including timely making monthly periodic loan payment and paying the 1% loan assumption fee.

339. Square LLC has performed all of the duties and obligations required of it under the terms of the terms of the Loan Agreement with Grandbridge, including timely making monthly periodic loan payment and paying the 1% loan assumption fee.

340. To the extent that any duties or obligations required of Westland have not been performed, such duties or obligations have been excused because of Grandbridge's and Fannie Mae's non-performance of the Agreement.

341. Grandbridge has materially breached its agreement with Square LLC by failing to require adequate reserves at the time of the initial loan, requesting and performing an improper property condition assessment, utilizing that improper PCA to demand and adjustment to reserve deposits, failing to disburse funds in response to reserve disbursement requests, sending/filing improper notices, and generally violating the terms of the Multifamily Loan and Security Agreement to the point that the administration has become so one-sided that Square LLC had no option but to commence these proceedings.

342. That as a direct and proximate result of Grandbridge's breach of contract, Square LLC has been damaged in an amount in excess of $15,000.00, the exact amount of which will be determined at trial.

343. That it has been necessary for Square LLC to retain counsel to prosecute this action by reason of which it is entitled to reasonable attorney's fees.

c. THIRD CAUSE OF ACTION (BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING – BY BOTH THIRD PARTY PLAINTIFFS)

344. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

345. A valid and binding agreement was formed between Westland and Fannie Mae/Grandbridge on each of the two separate sets of loan agreements.

346. Westland's agreements utilized the general provisions of the underlying loan agreement entered into between Westland's predecessor and Fannie Mae/Grandbridge to specify the terms that would govern the parties' practices for administration of the loan.

347. In every contract, including the loans between Westland and Fannie Mae/Grandbridge, there exists in law an implied covenant of good faith and fair dealing.

348. Both prior to the loan assumption and after, Westland acted in good faith by paying Fannie Mae/Grandbridge a 1% loan assumption fee under each agreement, providing Fannie

Mae/Grandbridge access to both the Liberty Property and the Square Property, paying for substantial improvements at each of the Properties, improving the condition of each of the Properties and their tenant base, providing confidential business documents to Fannie Mae/Grandbridge, and continuously paying Westland's full loan payments on a timely basis even after Fannie Mae/Grandbridge suspended the automatic ACH payments the parties had used without prior notice.

349. Grandbridge wrongfully and deliberately took advantage of Westland's good faith actions, by, *inter alia*, failing to perform all conditions, covenants and promises required under the Loan Agreements, including without limitation, altering the standard that they would apply to a property condition assessment undertaken in July 2019 from the standard used at the time the loan was assumed, telling Westland that they would cover the cost of the July 2019 property condition assessments but then refusing to discuss the purported default unless Westland paid those costs, making a demand that Westland deposit an additional $2,706,150.00 into escrow despite that the condition of its Properties had improved not deteriorated since the assumption agreement was signed, and by each of these actions Grandbridge and Fannie Mae thereby breached the implied covenant of good faith and fair dealing inherent in the subject agreement.

350. Grandbridge's actions were taken both on its own behalf as a Lender and/or Servicer.

351. Wherefore Grandbridge did not act in good faith, that is, did not perform its contract with each Third Party Plaintiff in the manner reasonably contemplated by the parties, so that each Third Party Plaintiff has a remedy that goes beyond that of breach of the express terms of their contract.

352. Grandbridge's actions, misrepresentations, deception, concealment, and breach of the covenant of good faith and fair dealing were done intentionally with malice for the specific purpose of causing injury to Liberty LLC and Square LLC.

353. As a direct and proximate result of Grandbridge's breach, each Third Party Plaintiff has suffered damages in excess of $15,000.00, the exact amount of which will be proven at trial.

354. As a further direct and proximate result of Grandbridge's breach, each Third Party Plaintiff has had to hire counsel to prosecute this matter by reason of which it is entitled to reasonable attorney's fees.

d. FOURTH CAUSE OF ACTION (DECLARATORY RELIEF)

355. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

356. A genuine justiciable controversy exists relevant to the rights and obligations herein regarding Westland's obligations under each of the Loan Agreements, and whether Grandbridge may demand that Westland deposit additional funds into reserve accounts.

357. The interests of Third Party Plaintiffs, on the one hand, and Grandbridge on the other are adverse.

358. Specifically, the present dispute that resulted in a Notice of Default and Election to Sell being sent by Fannie Mae is a dispute over the parties' interpretation of Article 13.02 of the Loan Agreement related to adjustments to reserve funding and the related reserve administration requirements, as well as Article 6.03 related to the conditions when property condition assessments may be utilized.

359. Westland has a legally protectable interest in the two Properties.

360. These issues are ripe for judicial determination, because on or about October 18, 2019, Grandbridge served a Notice of Demand, both as Servicer/Lender, and/or on behalf of Fannie Mae.

361. These issues are ripe for judicial determination, because on or about July 15, 2020, Fannie Mae served Westland with a Notice of Default and Intent to Sell Westland's Properties.

362. These issues are ripe for judicial determination, because on or about August 12, 2020, Fannie Mae filed a complaint seeking the appointment of a receiver to ouster Westland from its Properties.

363. Westland seeks an order from this Court declaring that Article 13.02 and Article 6.03 are only implicated if the condition of the Properties has physically deteriorated, or impaired

the value of Fannie Mae's and Grandbridge's security, and that no additional reserve deposit is needed.

364. Westland seeks an order from this Court declaring that Fannie Mae and/or Grandbridge breached the terms of the two Loan Agreements by demanding a property condition assessment, demanding the adjustment of reserve deposits without any proper basis, and filing a NOD.

365. That it has been necessary for Westland to retain the services of legal counsel for which Westland is entitled to recover such costs and expenses from Grandbridge.

e. FIFTH CAUSE OF ACTION (FRAUD IN THE INDUCEMENT)

366. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

367. That Westland entered into its Loan Agreement relying on Fannie Mae and Grandbridge continuing to utilize the same standard for evaluating the condition of the Properties that had been used at the origination of the Loan Agreements during late 2017, and at the time of the loan assumption during the summer of 2018.

368. When Grandbridge forwarded documents regarding the loan assumption and loan agreements to Westland, it did so not only on its own behalf, but also on behalf of Fannie Mae, who advised Grandbridge to forward those documents to Westland with the intent that Westland would be provided the loan assumption, loan agreements, and reserve schedules, and that Westland would rely on those documents.

369. By letter dated August 20, 2018, Grandbridge represented on behalf of itself and Fannie Mae to Liberty LLC that, "after a thorough review and analysis of the Proposed Borrower's [Liberty LLC's] financial and managerial capacity, the Assumption has been approved on the following terms: . . . No change to the Replacement Reserve monthly deposit or established schedule identified on Exhibit B attached hereto; No Change to the Required Repair Reserve of $39,375.00 as identified in schedule on Exhibit C attached hereto . . ." (Exhibit J.) Further, Exhibit C, Required Reserve Schedule, listed all items as completed, except for a $9,375.00 holdback for

"Misc. Concrete and Fence Repairs. Sports Court Resurfacing" that was shown as having already been fully funded. (Exhibit J, at 7.)

370. Further, by letter dated August 20, 2018, Grandbridge represented on behalf of itself and Fannie Mae to Square LLC that, "after a thorough review and analysis of the Proposed Borrower's [Square LLC's] financial and managerial capacity, the Assumption has been approved on the following terms: . . . No change to the Replacement Reserve monthly deposit or established schedule identified on Exhibit B attached hereto . . ." (Exhibit K.) Further, Exhibit C, Required Repair Reserve Schedule, simply stated "N/A" indicating that no repair reserve was required for that loan. (Exhibit K, at 7.)

371. Grandbridge knew that Westland relied upon the amounts and types of conditions requiring reserve deposits when entering into the Loan Agreements.

372. Grandbridge did not inform Westland that they planned to seek additional reserves in order to induce Westland to consent to the Loan Agreements, to collect the loan assumption fee from Westland, for Grandbridge to improve its own liquidity position with Fannie Mae, to improve the creditworthiness of Fannie Mae's loan portfolio, to attempt to improperly generate additional fees and costs, and to improperly profit off of holding Westland's funds in a non-interest bearing escrow account.

373. That Fannie Mae does credit reviews and monitoring of Grandbridge's lending practices, and upon information and belief, that Fannie Mae determined that Grandbridge failed to follow Fannie Mae's credit and underwriting criteria for loans in underwriting the November 2017 loan.

374. Upon information and belief, that Fannie Mae required that Grandbridge obtain additional security due to its poor underwriting, and thus Grandbridge had no intent to service the Loan Agreements consistent with the documentation that was provided at the time of the August 2018 loan assumption.

375. That had Westland known that Fannie Mae and Grandbridge would require an additional deposit of over $2.7 million of additional reserve funding based on a loan balance of approximately $38.6 million, which amounts to approximately 7% of the loan amount, for a loan

with a seven year term, Counterclaimants would not have entered into the assumption agreement and would have obtained alternative financing.

376. Westland reasonably relied upon the types of expenses contained in the repair and replacement escrow accounts schedules, because Westland has entered into numerous loan agreements previously, but on those loan agreements, the lender never requested any significant adjusted reserve deposits.

377. Westland relied on Fannie Mae's material misstatements and omissions by paying a 1% loan assumption fee, providing Fannie Mae access to the Property, paying for substantial improvements at the Property, improving the condition of the Property and its tenant base, providing Fannie Mae confidential business documents, and continuously paying loan payments.

378. As a result of Grandbridge's misrepresentations, Westland was induced to enter into the assumption agreement with Fannie Mae as lender and Grandbridge as servicer, which has damaged Westland.

379. As a direct and proximate result of Grandbridge's misstatements and omissions, Westland has suffered damages in excess of $15,000.00, the exact amount of which will be proven at trial, because, *inter alia,* this is the only default that Westland has ever suffered, it will impair Westland's credit rating leading to long term higher borrowing costs, and it has impaired Westland's ability to re-finance its Properties at a time when interest rates are at an all-time low.

380. By reason of the foregoing, Grandbridge acted with oppression, fraud and malice, and therefore, Westland is entitled to exemplary and punitive damages.

f. SIXTH CAUSE OF ACTION (NEGLIGENT MISREPRESENTATION AND CONCEALMENT)

381. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

382. Grandbridge supplied information and made material misrepresentations to Westland, including without limitation, as detailed above that adequate reserve amounts had already been submitted, consistent with the schedules attached to the loan assumption letters and documentation.

383. By letter dated August 20, 2018, Grandbridge represented on behalf of itself and Fannie Mae to Westland that, it conducted "a thorough review and analysis of the Proposed Borrower's financial and managerial capacity" before approving the assumption.

384. Upon information and belief, Grandbridge negligently misrepresented that it conducted an adequate review when setting the reserve amounts in August 2018, prior to Westland signing the loan assumption, because a short one (1) year later, it requested an additional $2.7 million be placed into escrow with no deterioration of the Properties.

385. The information and representations made by Grandbridge was false, in that unbeknownst to Westland they knew the loan did not have sufficient security, and that there was a substantial likelihood they would attempt to seek additional reserves.

386. Grandbridge supplied the information and made the representations to induce Westland to rely upon it, to act or refrain from acting in reliance upon it, and to have Westland enter into the assumption agreement.

387. Grandbridge owed Westland a duty not to make material misrepresentations.

388. Westland justifiably relied upon the information Grandbridge provided.

389. As a direct and proximate result of Grandbridge's misstatements and omissions, Westland has suffered damages in excess of $15,000.00, the exact amount of which will be proven at trial, because, *inter alia*, this is the only default that Westland has ever suffered and it will impair Westland's credit rating and leading to long term higher borrowing costs, and it has impaired Westland's ability to re-finance its Properties at a time when interest rates are at an all-time low.

g. SEVENTH CAUSE OF ACTION (INTENTIONAL INTERFERENCE WITH CONTRACT)

390. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

391. To the extent that Grandbridge is not found to be a party to the assumption agreements and/or the loan agreements, this cause of action is pleaded in the alternative against it by both Third Party Plaintiffs.

392. Based on Westland's financial disclosures at the time of the loan assumption, Grandbridge knew Westland Real Estate Group is a privately held real estate company with a sizable portfolio of properties, and approximately $800 million in loans outstanding.

393. Each of the loans underlying that are part of that $800 million loan portfolio is a written contractual agreement. Upon information and belief, Grandbridge knows these contracts and lending arrangements exist.

394. Further, Grandbridge knew that $300 million of Westland's loans are outstanding with Fannie Mae, and that it is economically advantageous for Westland to have access to lender funds in other to refinance its properties.

395. Grandbridge committed intentional acts intended or designed to disrupt the contractual loan agreements that Westland has with Fannie Mae, and Westland's ability to refinance those loan agreements with Fannie Mae.

396. Grandbridge knew that by manufacturing the purported default, Fannie Mae would blacklist Westland, by placing a "lending hold" on any Westland loan, which would have the effect of limiting, delaying, and/or disrupting Westland's ability to refinance a loan with Fannie Mae.

397. Grandbridge manufactured the Default in an attempt to put financial pressure on Westland, despite that it knew it would cause disruption to Westland's business, and preclude it from obtaining favorable rates from one of only two primary lenders in the multifamily housing loan market, and upon information and belief, Grandbridge intended to cause harm to the contractual relationship between Westland and Fannie Mae.

398. There was, and continues to be, actual disruption of the written loan agreements that Westland has with Fannie Mae, as Grandbridge's actions have in fact resulted in Westland being placed on Fannie Mae's blacklist, which has caused Westland harm.

399. As a direct and proximate result of Fannie Mae's breach, Westland has suffered damages in excess of $15,000.00, the exact amount of which will be proven at trial.

400. By reason of the foregoing, Grandbridge acted with oppression, fraud and malice, and therefore, Westland is entitled to exemplary and punitive damages in excess of $15,000.

h. EIGHTH CAUSE OF ACTION (CONVERSION)

401. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

402. Westland has submitted several prior reserve reimbursement requests that went unanswered by Grandbridge, including before its November 2019 demand for additional reserve funding.

403. Westland and its predecessor submitted funds related to two fire insurance claims to Grandbridge, which earmarked funds were to be held in escrow until the two fire-damaged building were rebuilt.

404. The fire-damaged buildings were completely rebuilt with Westland's funds.

405. Westland has submitted reserve disbursement requests for the release of those funds, and other reserve disbursement requests for work that was completed, each of which was accompanied by invoices, proof of payment, and documentation showing approval of all required permits, but Grandbridge has failed to respond to those requests.

406. As such, Grandbridge has wrongfully exerted dominion over Westland's personal property, including, without limitation, the funds that Grandbridge is holding in reserve accounts, that were earmarked for reconstruction of two fire damaged buildings at the Liberty Property, and Grandbridge has thereby wrongly converted the funds to their own use and benefit.

407. Grandbridge's continued dominion over Westland's personal property was unauthorized and inconsistent with Westland's property rights.

408. Grandbridge's dominion over Westland's personal property deprived Westland of all of their property rights relating thereto.

409. Grandbridge's acts constitute conversion.

410. As a direct and proximate result of Grandbridge's conversion, Westland has suffered damages in excess of $15,000.00, the exact amount of which will be proven at trial.

411. Further, due to the wanton, malicious, and intentional conduct of Grandbridge, Westland is entitled to an award of exemplary and punitive damages against Grandbridge.

412. Grandview knew that by refusing to return the converted proceeds after just demand, Borrowers would have to hire counsel to have those funds returned. Thus, it was foreseeable that Borrowers would incur attorney's fees as special damages. Borrowers have incurred these fees and request same as part of their special damages for conversion.

i. NINTH CAUSE OF ACTION (INJUNCTIVE RELIEF)

413. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

414. On or about July 15, 2020, two NODs that were filed against the Liberty Property and the Square Property and served on Westland.

415. Upon information and belief, in Nevada, the typical period for a foreclosure sale to occur after a borrower receives a NOD is 120 days.

416. As Westland has made all debt service payments, and complied with the terms of the Loan Agreements, the Properties rightfully belong to Westland.

417. Fannie Mae and Grandbridge are attempting to utilize Nevada's non-judicial foreclosure process to improperly seize and sell Westland's Liberty Property and Square Property.

418. Real property is a unique asset, and on that basis, in the event that a wrongful foreclosure sale occurs, Westland will suffer extreme hardship and actual and impending irreparable loss and damage.

419. Westland has no adequate or speedy remedy at law to prevent the sale of the Properties, and injunctive relief is therefore Westland's only means for securing relief.

420. Westland is likely to succeed in this lawsuit on the merits of its claims.

421. Based on the foregoing, Westland is entitled to temporary restraining orders and preliminary and permanent injunctive relief to preserve the status quo, to mitigate its damages, and to prevent further irreparable injury to Westland, including, without limitation by: (a) enjoining Fannie Mae and/or Grandbridge from any further attempts to foreclose on the Properties related to their baseless requests to adjust the reserve deposits, and (b) enjoining Fannie Mae and/or Grandbridge from any further attempts to coerce Westland into providing additional reserves or to pay for the expenses related to the default that Grandbridge manufactured.

422. As a further direct and proximate result of Fannie Mae's and/or Grandbridge's improper demands to adjust reserves, their filing of the NOD, and the filing of their Complaint seeking appointment of a receiver, Westland has had to hire counsel to prosecute this matter by reason of which it is entitled to reasonable attorney's fees.

j. TENTH CAUSE OF ACTION (EQUITABLE RELIEF/RESCISSION/ REFORMATION)

423. Third Party Plaintiffs repeat, reallege, and incorporate the allegations set forth in the preceding paragraphs, including in the Counterclaim above, as if fully set forth herein.

424. On or about August 29, 2018, Westland entered into two assumption agreements for the loans applicable to the Liberty Property and the Square Property.

425. Prior to signing the assumption, Grandbridge individually, and on behalf of Fannie Mae, forwarded Westland a loan assumption agreement letter, which contained the terms under which it would permit Westland's assumption of the Liberty Loan and Square Loan.

426. By letter dated August 20, 2018, Grandbridge represented on behalf of itself and Fannie Mae to Liberty LLC that, "after a thorough review and analysis of the Proposed Borrower's [Liberty LLC's] financial and managerial capacity, the Assumption has been approved on the following terms: . . . No change to the Replacement Reserve monthly deposit or established schedule identified on Exhibit B attached hereto; No Change to the Required Repair Reserve of $39,375.00 as identified in schedule on Exhibit C attached hereto . . ." (Exhibit J.) Further, Exhibit C, Required Reserve Schedule, listed all items as completed, except for a $9,375.00 holdback for "Misc. Concrete and Fence Repairs. Sports Court Resurfacing" that was shown as having already been fully funded. (Exhibit J, at 7.)

427. By letter dated August 20, 2018, Grandbridge represented on behalf of itself and Fannie Mae to Square LLC that, "after a thorough review and analysis of the Proposed Borrower's [Square LLC's] financial and managerial capacity, the Assumption has been approved on the following terms: . . . No change to the Replacement Reserve monthly deposit or established schedule identified on Exhibit B attached hereto . . ." (Exhibit K.) Further, Exhibit C, Required

Repair Reserve Schedule, simply stated "N/A" indicating that no repair reserve was required for that loan. (Exhibit K, at 7.)

428. When the loan assumption agreements were signed, the above-referenced Required Repair Reserve Schedule and Required Replacement Reserve Schedule, for each Property, were specifically included as part of the assumption agreement.

429. The statements made by Grandbridge, on behalf of itself and on behalf of Fannie Mae, were either false or amounted to a mutual mistake by both parties, because Grandbridge and Fannie Mae later attempted to obtain additional reserve payments in excess of the schedules that were provided to Westland, and those requests for additional reserve deposits included requests to deposit $2.7 million of funds related to physical conditions that were not of the same type or category as the expenses included in the schedules.

430. In making those statements, Fannie Mae and Grandbridge knew that Westland would rely upon the amounts and types of conditions requiring reserve deposits when entering into the Loan Agreements, and intended for Westland to do so, to ensure that the loans would close.

431. Westland did rely on the amounts and types of conditions requiring reserve deposits that were listed in the schedules attached to the loan assumption letters, and as such Westland justifiably relied upon the information Grandbridge and Fannie Mae provided.

432. If Grandbridge or Fannie Mae would have had f3 or another inspection company perform a PCA as thorough and with the same criteria before the assumption as it did a year later, and told Westland that an additional reserve deposit would be required, then Westland would have demanded that the Shamrock Entities met the additional reserve funding requirement prior to agreeing to assume the loan, that the terms of the purchase and/or loan assumption be amended, and/or other relief from the Shamrock Entities, Fannie Mae and/or Grandbridge, and without such relief, would not have entered into the two assumption agreements.

433. As such, to the extent that that a finding is made that the loan agreements would permit Grandbridge and Fannie Mae to demand additional reserve deposits, then the loan documents should be reformed consistent with the statements contained in the loan assumption letters and its attached reserve schedules due to irregularities in assumption process amounting to

fraud, unfairness or oppression, and if not reformed, other appropriate equitable relief to rectify the inequities and unfairness of this situation, and if not, then rescinded altogether.

434. Based on the foregoing, Westland is entitled to reformation, other equitable relief, or rescission of the loan agreements consistent with Grandbridge's and Fannie Mae's statements that no additional reserve deposits were required for the loans.

435. As a further direct and proximate result of Fannie Mae's and/or Grandbridge's improper demands to adjust reserves and related actions, Westland has had to hire counsel to prosecute this matter and obtain reformation of the loan documents by reason of which it is entitled to reasonable attorney's fees.

WHEREFORE, Third Party Plaintiffs pray for judgment against Third Party Defendant, as follows:

1. For declaratory relief acknowledging that no default has occurred and that Third Party Defendant improperly sought a property condition assessment;
2. For injunctive relief, including without limitation, precluding any non-judicial foreclosure against either the Liberty Property or the Square Property;
3. For equitable relief as demanded herein;
4. For compensatory damages in excess of $15,000;
5. For punitive damages;
6. For prejudgment interest at the statutory rate;
7. For attorney's fees and costs of suit, including as special damages for conversion; and
8. For such other relief as the Court deems appropriate.

Dated: August 31, 2020

LAW OFFICES OF JOHN BENEDICT

/s/ *John Benedict*

John Benedict (NV Bar No. 5581)
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Las Vegas, NV 89123
Telephone: (702) 333-3770
Attorneys for Defendants/Counterclaimants/Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August 2020, I served a true and correct copy of the foregoing **ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIM AND THIRD PARTY COMPLAINT** via electronic service through Odyssey to the following:

Nathan G. Kanute, Esq. and/or David L. Edelblute, Esq.
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Attorneys for Plaintiff

/s/ Igor Makarov
An Employee of the Law Offices of John Benedict

EXHS

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Attorneys for Defendants/Counterclaimants/ Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC

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.

CASE NO. A-20-819412-C

DEPT NO. 4

DEFENDANTS'/ COUNTERCLAIMANTS'/THIRD PARTY PLAINTIFFS' EXHIBITS A THROUGH T FILED IN SUPPORT OF ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIM AND THIRD PARTY COMPLAINT; AND IN SUPPORT OF OPPOSITION TO PLAINTIFF'S APPLICATION FOR APPOINTMENT OF RECEIVER ON ORDER SHORTENING TIME; AND IN SUPPORT OF COUNTERMOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Hearing Date: September 22, 2020
Hearing Time: 9:00 a.m.

WESTLAND LIBERTY VILLAGE, LLC, a Nevada Limited Liability Company; and WESTLAND VILLAGE SQUARE, LLC, a Nevada Limited Liability Company

Counterclaimants,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, a federally-charted corporation,

Counter-Defendant.

WESTLAND LIBERTY VILLAGE, LLC, a Nevada Limited Liability Company; and WESTLAND VILLAGE SQUARE, LLC, a Nevada Limited Liability Company

Third Party Plaintiffs,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, a federally-charted corporation,

Counter-Defendant.

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G	Purchase and Sale Agreement for Village Square Apartments, dated June 22, 2018	Westland 000353-Westland 000414
H	Assumption Closing Statement for Liberty Village Apartments, dated August 29, 2018	Westland 000415-Westland 000416
I	Assumption Closing Statement for Village Square Apartments, dated August 29, 2018	Westland 000417-Westland 000418
J	Assumption Approval Letter for Liberty Village Apartments, dated August 20, 2018	Westland 000419-Westland 000427
K	Assumption Approval Letter for Village Square Apartments, dated August 22, 2018	Westland 000428-Westland 000436
L	Letter of Nevada State Apartment Association Executive Director, dated November 22, 2019	Westland 000437
M	Letter of County Commissioner, dated August 20, 2020	Westland 000438
N	Westland Strategic Improvement Plan for Liberty Village and Village Square, dated November 27, 2019	Westland 000439-Westland 000760
O	Property Site Map	Westland 000761
P	Purchase and Sale Agreement for 3435 N. Nellis Blvd., Las Vegas, dated July 8, 2019	Westland 000762-Westland 000809
Q	Letter of John Hofsaess, dated November 13, 2019	Westland 000810-Westland 000814
R	Letter of John Hofsaess, dated December 23, 2019	Westland 000815-Westland 000817
S	Letter of John Hofsaess, dated January 6, 2020	Westland 000818-Westland 000819
T	Lender's counsel's Non-Waiver Letters, dated February 19, 2020	Westland 000820-Westland 000835

Dated this 1st day of September 2020

Respectfully submitted,

LAW OFFICES OF JOHN BENEDICT

By:__/s/ John Benedict_____
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Attorneys for Defendants/Counterclaimants/ Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2020, a copy of the foregoing **DEFENDANTS'/ COUNTERCLAIMANTS'/THIRD PARTY PLAINTIFFS' EXHIBITS A THROUGH T FILED IN SUPPORT OF ANSWER TO PLAINTIFF'S COMPLAINT, COUNTERCLAIM AND THIRD PARTY COMPLAINT; AND IN SUPPORT OF OPPOSITION TO PLAINTIFF'S APPLICATION FOR APPOINTMENT OF RECEIVER ON ORDER SHORTENING TIME; AND IN SUPPORT OF COUNTERMOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION** and the Exhibits were served on the parties listed below via electronic service through Odyssey to the following:

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E-mail: nkanute@swlaw.com; dedelblute@swlaw.com
Attorneys for Plaintiff

___/s/ Igor Makarov_____
An Employee of the Law Offices of John Benedict

EXHIBIT “N”

Westland Strategic Improvement Plan for Liberty Village and Village Square, dated November 27, 2019

Westland 000439 – Westland 000760

EXHIBIT “N”

Westland Strategic Improvement Plan for Liberty Village & Village Square

On August 29, 2019, upon the purchase of 4870 Nellis Oasis Lane, Las Vegas, NV 89115 ("Liberty Village Apartment Homes") and 5025 Nellis Oasis Lane, Las Vegas, NV 89115 ("Village Square Apartment Homes" or in combination the "Properties") it was determined that the condition of the Properties was unstable and the Properties were poorly managed. This Strategic Improvement Plan (the "Plan") lays a framework for attaining the goals of improving the onsite conditions at the communities and profitability of the Properties. This Plan establishes a framework for effective management at the Properties with targeted strategic improvements, and a documented focus for the substantial influx of financial capital and hands-on work.

INITIAL ASSESSMENT & EXECUTIVE SUMMARY

To develop this Plan, due to limitations imposed in the due diligence process, the Properties were subject to an initial assessment during an evaluation period after the purchase of the Properties. The assessment included:

- an evaluation of the onsite conditions;
- data gathering to assess the true financial condition and level of delinquencies at the Properties;
- a marketing assessment to better target a viable resident base;
- a human resource evaluation to develop a staff required to properly manage the properties; and
- an assessment of electronic, equipment and documentary resources.

Based on the needs derived from the initial assessment, it was determined that Westland would need to engage in a multi-stage plan. Phase One involved a test period for gathering and analyzing data, deploying new staff to the property, and removal of hazardous conditions in need of abatement at the property. Phase Two is to implement stabilizing processes, make wide-scale physical improvements of areas at the property in need of imminent improvements, upgrade electronic resources and equipment to allow for effective management, and execute an initial marketing plan to increase occupancy at the Properties with a viable resident base. Phase Three is to maximize profitability once the property is fully stabilized through targeted unit upgrades and cooperative agreements with local businesses.

MISSION STATEMENT

Westland provides spaces where people can reach their true potential by providing quality residential services and seeking to make a positive impact on each community we serve.

SWOT ANALYSIS

Strengths	**Weaknesses**
● Large floorplans compared to the market ● Down units expected to return online have more desirable unit floor plans ● Laundry hookups available in some floorplans ● Large open green spaces ● Existing onsite amenities are richer than competition ● Space in old leasing office can be converted into a new amenity ● High concentration of 3 bedroom units (a draw for families)	● Inaccurate historical data for property before acquisition ● Current demographics of tenant base is not strong ● High current concentration of studio and one bedroom units that are leased ● High vacancy ● Need to overcome property's long-standing poor reputation
Opportunities	**Threats**
● Low expected inventory in the local sub-market ● Growing Las Vegas residential market ● Nellis Air Force Base expansion ● Able to remove draw of adjacent property to negative elements ● Technological improvements for lease payments and vendor portal not utilized ● Rapidly increasing rent rates & historically low loan rates ● Limited taxation and employment regulations	● Current market pricing is low ● High crime potential area ● Changing political climate in Nevada favoring greater tenant protections, and increased hurdles for evictions ● Changing customer expectations for repair times not aligned with short-term maintenance needs ● High employee turnover rates in Las Vegas market

GOALS/KEY PERFORMANCE INDICATORS

- Obtain rental occupancy of 94% within 5 years, and 87% within 1 year
- Increase renewals about 50%
- Reduce, or maintain, evictions at their current level (10 or less/month; under 10%)
- Increase online reputation ratings to at least 3.5 out of 5.0
- Decrease annual apartment turnover to under 35%
- Restore all vacant units by the end of 2020
- Revitalize athletic and recreational amenities during Q1 & Q2 2020

TARGET CUSTOMERS

While the Properties have unit sizes and styles that are suitable for a broad range of potential residents, consistent with the above SWOT analysis, the additional units coming online are larger floorplans. The natural target market for such units are families with income in the $25,000 to $65,000 range.

Two local employment segments have high concentrations of potential residents who meet the target criteria: Nellis Air Force Base and nearby warehouse facilities. Short-term specialty concessions have been offered to employees of the local warehouse facilities, and will be provided to Air Force base housing in order to capitalize on those markets.

Onsite several changes in amenities can be made to increase the appeal of the Properties to those target markets. First, renovation of onsite amenities can focus on recreational opportunities that add value and appeal to families. Specifically, the current tennis court renovation project will convert the amenity to a splash pad, soccer field and playground, and the old leasing office can be converted into an onsite gym. Finally, the prior fire damaged units can be reconstructed with increased size floor plans and in unit laundry capabilities, which are critical selling point to families, result in an increased rental rate, and decrease unit turnover.

COMPETITIVE ANALYSIS & OPERATIONS PLAN

Phase One

The initial step taken at the property was a thorough evaluation of the onsite staff. Prior to acquisition all members of the staff were interviewed. Prior management had employed approximately 20 staff members onsite. However, Westland was only able to retain 2 employees, based on numerous staff members lacking proper qualifications and others having engaged in past ethical breaches, and at the present time not one of those individuals remains with Westland. Ultimately, Westland determined that the optimal number of employees needed to efficiently operate the Properties was 32 staff members. By the end of Q2 2019, Westland had the property fully staffed and properly trained.

Second, prior to acquisition, the Properties were cited as in need of abatement of a dangerous condition. The notice of abatement required the owner of the Properties to take action to decrease the rate of crime onsite, as local law enforcement deemed the level of crime at the Properties a dangerous condition. A portion of the physical improvements required by the notice of abatement had been performed by the date of the change in ownership, but the "improvements" nearly immediately failed as a result of substandard work, and the rate of criminal activity at the Properties remained unchanged. As such, during the initial phase, four actions were taken to displace the criminal element from the Properties and create a safe environment. Those actions were: 1) repairing and replacing the defective security measures, 2) working cooperative with law enforcement to increase the police presence onsite and restore the onsite "shotspotter" gunshot detection system, 3) evict tenants when cited for criminal violations, and 4) hiring a new onsite security vendor. By the end of Q2 2019, the actions had successfully reduced criminal activity onsite, and the notice of abatement was rescinded.

Finally, throughout due diligence, the seller of the Properties imposed numerous restrictions on inspections and data gathering. Upon the purchase of the property through the end of the fourth quarter of 2018, Westland engaged in extensive data gathering and analysis, which revealed the true condition of the property.

For instance, based on the data received from Seller, the property was allegedly 86% occupied at the time of purchase. However, upon assuming management of the Properties, we found that to be untrue. Specifically, those "occupied" units included numerous tenants, amounting to approximately 8.3% of the residents onsite, who had been served with a five-day notice to pay rent or quit, remained non-compliant for several months, and who had no legal action taken against them. Those tenants should have been evicted prior to acquisition, but were not. Similarly, none of the tenants appear to have been submitted to appropriately rigorous background checks[1], because an enormous percentage of the tenants that moved into the property within a year prior to Westland's acquisition defaulted on their rental obligations and had to be evicted, primarily for the non-payment of rent. Specifically, since the purchase, Westland had to evict 32% of the occupied units, or a total of 311 tenants, who were individuals that moved into the Properties from August 29, 2017 to August 29, 2018. Those tenant evictions resulted in a 27.5% decrease in occupancy at the Properties, and stressed the need for more stringent rental criteria. Ultimately, in large part due to those evictions, the Properties reached its lowest level of occupancy, with only 44% of the units occupied, in July 2019.

Phase Two

By August of 2019, the rate of crime at the Properties had been reduced and defaults resulting in evictions had slowed to a level consistent with other well managed properties.

[1] Westland substituted the best in class rental criteria that it utilizes at other properties. The criteria requires that the applicant meet not only defined credit based scores, but also requires a verifiable residential history, verifiable employment or source(s) of income, lack of criminal history that would be detrimental to the community (positive results are subject to individual review), and a lack of evictions. These criteria attract more stable tenants, and result in lower turnover, lower eviction rates, and lower rates of crime.

At that point, we were able to refocus our management efforts on our Phase Two goal of stabilizing the Properties and increasing its occupancy with the quality tenants that were reluctant to relocate to the Properties during Phase One. During Q1 of 2019, Westland had already began to shift personnel from other Westland communities who were part of our leasing and maintenance turn teams, in an effort to jump start an increase in occupancy and rehabilitation of vacant units. To date, utilizing our own employees from other sites has resulted, and is expected to continue to result in, a reduction of the normally high Las Vegas employee turnover rate, which is necessary to create a further environment of stability at the Properties. By August 2019, those efforts resulted in a steady increase in the number of rent ready units, and the number of those units that were re-let.

Specifically, the Properties' number of rent ready units and occupancy have increased by approximately 2% each month (slightly over 20 units), and has pushed towards increasing by 3% monthly (to over 30 units, or more than an additional net unit per day). Essentially, we have increased the number of rent ready units and quality move-ins, which has reduced the number of evictions and move outs, and resulted in the following occupancy trend:

45% in August
47% in September
49% in October and
Estimated to be at 52% by the end of November

Notably, the strong November increases are being made at a time of year when new leasing traditionally slows. As such, we estimate that we are on track to move in 40+ new Residents monthly by Q1 2020. In order to accomplish that estimate, we will be turning 10-12 units per week, depending on the severity of damage in the vacant unit. However, as can be seen by recent results, our trained leasing agents and professional turn team are working diligently to ensure those results.

The occupancy trend is perhaps most clearly seen by examining the numbers from November 2019. Currently, we have an inventory of 59 units ready for move in, after already moving in 62 new residents during November 2019, and having another 3 applicants who are confirmed for move in before the end of November 2019. For this month, we currently have only 8 residents on eviction status. These numbers support our expected 52% occupancy rate by the end of November. Additionally we have 46 pending applications in various stages of the approval process.

Thereafter, we expect that increases of at least 3% additional occupancy each month are sustainable throughout the remainder of Phase Two by continuing to utilize our internal marketing plan (some of which is incorporated in this document), which is attached as Appendix A. Specifically, that plan includes additional customer outreach via follow-up calls after maintenance requests, and during the 90-120 day period after beginning residency is a key method of gauging customer satisfaction. Importantly, based on the limited supply of available units of similar size and quality, Westland expects to be able

to continue the projected occupancy rate increases while also simultaneously implementing a pricing increase.

In relation to onsite costs associated with vacancies, based on our experience in actually restoring units, Westland has determined that the recent Property Condition Assessment ("PCA") commissioned by Lender is inflated. The costs are known to be inflated because the identified repair costs for vacant units contained estimated amounts that are much higher than the amount Westland actually pays for specific items that have fixed prices based on pricing agreements with pre-approved vendors.

The costs related to many of the individual units listed in the PCA are addressed within the attached report (Appendix B), in which Westland addresses the actual pricing it has secured related to the PCA commissioned by Lender. Importantly, there are a substantial number of the units where repairs are stated to be required in the PCA but have already been completed, and many of those units are already occupied. No individual budget has been provided related to those units. The number of units where such work was performed are:

	Completed	Occupied
Liberty Village	139	103
Village Square	43	33
Total	182	136

As such, for Appendix B, Westland prepared a sample of 164 budgets at Liberty Village and 142 at Village Square. Our area manager and property manager walked each of these units and filled out a budget form (attached) for each unit.

Of the Liberty Village sample, 145 units had budgets prepared by F3.

Sample size	Westland Prepared Budgets	F3 prepared budgets	Difference
145	$383,051.83	$542,065.00	$ 159,013.17
Average cost	$2,641.74	$3,738.38	42%

An additional 19 units had no F3 budgets associated.

Sample size	Westland Prepared Budgets
19	$42,719.06
Average cost	$2,248.37

Of the Village Square sample, 115 units had budgets prepared by F3.

Sample size	Westland Prepared Budgets	F3 prepared budgets	Difference
115	$173,761.00	$400,675.00	$226,914.00
Average cost	$1,510.97	$3,484.13	131%

An additional 27 units had no F3 budgets associated.

Sample size	Westland Prepared Budgets
27	$31,926.80
Average cost	$1,182.47

Further, the summary below reflects the difference between the PCA's estimated cost per unit and Westland's estimated cost per unit.

	F3 PCA	Westland Budget[2]	Difference ($)	Difference (%)
Liberty Village	$1,197,545.00	$911,399.18	$286,145.82	23.89%
Village Square	$711,215.00	$306,725.94	$404,489.06	56.87%
Total	$1,908,760.00	$1,218,125.12	$690,634.88	40.44%

Again, details on individual units that have already been reviewed by our maintenance turn team are addressed in Appendix B.

Aside from individual unit improvements, our recent capital expenditures have also increased tenant retention during Phase Two, based on wide-scale physical improvements to areas at the property in need of imminent improvements, upgrades to electronic resources and equipment to allow for effective management at the property. A summary of the capital expenditures that have already been made, that are in process, and that are on hold/planned for Q1 & Q2 2020, in relation to the Property Condition Assessment commissioned by the lender (including substantiating details showing the cost of work done or bid amounts) are shown below:

[2] The summary uses the average per unit cost multiplied by the number of Vacant/Down units outlined in the PCAs, and does not take into account the 182 units Westland has already been made rent ready.

	Liberty Village Required Repairs	Status	Estimated Completion	Notes	Amount
1	Sidewalks	Completed		Contract & pictures attached	$15,072.00
2	Stairways	Completed		Stairways Contract & pictures attached	$21,160.00
4	Roofs	Completed		Contract attached	$107,850.00
9	Moisture Management Plan #1017	Completed		Invoice attached	$4,800.00
12	Building Cladding (stucco)	Completed		Done in-house, pictures attached	
14	Sunken Areas	Completed		Contract attached.	$4,935.00
9 (a)	Moisture Management Plan #1063	Completed		Invoice attached	$5,500.00
9 (b)	Moisture Management Plan #1064	Completed		Invoice attached	$1,800.00
				Total paid for completed work	**$161,117.00**
3	Smoke and CO Detectors (Vacant Units)	In Progress	Q4 2020	Smoke Alarms & CO have been purchased & will be installed at turn. Invoices attached that include shared cost for Liberty & Village Square	$35,209.69
6	Laundry Facilities	In Progress			
8	Vacant and Down Apartments	In Progress	Q4 2020	Working on units (see alternate report)	
10	Pest Management (pigeons)	In Progress	Q1 2020	Received estimates, expect to sign and commence in 30 days; **Bid amount for annual service	$12,720.00
11	Carports	In Progress	Q2 2020	Waiting on additional estimates; to be done by 1st quarter 2020; **First estimate received	$12,789.00
10 (a)	Pest Management (pigeons exclusion)	In Progress	Q1 2020	Received estimates, expect to sign and commence in 30 days	$40,284.00
2 (a)	Landings	In progress	Q4 2020	Concurrent with unit turnover	$100.00
2 (b)	Patios	In progress	Q4 2020	Obtaining bids as needed at time of turn over; per unit cost varies	$200 - $300
2 (c)	Balconies	In progress	Q4 2020	Obtaining bids as needed at time of turn over; per unit cost varies	$400 - $600
6 (a)	SW Laundry room Roof	In Progress	Q1 2020	Bid attached, scheduled start date 11/22/2019	$3,458.00
6 (b)	SW Laundry room vandalized walls/ceiling	In Progress	Q2 2020	Obtaining bids	
6 (c)	SW Laundry room flooring	In Progress	Q2 2020	Obtaining bids	
5	Swimming Pools	On Hold	Q2 2020	Will obtain bids and have it repaired by May of 2020.	
7	Fitness Center	On Hold	Q4 2020	Being used as storage unit until optimum occupancy reached	
13	Sports Court (cracked surface)	On Hold	Q3 2020	Will obtain estimates for alternate design planned by end of Q2 2020	
	Village Square Required Repairs	**Status**		**Notes**	
1	Building Roofs	Completed		Contract and pictures attached.	$46,200.00
4	Moisture Management Plan #095	Completed		Invoice attached.	$5,500.00
4 (a)	Moisture Management Plan #183	Completed		Invoice attached.	$5,500.00
				Total paid for completed work	**$57,200.00**
2	Vacant and Down Apartments	In Progress	Q4 2020	Working on units (see alternate report)	
5	Pest Management (pigeons)	In Progress	Q1 2020	Received estimates, expect to sign and commence in 30 days; **Bid amount for annual service	$9,600.00
6	Amenities/Sports Court (surface damaged)	In Progress	Q1 2020	Obtaining bids	
3	Central Domestic Boilers / Water Heaters	On Hold	See note	Will replace boilers as needed, not needed at this time	
				Combined Total Expended on Completed Items	**$218,317.00**

In reviewing this summary chart, please note that additional capital expenditures have also already been made, which total $1.8 million. Further, the combined total expenditure amount listed above in this summary only includes projects that have been completed. However, as the summary details, payments have already been made on a portion of the expenses listed as work in progress, which is not reflected in the combined total expenditures on completed items.

In addition to these expenditures, retention has increased because the overall tenant service experience has been enhanced during Phase Two by the addition of the mobile maintenance orders at the Properties (a process that pushes work orders to the maintenance employee's mobile device and reduces processing delays). Additionally, during Phase Two, online application processing was made available for the Properties, which has enhanced the availing leasing options. Finally, online payment processing has

created a convenient bill payment option for tenants that decreased accounts receivable handling times.

The overall condition of the Properties will also be improved, because two buildings that were destroyed by fire are in the process of being restored with completion dates anticipated to occur within the next month. Specifically, two buildings, Buildings 3517 and 3426, were fire damaged at the time of purchase, and under construction at the time of the inspection. One of those buildings (8 units) will be completed and rent ready in December 2019, and the other building's (8 units) scheduled completion date in Q1 2020.

Phase Three

Based on our experience in the local community and the trends at these Properties we anticipate being able to sustain 3% occupancy increases until we reach 87% occupancy, which should occur during Q1 2021. At that time, Westland will shift its processes and policies to focus on increasing profitability.

First, due to the substantial size of the properties, with a combined 1129 units, we will be able to create a segmented premium customer base by improving vacant units with Westland's standardized premium unit upgrades. Doing so requires an additional expenditure of $3,000 to $5,000 per unit (depending on unit size), but allows for the ability to charge an additional $100.00 per month for such units, resulting in a payback period of 30 to 50 months for the additional expenditure. Coupled with a lower turn rate for such units, premium upgraded units have an average 18.71% expected return on investment, even in the unlikely event that the premium upgrades are fully depreciated in five (5) years. Long term, Westland believes it would be most efficient for 25-30% of the units to be upgraded to premium units.

Second, past owners have been unsuccessful in establishing a contractual placement relationship with Nellis Air Force Base's local on-base housing office. In the past, the primary impediments have been the dilapidated physical condition of the property and the number of citations issued by law enforcement being regarded as unacceptable for use as safe off-base housing. Westland has already established contacts with onbase housing, which have been productive, and upon no later than reaching Phase Three, Westland believes that off-base housing will be receptive to a marketing presentation to place service members at the Properties. Due to government budgetary considerations, non-upgraded units are likely to be most acceptable to the off-base housing offices. Filling units with that potential tenant population would have the effect of maximizing stability at the property by creating a stable baseline population, lower eviction rates, enable the Properties to rely on rent payments effectively backed by federal government guaranties, and minimize turnover costs.

Westland is in the process of capitalizing upon a significant off-site opportunity related to a site adjacent to the property, which purchase is expected to be completed by the end of the current year. Currently, the site is occupied by a liquor store and bar that have been identified as a draw to an undesirable segment of the local population. Through a

separate entity, Westland would purchase the site, run out the leases, and redevelop the space. Westland has gauged interest from local government for use as a police substation and from non-profit organizations as a childcare facility, and has received positive responses expressing interest in and the need for such spaces at that location. Such a repurposed space would be expected to further increase the value of these Properties by creating an even stronger police presence to deter a return of crime and/or by adding local services consistent with Westland's long-term strategic plan of establishing a family-oriented resident base. The purchase, redevelopment and leasing of that adjacent site is anticipated to be completed in the long-term range of three to five years.

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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-C Dept No. 4 **FEDERAL NATIONAL MORTGAGE ASSOCIATION'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**

Plaintiff Federal National Mortgage Association ("Plaintiff" or "Fannie Mae"), by and through its undersigned counsel, hereby submits this Reply in Support of Application for Appointment of Receiver on Order Shortening Time ("Reply") and Opposition to Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction ("Opposition to Counter-Motion"). The Application, this Reply and Opposition to Counter-Motion are supported by the Supplemental Declaration of James Noakes, attached hereto as Exhibit "1" (the "Supplemental Noakes Declaration").

For the following reasons, in addition to those addressed in Plaintiff's Application for

Appointment of Receiver on Order Shortening Time ("Application"),[1] the Court should appoint Jacqueline Kimaz of The Madison Real Estate Group LLC as a receiver over Liberty Village and Village Square and deny Defendants' Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction ("Counter-Motion").

Defendants would have the Court believe that their failure to pay over $2.8 million required under the Loan Documents is not a default. Yet, Defendants fail, in opposing the Application and bringing their Counter-Motion, to analyze the applicable terms of the agreements that establish the parties' rights and obligations. As detailed below, the Loan Documents clearly establish: (i) a right to inspect the Properties, (ii) a right to demand an increase in reserves to address property condition issues, and (iii) Defendants' failure to pay that demand is an automatic Event of Default. The Loan Documents further provide that Fannie Mae is entitled to an appointment of a receiver upon Defendants' default.

Defendants spend much of their Opposition and Counter-Motion discussing purported issues with the Properties at the time of their assumption of the Loans and contending that they have made many of the repairs detailed in the Property Condition Assessments ("PCAs"). Defendants fail, however, to explain how any of that discussion excuses them from their obligations under the Loan Documents or how those alleged actions cure their defaults. Defendants' assertions are irrelevant to the Application or Counter-Motion given the express terms of the Loan Documents, which are discussed in detail below.[2]

If the Court believes, however, that the Defendants' evidence of recent repairs is relevant, Fannie Mae must be permitted access to the Properties to confirm that repairs were in fact made, ascertain the quality of those repairs, and to obtain updated PCAs. Plaintiff was only provided with documentation of purported repairs after it filed the Complaint and Application. The Opposition is the first time that the purported repair work has been attested to under penalty of perjury. Since receiving the information, Plaintiff has requested access to the Properties for an inspection. Defendants, however, have not cooperated with Plaintiff in this reasonable—and contractually

[1] The Application's defined terms are expressly incorporated herein by reference unless otherwise noted.
[2] Defendants may have claims against the prior owners of the Properties, but these arguments do not negate or cure Defendants' default.

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obligated—request. Plaintiff finds Defendants' refusal to cooperate puzzling in light of their claims of significant repairs to the Properties. If this Court is concerned that the repairs Defendants allege they made to the Properties following their receipt of the PCAs affect Fannie Mae's entitlement to a receiver, Fannie Mae requests that this Court: (a) continue the hearing on the Application and Counter-Motion for a period of time to allow Plaintiff to take necessary discovery regarding the value and condition of the Properties; and (b) order Defendants to provide Plaintiff and its agents access to the Properties for the purposes of inspecting the Properties and obtaining new PCAs.

Dated: September 14, 2020

SNELL & WILMER L.L.P.

By:/s/ *Nathan G. Kanute*
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ARGUMENT

I

DEFENDANTS ARE IN DEFAULT UNDER THE LOAN DOCUMENTS

A. Defendants' Assumption of the Village Square Loan Documents and the Liberty Village Loan Documents Contractually Binds them to Plaintiff.

When Defendants acquired the Village Square Property and the Liberty Village Property (collectively the "Properties"), they asked Plaintiff to consent to the transfer of the Properties to them.[3] Plaintiff consented to Defendants' acquisition of the Properties on the terms and conditions contained in the Assumption and Assignment Agreements dated August 29, 2018.[4] Those conditions included Defendants' assumption of all the obligations owed to Plaintiff under the Village Square Loan Documents and the Liberty Village Loan Documents (collectively the "Loan Documents").[5] Section 3 of the Assumption and Assignment Agreements provide:

[3] *See* Verified Compl. Exs. 5 and 10, Recital G.
[4] *See* Verified Compl. Exs. 5 and 10.
[5] *Haspray v. Pasarelli*, 79 Nev. 203, 208, 380 P.2d 919, 921 (1963) (stating that two separate writings may be sufficiently connected by internal evidence without any express words of reference of one to the other. That they refer to the same transaction and state the terms thereof may appear from the character of the subject matter and from the nature of the terms.) (citing 2 Corbin, Contracts § 514); *Sullivan v. Mounger*, 882 So.2d 1219, 135 (Miss. 2004) (finding

> **3. Assumption of Transferor's Obligations.**
>
> Transferor hereby assigns and Transferee hereby assumes all of the payment and performance obligations of Transferor set forth in the Note, the Security Instrument, the Loan Agreement, and the other Loan Documents in accordance with their respective terms and conditions, as the same may be modified from time to time, including payment of all sums due under the Loan Documents. Transferee further agrees to abide by and be bound by all of the terms of the Loan Documents, all as though each of the Lon Documents had been made, executed and delivered by Transferee.[6]

The quoted language from the Assumption and Assignments Agreements is consistent with the successors and assigns provision in the Loan Agreements.[7] Thus, there is no dispute that Defendants assumed each and every monetary and non-monetary obligation of Shamrock VI and Shamrock VII – the prior owners of the Properties – to Plaintiff.

B. Defendants are in Default Under the Loan Documents.

The Loan Documents clearly establish the parties' respective rights and obligations. Among other things, the Loan Documents impose a continuing obligation that Defendants pay all expenses for the Properties' maintenance[8] and provide that Defendants' failure to maintain the properties is an automatic Event of Default.[9] The Loan Documents empower Fannie Mae to enforce Defendants' obligation to maintain the Properties by allowing Fannie Mae to inspect the Properties and, if necessary, to repair and maintain the Properties, require Defendants to make additional deposits into the Repairs Escrow Accounts and/or to increase the Monthly Replacement Reserve Accounts.[10] The Loan Documents further provide that the failure to "pay or deposit" the additional funds in the Repairs Escrow Accounts and the Monthly Replacement Reserve Accounts is an automatic Event

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that separate documents executed at the same time and for the same purpose and in course of the same transaction are construed together.); *see also* 17 Am. Jur. 2d Contracts, §§ 263-64.

[6] *See* Verified Compl. Exs. 5 and 10, § 3.

[7] *See* Verified Compl., Exs. 1 and 6, § 15.03(a) ("This Loan Agreement shall bind, and the rights granted by this Loan Agreement shall inure to, the successors shall inure to, the successors and assigned of Lender and the permitted successors and assigns of Borrower . . ."); Verified Compl, Exs. 1 and 6, § 15.12(b) ("Borrower acknowledges, represents, and warrants that: (b) it is familiar with the provision of all of the documents and instruments relating to such transactions . . ..")

[8] Verified Compl. Exs. 1 and 6, § 6.02(b)(1) ("Borrower shall pay the expenses of operating, managing, maintaining, and repairing the Mortgaged Property (including insurance premiums, utilities, **Repairs, and Replacements**) before the last date upon which each payment may be made without any penalty or interest charge being added.") (emphasis added).

[9] Verified Compl., Exs. 1 and 6, § 6.02(b)(2) and § 14.01(a)(10).

[10] Verified Compl. Exs. 1 and 6, § 13.02(a)(4).

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of Default[11] under the Loan Documents. If the required amount is deposited into the Repairs Escrow Accounts and the Monthly Replacement Reserve Accounts, absent an Event of Default, disbursements may be made from those accounts once the repairs are made.[12] If all of the required repairs are made and there is not an Event of Default, any funds remaining in the Repairs Escrow Account may be disbursed to the Borrower.[13]

1. The Loan Agreements Entitle Plaintiff to Inspect the Properties.

The Loan Agreements unambiguously entitle Plaintiff to inspect the Properties. Section 6.02(d)[14] of the Loan Agreements states:

> **(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);

Thus, it is undeniable that Plaintiff had the right to have the Property inspected by f3.

Following Defendants' assumption of the Loan Documents, there was a dramatic drop in the occupancy rates of the Properties.[15] Specifically, in November 2017, the time of the original loans, and before Defendants executed the Assumption and Assignment Agreements on August 29, 2018, the occupancy rate at the Properties was, by all accounts, approximately 80%.[16] By early 2019, the occupancy rate at the Properties had declined to approximately 45%.[17] This concerned Plaintiff because significantly declining occupancy rates signaled that the underlying Properties were deteriorating and reducing the Properties' income, thereby jeopardizing payment of the loans secured by those Properties.[18] Further, Plaintiff was concerned about the potential for life and safety

[11] Verified Compl. Exs. 1 and 6, § 14.01(b)(1) (automatic Event of Default includes "any failure by Borrower to any or deposit when due any amount required by the Note, this Loan Agreement or any other Loan Document").
[12] Verified Compl. Exs. 1 and 6, § 13.02(a)(9)(B).
[13] Verified Compl. Exs 1 and 6, § 13.02(a)(11).
[14] *See* Verified Compl. Exs. 1 and 6, § 6.02(d).
[15] Supplemental Noakes Declaration, ¶ 5-6.
[16] *Id.* at ¶ 5.
[17] *Id.* at ¶ 6.
[18] *Id.* at ¶ 7.

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issues to the other tenants, including potential perils to their livelihood due to unkept property conditions and the fact that the deteriorating conditions indicated that the Properties were not meeting Plaintiff's objective to provide affordable and safe housing to low- and moderate-income to provide a sustainable community and to cultivate opportunities to improve lives.[19] Defendants acknowledge that Plaintiff's concerns were justified by admitting that the occupancy rates at the Properties declined[20] and that Defendants had to inject their own money into the Properties to cover their monthly debt service obligations to Plaintiff.[21] This led Plaintiff to inspect the Properties in July 2019 and obtain the current PCAs dated September 9-11, 2019.[22]

2. The Loan Agreements Entitle Plaintiff to Obtain the PCAs.

After the Effective Date of the Loans, defined to be November 2, 2017,[23] Plaintiff is entitled to obtain one or more PCAs to address the deteriorating condition of the Properties. Section 6.03(c)[24] of the Loan Agreements state in their entirety:

> **(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).

Due to the deterioration of the Properties seen by their declined occupancy rates and their failure to generate sufficient rents to pay even debt service, it is clear that Plaintiff was entitled to obtain PCAs for the Properties. Plaintiff had f3 perform property condition assessments on September 9-11, 2019.[25]

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[19] *Id.*
[20] *See* Opposition, p, 4, lines 12-14. This is inconsistent with the Affidavit of Yakoov Greenspan (the "Greenspan Affidavit") which states that the occupancy rate dropped to a low of 52%. Greenspan Affidavit, ¶ 23.
[21] *See* Opposition, pp. 10-11.
[22] Supplemental Noakes Declaration, ¶ 8.
[23] *See* Verified Compl., Exs. 1 and 6, Schedule 2, p. 3.
[24] *See* Verified Compl. Exs. 1 and 6, § 6.03(c).
[25] *See* Verified Compl. Ex. 11.

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3. The Loan Agreements Entitle Plaintiff to Demand Additional Deposits from Defendants.

f3's PCAs specified that immediate repairs totaling $1,092,835 for Village Square and $1,753,145 for Liberty Village were needed, many of which involved issues of life and safety.[26] The majority of those repairs concerned apartments at Village Square and Liberty Village that were vacant and "down" (unleasable).[27] The PCAs also detailed a Replacement of Capital Items Schedule which showed the escalating cost of capital improvements at the aging properties.[28]

Following delivery of the PCAs to Defendants, there was only $106,217 in the Repairs Escrow Accounts for Village Square and $246,047 in the Repairs Escrow Accounts for Liberty Village.[29] The Repairs Escrow Accounts for the Properties, therefore, only contained a fraction of the necessary $2,845,980 to remediate the issues identified by the PCAs, because nearly $1,000,000 was required to bring the Village Square reserve accounts into balance and over $1,500,000 was required to bring the Liberty Village reserve accounts into balance.[30] Thus, Plaintiff was entitled to demand that Defendants deposit a total of $2,845,980 pursuant to section 13.02(a)(4) of the Loan Agreements[31] which provides:

> **(4) Insufficient Funds.**
>
> Lender may, upon thirty (30) days' prior written notice to Borrower, require an additional deposit(s) to the Replacement Reserve Account or Repairs Escrow Account, or an increase in the amount of the Monthly Replacement Reserve Deposit, if Lender determines that the amounts on deposit in either the Replacement Reserve Account or the Repairs Escrow Account are not sufficient to cover the costs for Required Repairs or Required Replacements, or, pursuant to the terms of Section 13.02(a)(9), not sufficient to cover the costs for Borrower Requested Repairs, Additional Lender Repairs, Borrower Requested Replacements, or Additional Lender Replacements. Borrower's agreement to complete the Replacements or Repairs as required by this Loan Agreement shall not be affected by the insufficiency of any balance in the Replacement Reserve Account or the Repairs Escrow Account, as applicable.

Once deposits are made into the respective reserve account, Section 13.02(a)(9)(B)[32] of the

[26] Verified Compl., Ex. 11, p. 8 (both reports).
[27] *Id.* at p. 6 (both reports).
[28] *Id.* at p. 23 (both reports).
[29] Noakes Supplemental Declaration, ¶ 11.
[30] *Id.* at ¶ 12.
[31] *See* Verified Compl., Exs. 1 and 6, § 13.02(a)(4).
[32] Verified Compl., Exs 1 and 6, § 13.02(a)(9)(B).

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Loan Agreements governs the manner in which funds are disbursed following completion of the repairs, provided there is no Event of Default.

At least one Court has held that it is reasonable for a lender to demand the borrower deposit amounts to cover necessary repairs.[33] Thus, there can be no dispute that Plaintiff was entitled under the Loan Documents to demand that Defendants deposit in excess of $2.8 million into the appropriate reserve accounts for the Properties.

4. Defendants Breached the Agreements with Plaintiff by Failing to Fund the Reserve Accounts.

Following Plaintiff's receipt of the September 9-11, 2019 PCAs, Plaintiff's agent, SunTrust Bank, sent Defendants each a Notice of Demand on October 18, 2019.[34] The Notice of Demand which pertained to Liberty Village demanded payment of $1,753,145 to Servicer to be deposited into the Repairs Escrow Account within the thirty (30) required by section 13.02(a)(4) of the Loan Agreement. The Notice of Demand to Liberty Village also advised that the Monthly Replacement Reserve Deposit was being increased by $8,160 per month to $26,760 per month commencing on December 1, 2019.[35]

The Notice of Demand which pertained to Village Square demanded payment of $1,092,835 to Servicer to be deposited into the Repairs Escrow Account within the thirty (30) days required by section 13.02(a)(4) of the Loan Agreement. The Notice of Demand to Village Square also advised that the Monthly Replacement Reserve Deposit was being increased by $1,397.42 per month to $11,656.50 per month commencing on December 1, 2019.[36]

The deadline for making the payments described in the Notices of Demand was November 17, 2019. Defendants failed to make the required payments by that time and were in default pursuant to section 14.01(a)(1)[37] of the Loan Agreements, which provides that there is an automatic Event of Default upon the "failure by borrower to pay or deposit when due any amount required by the Note, this Loan Agreement or any other Loan Document." Thus, Defendants have been in

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[33] *See Brierton v. Brown Deer Apartments Housing Associates, LLC*, 2010 WL 5071274 (Ct. of App. MN, Dec. 14, 2010).
[34] *See* Verified Compl. Ex. 12.
[35] *Id*.
[36] *Id*.
[37] *See* Verified Compl. Exs. 1 and 6, § 14.01(a)(1).

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payment default under the Loan since at least November 17, 2019.

a. Defendants' Default is Material.

Evidence of this nonpayment by the due date of November 17, 2019, is sufficient to establish a default.[38] Yet, Defendants imply that the default is not material because, among other things, they were current on their monthly loan payments and it is not a "payment default."[39] That is simply misdirection. Defendants have failed to pay $2,845,980 pursuant to the October 18, 2019 Notices of Demand – something that can only be described as a "payment default." Section 14.01(a)(1) Loan Agreements make it clear that the failure to pay the amounts demanded in the Notices of Demand is an "automatic" "payment default."[40]

There is also no doubt that Defendants' payment default is material. A failure to fund reserve accounts are material defaults which entitle the lender to accelerate the debt.[41] In addition, the amount of the payment default is in excess of $2.8 million—a significant amount in any respect.

Fannie Mae is entitled to the appointment of a receiver upon an Event of Default pursuant to the Deeds of Trust.[42] Fannie Mae's right to seek appointment of a receiver upon default is absolute, and the Court should honor the parties' agreements.

b. Defendants' Alleged Repairs Have Not Cured the Default.

Defendants admit they did not make the payments to the Servicer as required by the October 18, 2019 Notices of Demand.[43] Instead, and in lieu of making the required payments, Defendants contend that they sent Plaintiff a Westland Strategic Improvement Plan for Liberty Village and

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[38] *See Vill. Pointe, LLC v. Resort Funding, LLC*, 127 Nev. 1183, 373 P.3d 971 (2011) (finding that a failure to make full payments when due consistent with a loan agreement constitutes a default); *see also Weems v. Transamerica Mortgage Co.*, 770 So. 2 936, 939 (Miss. 2000).

[39] *See* Opposition, p. 11; Greenspun Declaration, ¶ 18.

[40] Verified Compl. Exs. 1 and 6, § 14.01(a)(1).

[41] *See, e.g., American Sav. & Loan Ass'n v. Bloomquist*, 21 Utah 2d 289, 293 (1968) (holding that when mortgagor specifically agrees to pay sums as estimated by the mortgagee into the reserve account, its partial payment, even if the difference is de minimis, is inadequate and entitles the mortgage to declare the entire debt due); *see also Brierton v. Brown Deer Apartments Housing Associates, LLC*, 2010 WL 507124 at *9 (Ct. of App. MN, Dec. 14, 2010) (holding that it is immaterial that the shortage is a lesser amount than what is demanded when no payment at all is made); *see also Peny & Co v. Food First Housing Development Fund, Co., Inc.*, 39 Misc. 3d 1234, 972 N.Y.S.2d 145 *4 (N.Y. 2013) (continued willful failure to pay Imposition Deposits within twenty days after written notice constituted an Event of Default permitting the mortgagee to demand full payment of the principal and interest under the loan documents); *Collector's Coffee, Inc. v. Zobel*, No. 17-A-764943, 2018 WL 7572436, at *1 (Nev.Dist.Ct. Dec. 26, 2018) (finding that partial payment pursuant to an agreement constitutes a breach of contract sufficient for summary judgment).

[42] Verified Compl., Exs. 3 and 8, § 3(e).

[43] *See* Opposition, pp. 8-12 (showing the absence of paying the required deposits to Fannie Mae).

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Village Square (the "Plan") outlining their plan to rehabilitate the Properties. Somehow, Defendants believe this action replaces the requirement to cure their defaults under the Loan Documents. Notably, Defendants allege they made repairs worth $1.8 million before the PCAs were completed and $1.7 million after the PCAs were completed.[44]

This argument is misguided for several reasons. First, Defendants admit by omission that they made no effort to cure the default in the manner required by the October 18, 2019 Notices of Demand and the Loan Documents, which accelerated of the Loans.[45] Instead, it appears that they tried to replace their contractual obligation to make deposits of approximately $2.8 million with the Plan—a proposal that was not contemplated by the Loan Documents or ratified by Fannie Mae. Second, there is no evidence confirming that any of the repairs described in the PCAs were made by Defendants or the extent of the repairs described in the PCAs. Third, the contention that some of the repairs required by the PCA have been made was only recently disclosed to Plaintiff, and Plaintiff has not been provided with a meaningful opportunity to confirm that any of the described repairs were actually made to the Properties.[46] Finally, even if Defendants have made *some* of the repairs required by the PCAs, they have still failed to complete *all* of the repairs and have continued to be in default of their obligation to fund the reserve accounts.

Defendants appear to be coming to this Court asking for equitable relief from their willful failure to cure the defaults under the Loan Documents described in the Notices of Demand because they tried to address the issue in a manner of their own choosing that is not authorized by the Loan Document. Defendants, however, are not entitled to any relief from their contractual obligations under the Loan Documents. Simply stated, when a default is willful or continuous, equity will not relieve the borrower from acceleration following an Event of Default.[47] Similarly, the concept of substantial performance does not apply where there is a willful breach.[48]

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[44] Opposition, p. 2, lines 3-5.
[45] *See* Note 31, above.
[46] If the court finds that these allegations raise any issue with respect to need to appoint a receiver in this case, Plaintiff requests that the hearing on the Application and Counter-Motion be continued for an appropriate period of time to allow Plaintiff to obtain necessary discovery and new PCAs for the Properties and that the Court direct Defendants to cooperate with the PCAs.
[47] *Peny & Co.*, 972 N.Y.S.2d 145 at 4-5; *First Nat. Bank of Omaha v. Centennial Park, LLC,* 48 Kan. App.2d 714, 721-23 (Ct. App. Kan. 2013) (because the commercially sophisticated borrower intentionally elected not to pay the amount due, the trial court properly rejected the use of its equitable powers to prevent acceleration of the loan balance).
[48] *Harvey v. Caesar's Entertainment Operating Co., Inc.*, 55 F.Supp. 3d 901, 907-8 (N.D. Miss. 2014).

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Thus, this court should find that the repairs Defendants allege to have made to the Properties do not excuse their failure to cure the defaults under the Loan Documents as described in the Notice of Demand dated October 28, 2019.

c. The Alleged "Equity" in the Properties Does not Excuse Defendants' Defaults.

Defendants suggest that Plaintiff is not entitled to the appointment of a receiver because of the equity the Defendants have in the Properties. Defendants, however, have not submitted any appraisals or other evidence of the Properties' value to the Court.[49] Instead, they seem to be asking the Court to assume that they have $20 million in equity in the Properties because they made a down payment to the Sellers in that approximate amount. That, however, is evidence of only what was paid for the Properties, not what they are currently worth.

More importantly, it is clear in this case that there are serious issues with the Properties. Defendants themselves have admitted that the Properties had astonishingly low occupancy rates of 44% to 52% and did not generate sufficient revenue to pay debt service, thereby requiring Defendants to fund debt service with funds from sources other than the Properties' rents.[50] This suggests that the value of the Properties on an income capitalization approach is far less than what Defendants would have this Court believe. Regardless, no amount of equity that Defendants allege to have cures their defaults under the Loan Documents.

d. Defendants' Allegations that the Properties Were in Disrepair When they Purchased Them is Irrelevant.

Defendants go to great lengths in the Opposition to try to convince the Court that their defaults under the Loan Documents as described by the October 18, 2019 Notices of Demand are unfair because the Properties were in a state of disrepair when they bought them from Shamrock VI and Shamrock VII. Indeed, Defendants claim that many of the issues identified in the PCAs "pre-existed the Loans" because they were "already dilapidated at the time of the initial loan" and "that was how things were at the time of the Loan assumption."[51] This does nothing to further Defendants' cause because Westland knew or should have known the Properties were distressed at

[49] Generally, only a Nevada licensed real estate appraiser may act as an appraiser in Nevada and it is a misdemeanor to deliver an appraisal without obtaining the appropriate certificate, license or permit. NRS 645C.260(1).
[50] Opposition, pp. 10-11.
[51] Opposition, p. 9, ln. 10-12.

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the time they assumed the Loans. This fact should have motivated Defendants to closely examine the conditions of the Properties, and familiarize themselves with the Loan Documents, before purchasing the Properties and assuming the Loan Documents.

The failure to conduct this due diligence is inexcusable since Defendants' contend that their parent company, Westland Real Estate Group ("Westland") has a long history of multifamily housing experience.[52] This suggests that Westland should have performed its own due diligence on the Properties before purchasing them and should have familiarized itself with the terms of the Loan Documents.[53]

Defendants also conveniently ignore that they assumed all obligations contained in the Loan Documents, including the obligation to fund any deficiencies in any of the reserve accounts established under the Loans, when they purchased the Properties.[54] The mere fact that Defendants acquired the Properties which were in a bad condition from a stranger to this case does not excuse Defendants of the contractual obligations they voluntarily assumed.

e. Plaintiff Has not Unreasonably Delayed Seeking a Receiver.

Defendants would have this Court believe that it should not appoint a receiver because of the time that has lapsed from the date of the PCAs – September 9-11, 2019 and the date of the initiation of this action – August 12, 2020. This is far too simple of a snapshot of what occurred and ignores the COVID-19 pandemic.

In this case the following occurred:

September 9-11, 2019	PCAs
October 18, 2019	Notices of Demand
November 17, 2019	Deadline to Comply with Notices of Demand
December 17, 2019	Notice of Default and Acceleration of Note
Jan.-Feb. 2020	Attempted settlement discussions with Defendants

[52] Opposition, p. 9, ln. 10-12.

[53] *See Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) (holding that "[w]hen a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them, and there can be no evidence for the jury as to his understanding of its terms.")

[54] *See* Section A, above.

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April 1, 2020	Commencement of COVID-19 foreclosure moratorium[55]
June 4, 2020	Attempted settlement discussions with Defendants
July 1, 2020	Termination of COVID-19 foreclosure moratorium for commercial properties[56]
July 14, 2020	Recordation of Notices of Default and Election to Sell[57]
August 12, 2020	Plaintiff files the Complaint in this case[58]

This demonstrates that any "delay" was reasonable and does not waive Fannie Mae's right to the appointment of a receiver. Most of the delay was caused by the notice periods in the Loan Documents, good faith efforts to negotiate with Defendants, and the COVID-19 pandemic, not Plaintiff's delay. Additionally, it demonstrates that Plaintiff was overly generous with Defendants in that they had nine (9) months to cure the default under the Loan Documents described in the Notices of Demand before the Notices of Default and Election to Sell were recorded but failed to do so.

II

FANNIE MAE HAS COMPLIED WITH THE LOAN DOCUMENTS

Defendants also make much of the claim that Fannie Mae is holding roughly $1 million in insurance proceeds for portions of the Liberty Village Property that had prior fire damage.[59] Defendants fail, however, to explain that the repairs were not completed until after the Notices of Default were sent and after Defendants were in automatic default under the Loan Documents. As fully set out above, multiple Events of Default occurred under the Liberty Village Loan Documents. As such, the Liberty Village Loan was accelerated and is due and payable in full, plus interest. The Events of Default have not been cured, and the Liberty Village Loan has not been repaid.

Pursuant to Section 14.02(b) of the Liberty Village Loan Agreement, "[i]f an Event of Default has occurred and is continuing, Borrower shall immediately lose all of its rights to receive disbursements from . . . any Collateral Accounts" and Fannie Mae will have the ability to apply the

[55] *See* Declaration of Emergency Directive 008 dated March 29, 2020.
[56] *See* Declaration of Emergency Directive 025, dated June 25, 2020.
[57] The Notices of Default and Election to Sell would have been recorded months earlier but for the foreclosure moratorium.
[58] The Complaint would have been filed months earlier but for the foreclosure moratorium.
[59] Opposition, p. 7, ln. 17-21.

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funds in those accounts as provided in the Loan Agreement.[60] The Restoration Reserve Account is a Collateral Account pursuant to Section 17.03(a)(1) of the Loan Agreement, as amended by the Second Amendment to Multifamily Loan and Security Agreement dated as of April 26, 2018 and the Third Amendment to Multifamily Loan and Security Agreement dated as of May 9, 2018.[61]

Section 17.03(a)(1) of the Liberty Village Loan Agreement, as amended, provides that "[i]n no event shall Fannie Mae be obligated to disburse funds from the Restoration Reserve Account if an Event of Default has occurred and is continuing."[62] Section 17.03(a)(5)(iii) of the Liberty Village Loan Agreement, as amended, provides that "Fannie Mae shall not be required to disburse any amounts: . . . (iii) if an Event of Default has occurred and is continuing."[63]

Given the Events of Default that have occurred and are continuing, Liberty Village is not entitled to a disbursement of any funds that are or were in the Restoration Reserve Account. Fannie Mae is within its rights under the Liberty Village Loan Documents to sweep and apply any funds that are or were in the Restoration Reserve Account. Accordingly, Fannie Mae has not breached the Loan Documents by failing to pay to Defendants the amounts that were in the Liberty Village Restoration Reserve Account. Finally, Defendants' monetary default under the Loan Documents is nearly three times as much as the insurance proceeds that Fannie Mae has retained, so to the extent the Court finds Defendants' argument persuasive, Defendants would still be in material default of the Loan Documents.

III

PLAINTIFF IS ENTITLED TO APPOINTMENT OF A RECEIVER

The foregoing clearly establishes that Defendants are in default under the Loan Documents and that Plaintiff is entitled to accelerate the Loans. Nevada law also makes clear that Plaintiff is entitled to the immediate appointment of a Receiver.

A. Appointment of a Receiver Following the Recordation of a Notice of Breach and Election to Sell is Mandatory in the Case.

The Court has authority to appoint a receiver under four different sets of Nevada Statutes

[60] Verified Compl. Ex. 6, § 14.02(b).
[61] Verified Compl. Ex. 6, § 17.03(a)(1); *see also id.* at Second Amendment to Multifamily Loan and Security Agreement and Third Amendment to Multifamily Loan and Security Agreement.
[62] Verified Compl. Ex. 6, § 17.03(a)(1).
[63] Verified Compl. Ex. 6, § 17.03(a)(5)(iii).

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in this matter: (1) the Uniform Commercial Real Estate Receivership Act (the "UCRERA") codified in NRS § 32.100 *et. seq.*; (2) the Uniform Assignment of Rents Act ("UARA") codified in NRS § 107A *et seq.*; (3) NRS § 107.100; and (4) Nevada's general receivership statutes NRS § 32.010 to 32.020.

1. The Court Must Appoint a Receiver Under the UCRERA.

The UCRERA provides that the Court may appoint a receiver under several circumstances.[64] UCRERA provides, in part:

> 2. In connection with the foreclosure or other enforcement of a mortgage, a mortgagee is entitled to appointment of a receiver for the mortgaged property if:
>
> (a) Appointment is necessary to protect the property from waste, loss, transfer, dissipation or impairment;
>
> (b) The mortgagor agreed in a signed record to appointment of a receiver on default;
>
> (c) The owner agreed, after default and in a signed record, to appointment of a receiver;
>
> (d) The property and any other collateral held by the mortgagee are not sufficient to satisfy the secured obligation;
>
> (e) The owner fails to turn over to the mortgagee proceeds or rents the mortgagee was entitled to collect; or
>
> (f) The holder of a subordinate lien obtains appointment of a receiver for the property.[65]

Under NRS § 32.260(2), Fannie Mae is ***entitled***[66] to appointment of a receiver in connection with its attempt to enforce the Loans at issue if it can show that it has initiated foreclosure proceedings against the Properties and one of the six factors identified in subsection (a) through (f)

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[64] *See generally* NRS § 32.260.

[65] NRS § 32.260(2).

[66] The Nevada Supreme Court has interpreted the term "entitle" consistent with *Black's Law Dictionary* as granting an immediate legal right. *See Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. Adv. Op. 5, 458 P.3d 1048, 1060-61 (2020). "As defined by *Black's Law Dictionary*, the term 'entitle' means '[t]o grant a legal right to or qualify for,' *Entitle, Black's Law Dictionary* (11th ed. 2019), and an 'entitlement' is defined as '[a]n absolute right to a (usually monetary) benefit…granted immediately upon meeting a legal requirement,' *Entitlement, Black's Law Dictionary* (11th ed. 2019)." *Id.* The term "entitle" imposes a right similar to the duty imposed by the term "shall," which divests the court of discretion. *See Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) (explaining that, when used in a statute, the word "shall" impose a duty on a party to act and prohibits judicial discretion). Thus, unlike NRS § 32.260(1), NRS § 32.260(2) mandates the appointment of a receiver upon a party meeting any of the requirements thereunder rather than giving the court discretion to appoint one. *See American Bankers Ins. Co.*, 106 Nev. at 882, 802 P.2d at 1278 (discussing that "may" is a permissive, rather than a mandatory term).

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are present. In this case, at least two of those factors are present.

a. The Properties are Subject to Waste and Dissipation.

NRS § 32.260(2) provides that Plaintiff is entitled to appointment of a receiver to protect the property from waste, loss, transfer, dissipation, or impairment.[67] NRS § 32.260(2)(a) is silent as to what constitutes "waste"; however, the Restatement (Third) of Property states that "waste" occurs when a mortgagor "materially fails to comply with covenants in the mortgage respecting the physical care, maintenance, construction, demolition, or insurance against casualty of the real estate or improvements on it".[68]

Here, Defendants have materially[69] failed to uphold their obligations to Fannie Mae. Defendants have continued to refuse to deposit the additional amounts to the Repairs Escrow Accounts and to increase their Monthly Replacement Reserve Deposits.[70] This is undeniably both waste and dissipation of the Properties. These failures entitle Fannie Mae to a Receiver.

b. Defendants Consented to the Appointment of a Receiver.

Additionally, NRS § 32.260(2)(b) provides that, in connection with its attempt to enforce the loans at issue, Fannie Mae is entitled to appointment of a receiver because it has initiated foreclosure proceedings and Defendants "agreed in a signed record to appointment of a receiver on default."[71] The Village Square Deed of Trust and Liberty Village Deed of Trust contain Defendants' explicit consent to the appointment of a receiver upon an Event of Default. Because Defendants are in default under the loan agreements, Fannie Mae is entitled to the appointment of a receiver.[72]

2. The Court Must Appoint a Receiver Under the UARA.

Fannie Mae is entitled to the appointment of a receiver under NRS § 107A.260(1)(a)(1) and

[67] NRS 32.260(2)(a).
[68] Restatement (Third) of Property § 4.6(a)(4).
[69] While some jurisdictions limit materiality in the context of real property to be limited to monetary defaults, only, Nevada courts have not taken that approach.
[70] *See* Application, Ex. 2, ¶ 5.
[71] NRS § 32.260(2)(b).
[72] Verified Complaint, Exs. 3 and 8 § 3(e) (stating "[i]f Lender elects to seek the appointment of a receiver for the Mortgaged Property at any time after an Event of Default has occurred and is continuing, Borrower, by its execution of this Security Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver *ex parte*, if permitted by applicable law.").

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(1)(a)(3).[73] Subsection (1)(a)(1) mandates the appointment of a receiver where an assignor of rents is in default of an agreement and agreed in a signed document to the appointment of a receiver in the Event of Default.[74] Subsection (1)(a)(3) requires an appointment of a receiver where an assignor is in default of an agreement and has also failed to turn over the proceeds that the assignee was entitled to collect.[75]

Here, there is no question that the Defendants failed to pay Fannie Mae all rents after they defaulted under the Loan Documents. The plain language of the Loan Documents entitled Fannie Mae to demand that Defendants pay all rents after the occurrence of a default.[76] On December 17, 2019, Fannie Mae demanded the proceeds of any and all rents, based on Defendants' defaults.[77] Defendants admit they have not paid to Fannie Mae all rents from the Properties because "any rents collected were not even sufficient to cover the monthly debt service obligation."[78] This misses the point. There is no provision in the Loan Documents, or in any statute, that limits Defendants' obligation to pay rents after a legal demand simply because the debt service exceeds the rents. There is also no limitation in NRS § 107A.260 that requires rents to be in excess of the debt service in order for the mandatory receiver provisions to be effective. Once Defendants defaulted, and Fannie Mae demanded rents due to Defendants' default, Defendants had *cumulative* obligations to pay the accelerated note *and* to pay all rents. Defendants have not paid to Fannie Mae all rents they have received since December 17, 2019.

Moreover, the Security Instruments state that Fannie Mae is entitled to the appointment of a receiver upon an Event of Default that has occurred and is continuing.[79] Defendants' express consent to the appointment of a receiver is undeniable.[80]

Fannie Mae is entitled to the appointment of a receiver because Defendants have defaulted on their obligation to pay all rents, they continue to withhold all rents from Fannie Mae, and

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[73] NRS § 107A.260.
[74] *Id.*
[75] *Id.*
[76] Verified Compl. Exs. 1 and 6, § 7.03(a)(1).
[77] Verified Compl. Exs. 13 and 14.
[78] Opposition, p. 10, ln. 25-26.
[79] Verified Compl. Exs. 3 and 8, § 3(e).
[80] *Id.* (". . . Borrower, by its execution of this Security Instrument, expressly consents to the appointment of such receiver . . ..")

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Defendants agreed in the executed Security Instruments to the appointment of a receiver in these instances.

3. The Court Must Appoint a Receiver Under NRS 107.100.

Under NRS § 107.100(a), a lender may, at any time after filing a notice of breach and election to sell, seek the appointment of a receiver. NRS § 107.100(b) provides that the Court "shall"[81] appoint a receiver if the real property subject to a deed of trust is in danger of substantial waste or may become insufficient to discharge the debt it secures.

Here, the Village Square Property and Liberty Village Property are in danger of substantial waste due to Defendants' continued rejection of Fannie Mae's rightful demand to increase the Repairs Escrow Accounts and to increase the Monthly Replacement Reserve Accounts. In addition, Fannie Mae's ability to collect on the Loans is in danger of being lost due to the condition of the Properties as described in the PCAs. The Court must appoint a receiver over the Properties in order to secure Fannie Mae's interests.

4. The Court Must Appoint a Receiver Under NRS 32.010 to 32.020.

Fannie Mae agrees that the Court has equitable power to appoint a receiver under NRS § 32.010.[82] That section provides:

> A receiver may be appointed by the court in which an action is pending, or by the judge thereof:
> …
> 2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt…
> …
> 6. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity.

a. <u>Plaintiff is Entitled to a Receiver under NRS § 32.010(2)</u>.

As set out above, Plaintiff is entitled to appointment of a Receiver under NRS § 32.010(2)

[81] "In construing statutes, 'shall' is presumptively mandatory." *State v. American Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990).

[82] *See Barclays Bank of California v. Superior Ct.*, 69 Cal.App.3d 593, 599-601, 137 Cal. Rptr. 743, 746-47 (Cal. Ct. App. 1977) (stating that the Court's equitable power to appoint a receiver ***in certain circumstances*** sounds in equity).

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because it has commenced foreclosure proceedings against the Properties and they are in danger of being materially injured due to the condition of the Properties and Defendants' willful refusal to fund such repairs in the manner provided for in the Loan Agreement.

b. Plaintiff is Entitled to a Receiver under NRS § 32.010(6).

As stated in Fannie Mae's Application, NRS § 32.010(6) provides that a receiver may be appointed in all cases where receivers have heretofore been appointed by the courts of equity.[83]

Fannie Mae has shown that a receiver is needed to protect its interest in the Properties. The PCAs establish that the Properties are in desperate need of substantial repairs and that Defendants objected to Fannie Mae's demands.[84] In addition, even Defendants admit that they have not been able to collect any rents at the Properties sufficient to cover its monthly debt service obligations.[85] If Defendants are unwilling to put up necessary reserves to pay for needed repairs, as required by the Loan Documents, and Defendants cannot cover their monthly debt service obligations from the rents they are collecting, then clearly Fannie Mae's interest in the Properties is in danger, the Court should exercise its discretion to appoint a receiver to protect Fannie Mae's interests.

Defendants' arguments to the contrary are unpersuasive. First, Defendants' contention that their parent company, Westland Real Estate Group ("Westland"), has a long history of multifamily housing experience is completely irrelevant.[86] All that suggests is that Westland should have performed its own due diligence on the Village Square Property and Liberty Village Property, and that Westland knew or should have known the terms of the Loan Documents.[87] Second, Defendants' claim that many of the issues identified in the PCAs "pre-existed the Loans" because they were "already dilapidated at the time of the initial loan" and "that was how things were at the time of the Loan assumption" does nothing to further their cause.[88] The fact that Westland knew the Properties were distressed at the time they assumed the loans supports Fannie Mae's reasoning for requiring Defendants to pay an additional deposit into the Repairs Escrow Accounts and to increase the

[83] NRS § 32.010(6); *Lynn v. Ingalls*, 100 Nev. 115, 119, 676 P.2d 797, 800-801 (1984) (appointing a receiver to protect rents from real property and to maintain those assets in conjunction with a contractual default).
[84] Opposition, p. 9, ln: 7-22.
[85] *Id.* at p. 1, ln 25-26.
[86] Opposition, p. 9, ln. 10-12.
[87] *Campanelli*, 86 Nev. at 841 *supra* n.52.
[88] Opposition, p. 9, ln. 10-12.

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Monthly Replacement Reserve Accounts. Over a year after Defendants assumed the loans and began its management of the Properties, the PCAs demonstrated that the Properties ***still*** needed over $2.8 million in repairs—many of which were immediate needs to protect life and safety. The fact that Westland allegedly "spent $1.8 million" to repair the Village Square Property and Liberty Village Property offers support for f3's independent opinion that the Properties needed over $2.8 million in additional repairs. This also does not account for the fact that the Properties would necessarily require additional capital improvements and continuing maintenance that exist with any multifamily property. Third, Defendants' contention that they met their respective "Loan obligations by check plus approximately 10% to account for any variance in payment . . ." is both inaccurate and immaterial. When Defendants failed to make Fannie Mae's requested repairs and to fund the Repairs Escrow Accounts or increase their Monthly Replacement Reserve, they defaulted on the loans.[89] Defendants' automatic default automatically triggered acceleration of the loans.[90] Thus, Defendants' payments made after they defaulted on the loan balance were, in fact, partial payments of the full loan balance and not satisfactory to cure their defaults on the loan.

IV

THIS COURT SHOULD DENY DEFENDANTS' REQUEST FOR INJUNCTIVE RELIEF

A. The Court should not enjoin Fannie Mae's right to Foreclose the Properties.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."[91] A preliminary injunction is available "when it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually."[92] Nevada courts exercise their discretion by applying a four-factor test to determine whether a preliminary injunction should issue: (1) the reasonable likelihood that the plaintiff will prevail on the merits; (2) the threat of irreparable injury to the plaintiff if the injunction is not granted; (3) the threatened

[89] Verified Compl. Exs. 1 and 6, § 14.01(a)(1) (showing that "any failure by Borrower to pay or deposit when due any amount required by the Note, this Loan Agreement or any other Loan Document" is an automatic Event of Default).
[90] Verified Compl. Exs. 1 and 6, § 14.02(a).
[91] *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).
[92] NRS 33.010; *see also* NRCP 65(b) (authorizing the issuance of a temporary restraining order if irreparable harm will result before the preliminary injunction can be heard).

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injury to the plaintiff outweighs the threatened harm the injunction may cause the defendant; and (4) the granting of the injunction is not contrary to public interest.[93]

1. Defendants failed to show that they are likely to succeed on the merits.

Defendants failed to show the likelihood of success on the merits of Fannie Mae's request to appoint a receiver. First, it has been established that Defendants are in default under the Loan Agreements. Due to that default, Plaintiff is entitled to accelerate Defendants' obligations under the Loan Agreements, initiate foreclosure proceedings against the Properties and exercise the remedies provided under the Loan Agreements and applicable law including the right to seek the appointment of a receiver. Second, Plaintiff has demonstrated that it is entitled to the appointment of a receiver under the UCRERA, the UARA, NRS 107.100 and NRS 32.010 to 32.020. Enjoining Fannie Mae's contractual and statutory right to foreclose on the Properties and does not change these facts, it just delays Fannie Mae's ability to enforce its rights and protect its interests.

2. Defendants will not suffer irreparable injury if the injunction is not granted.

A preliminary injunction should only be entered based on a "likelihood," not a "possibility," of irreparable harm to occur in the absence of the issuance of an injunction by the Court.[94] "'Regardless of how the test for a preliminary injunction is phrased, the moving party must demonstrate irreparable harm'" by probative evidence. *Mandrigues v. World Savings, Inc.*, No. C 07-4497 JF (RS), 2009 WL 160213, at *3 (N.D. Cal. Jan. 20, 2009) (*quoting American Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985), in which the Ninth Circuit reversed a grant of preliminary injunction because movant failed to offer evidence of irreparable harm).

Defendants have defaulted under the Loan Documents and chose not to cure those defaults after adequate notice. Nevada law authorizes lenders such as Plaintiff to foreclose upon their collateral[95] when there is a default by the borrower and generally requires that foreclosure proceedings be completed before exercising other remedies against the borrower.[96] It is

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[93] *See Dixon v. Thatcher*, 103 Nev. 414, 415-16, 742 P.2d 1029, 1029-30 (1987); *Sobol v. Capital Management Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986).
[94] *Mazurek*, 520 U.S. at 972.
[95] *See generally* NRS chapter 107.
[96] Nevada's one-action-rule is codified at NRS 40.430.

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inconceivable that a borrower would suffer irreparable harm where the borrower's default caused the loss of that borrower's property at foreclosure. For example, in *Alcaraz v. Wachovia Mortg. FSB*, 592 F. Supp. 2d 1296 (E.D. Cal. 2009), the district court refused to grant an injunction prohibiting a foreclosure simply because the plaintiff would lose her home.[97] Similarly, in *Rosenberger v. Wells Fargo Home Mortgage*, 215CV2107JCMVCF, 2015 WL 8160360, at *3 (D. Nev. Dec. 7, 2015) the court declined to find evidence of irreparable harm by stating "Plaintiffs' loss of property is admittedly solely due to plaintiffs' own failure to make required payments. Plaintiffs cannot now complain that they will suffer irreparable harm."

It is also crucial to note that Defendants could have avoided the initiation of foreclosure proceedings against the Properties and this receivership action by making the payments required in the October 18, 2019 Notices of Demand. Defendants, however, chose to disregard their contractual obligations to Plaintiff. This left Plaintiff with no option but to accelerate the Loans, initiate foreclosure proceedings and request the court to appoint a receiver for the Properties to address Defendants' defaults under the Loan Agreements.

3. The balance of hardships favors Fannie Mae.

The guiding doctrine for the granting of equitable relief is the maxim that "he who comes into equity must come with clean hands."[98] "Under this doctrine, plaintiffs seeking equitable relief must have acted fairly and without fraud or deceit as to the controversy in issue."[99] In other words, unclean hands "means that in equity as in law the plaintiff's fault … is relevant to the question of what if any remedy the plaintiff is entitled to."[100] Thus, the unclean hands doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."[101] Defaulting on one's loan obligations is not "doing equity."[102] Accordingly, Nevada courts have refused requests

[97] 592 F. Supp. 2d at 1301-02 (denying injunctive relief on claim that deeds of trust were invalid and noting "[c]learly, loss of a home is a serious injury. However, the record suggests that Ms. Alcaraz sought a loan beyond her financial means and expectation of job loss. Such resulting harm does not alone entitle her to injunctive relief.").
[98] *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).
[99] *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 877 (9th Cir. 2000) (internal quotation marks and citations omitted).
[100] *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1021 (7th Cir. 2002).
[101] *Precision Instrument Mfg. Co.*, 324 U.S. at 814.
[102] *Anderson v. Deutsche Bank Nat'l Trust Co.*, No. 2:10-CV-1443-JCM-PAL, 2010 U.S. Dist. LEXIS 120865, 2010 WL 4386958, at *5 (D. Nev. Oct. 29, 2010).

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for injunctive relief where plaintiffs defaulted on their loan obligations and thus had not "done equity."[103]

Here, Defendants have not "done equity" entitling them to equitable relief. Defendants defaulted on the Loan Agreements and failed to cure those defaults after receiving notice from Fannie Mae. The balance of equities does not favor Defendants.

4. Public Interest Considerations favor Fannie Mae.

In cases where the public has an interest in the outcome of private litigation, the court may consider those interests in granting or refusing to grant injunctive relief. *Ellis v. McDaniel*, 95 Nev. 455, 459 (1979). Plaintiff does not explain how impeding Fannie Mae's right to a receiver and stalling the foreclosure process on the Properties on which they have defaulted is in the public interest. Quite frankly, it's not for at least three reasons. First, Fannie Mae's core objective is to "foster competitive, liquid, efficient, and resilient national housing finance markets that support sustainable homeownership and affordable rental housing"[104] and its purpose is to provide affordable and safe housing to low- and moderate-income to provide a sustainable community and to cultivate opportunities to improve lives.[105] This objective and purpose would be frustrated if Fannie Mae is prohibited from enforcing borrowers' obligations to repair and maintain property. A preliminary injunction would also impede that mission by preventing Fannie Mae from finding an alternative owner who would perform the necessary repairs to the unleasable apartments at the Properties, which would add needed inventory to Nevada's affordable housing market.[106] Second, lenders must be permitted to realize the value of the collateral for loans made to borrowers by foreclosing upon their interests in property they financed when the borrower defaults under the

[103] *See Anderson v. Deutsche Bank Nat'l Trust Co.*, No. 2:10-CV-1443-JCM-PAL, 2010 U.S. Dist. LEXIS 120865, 2010 WL 4386958, at *5 (D. Nev. Oct. 29, 2010) ("Plaintiff's claim must be dismissed because plaintiff has not done equity; it is undisputed that plaintiff defaulted on his loan."); *see also Thurston v. HSBC Bank USA, N.A.* (D. Nev., May 19, 2016, No. 3:16-CV-0246-LRH-VPC) 2016 WL 2930706, at *2 ("Moreover, the Thurstons have been living in the home without making payments for almost nine (9) years. As such, the court finds that the equities in this action favor defendants who were properly enforcing their rights under the mortgage note and deed of trust in seeking a non-judicial foreclosure of the property.")

[104] Fannie Mae's October 2019 Strategic Plan is available at: https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx (last accessed Sept. 11, 2020).

[105] Supplemental Noakes Declaration, ¶ 7.

[106] The National Low Income Housing Coalition's data on Nevada's affordable housing market is available at: https://nlihc.org/housing-needs-by-state/nevada (showing that Nevada's affordable housing market is the worst in the country) (last accessed Sept. 11, 2020).

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terms of the agreement. As noted in *Rosenberger v. Wells Fargo Home Mortgage*, 215CV2107JCMVCF, 2015 WL 8160360, at *3 (D. Nev. Dec. 7, 2015), "Enjoining a valid trustee's sale does not serve the public interest. Lenders and secondary mortgage participants alike cannot be barred from obtaining the value of the collateral for loans made to borrowers by foreclosing upon their interest in the property they financed." One by-product from enjoining valid foreclosure proceedings is the chilling of the credit market and other Nevadans experiencing increased difficulty in obtaining financing as a result.[107] Additionally, as evidenced by the PCAs, the Properties need significant repairs to make certain portions safe and livable for potential renters. The potential for life and safety issues to the other tenants, including potential perils to their livelihood due to unkept property conditions concerns Plaintiff and should concern this Court. It's in the public's best interest to provide safe housing without risk to life and safety.

5. Any Injunction Bond Should Protect Fannie Mae's Interests

If the Court grants Defendants' request to issue a preliminary injunction, NRCP 65(c) requires that the applicant gives security in a sum as the court deems proper before a restraining order or preliminary injunction can issue. The sum of the security is left to the discretion of the court and is for the payment of such costs and damages as may be incurred or suffered by any party found to be wrongfully restrained or enjoined.[108] However, the primary purpose of the bond is to safeguard the non-applicant from costs and damages incurred as a result of an improperly issued temporary restraining order.[109]

In this case, Fannie Mae initiated foreclosure proceedings due to Defendants' refusal to pay in excess of $2.8 million pursuant to the Notices of Demand. If this Court is inclined to issue the requested injunction, Fannie Mae requests that the Court require Defendants to post a bond of not less than $3,000,000. That should be sufficient to cover the amounts stated in the Notices of Demand—$1,753,145 for Liberty Village and $1,092,835 for Village Square, plus interest—and would cover Plaintiff's anticipated legal fees of not less than $200,000. The Court should also require Defendants to make the full regularly scheduled monthly payments to Fannie Mae, in

[107] *Rosenberger*, 2015 WL 8160360, at *3.
[108] *See* NRCP 65(c).
[109] *V'Guara Inc. v. Dec*, 925 F. Supp. 2d 1120, 1127 (D. Nev. 2013) (citations omitted).

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addition to continue paying their monthly debt service obligations on the underlying Loans, sufficient to cover the additional $8,160 per month for the Liberty Village Monthly Replacement Reserve Account and an additional $1,397.42 per month into the Village Square Monthly Replacement Reserve Account during the pendency of any injunction the court may issue.

CONCLUSION

Fannie Mae is entitled to the appointment of a receiver. Defendants cannot satisfy the elements necessary for the issuance of a preliminary injunction. For these reasons, and those stated previously, the Court should grant Fannie Mae's Application and issue an order appointing Jacqueline Kimaz of The Madison Real Estate Group LLC as a receiver over Liberty Village and Village Square and deny Defendants' request for injunctive relief.

If the Court, however, is inclined to evaluate the Defendants' evidence of purported repairs to the Properties, Fannie Mae respectfully requests that (i) the hearing on the Application and Counter-Motion be continued to allow Fannie Mae to conduct discovery on the value of the Properties, condition of the Properties, and the purported repairs and (ii) the Court order the Defendants to provide access to the Properties for Fannie Mae's agents to conduct the necessary inspections.

Dated: September 14, 2020

SNELL & WILMER L.L.P.

By:/s/ *Nathan G. Kanute*
Nathan G. Kanute, Esq. (NV Bar No. 12413)
Bob L. Olson, Esq. (NV Bar No. 3783)
David L. Edelblute, Esq. (NV Bar No. 14049)

Attorneys for Plaintiff Federal National Mortgage Association

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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 **FEDERAL NATIONAL MORTGAGE ASSOCIATION'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** 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:

John Benedict, Esq.
Law Offices of John Benedict
2190 E. Pebble Road, Suite 260
Las Vegas, Nevada 89123
John@BenedictLaw.com

Attorneys for Defendants/Counterclaimants/Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC

DATED: September 14, 2020

/s/ Lara J. Taylor
An Employee of Snell & Wilmer L.L.P.

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EXHIBIT 1 - Supplemental Declaration of James Noakes

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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-C Dept No. 4 **SUPPLEMENTAL DECLARATION OF JAMES NOAKES IN SUPPORT OF PLAINTIFF'S APPLICATION FOR APPOINTMENT OF RECEIVER AND IN OPPOSITION TO DEFENDANTS' COUNTER-MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

I, James Noakes, declare as follows:

1. I am a Senior Asset Manager for Federal National Mortgage Association ("Plaintiff"). I make this affidavit in support of Plaintiff's Application for Appointment of Receiver.

2. As to the facts in this declaration, I know them to be true of my own knowledge or have obtained knowledge of them from employees who I supervise or work with and from my review of the business records of Plaintiff concerning the loan documents with Westland Village Square, LLC ("Village Square LLC") and Westland Liberty Village, LLC ("Liberty Village LLC", collectively with Village Square LLC, "Defendants"). If called upon to testify as to the matters set

forth in this declaration, I could and would competently testify thereto. As to those matters stated in this declaration on information and belief, I believe them to be true.

3. I have reviewed the "Reply" and "Opposition to Counter-Motion" and the exhibits referenced therein, and affirm that, to the best of my knowledge, the contents of the "Reply" and "Opposition to Counter-Motion" are true and accurate.

4. Defendants assumed the Village Square Loan Documents and the Liberty Village Loan Documents (the "Loan Documents") on August 29, 2018.

5. In November 2017, at the time of the original Loans and prior to the Defendants assumption of the Loan Documents, the Village Square Property and the Liberty Village Property (the "Properties") had an occupancy rate of approximately 80%.

6. By early 2019, the Properties' occupancy rate dropped to approximately 45%.

7. The Properties' rapid drop in occupancy rate signaled numerous issues to Plaintiff. First, Plaintiff became concerned that the declining occupancy rates at both Properties was because the Properties were deteriorating into unleasable condition. The potential for life and safety issues to the tenants, including potential perils to their livelihood due to unkept property conditions concerned Plaintiff. Second, the deteriorating conditions indicated that the Properties were not meeting Plaintiff's objective to provide affordable and safe housing to low-to-moderate-income families fostering sustainable communities and cultivating opportunities for tenants to improve their lives—a central tenant of Plaintiff's plan. Finally, the deteriorating conditions and low occupancy rates lowered the Properties' potential for income significantly, which jeopardized both Plaintiff's interest in the Properties as collateral and Defendants' ability to meet their debt service obligations.

8. In July 2019, Plaintiff determined that it needed to inspect the Properties. Based on that inspection, Plaintiff determined that third-party property condition assessments ("PCAs") of the Properties needed to be conducted based on the dramatic decline in occupancy rates and potential for deterioration of the Properties. The PCAs were conducted in September 2019.

9. The PCAs showed that the Village Square Property needed immediate repairs totaling $1,092,835.00 and that the Liberty Village Property needed immediate repairs totaling

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$1,753,145.00. Many of these repairs required urgent attention because they involved issues of life and safety.

10. On October 18, 2019, Plaintiff sent each Defendant a Notice of Demand that included their respective PCA and demanded the following payments:

a. $1,753,145.00 to the Liberty Village Repairs Escrow Account within thirty (30) days;

b. An increase of $8,160.00 per month, for a new total of $26,760.00 per month, for the Liberty Village Monthly Replacement Reserve Deposit;

c. $1,092,835.00 to the Village Square Repairs Escrow Account within thirty (30) days;

d. An increase of $8,349.92 per month, for a new total of $11,656.50 per month, for the Liberty Village Monthly Replacement Reserve Deposit.

11. In October 2019, the Village Square reserve accounts held $106,217.00 and the Liberty Village reserve accounts held $246,047.00.

12. These accounts did not hold enough funds to pay the $2,845,980.00 in estimated total repair costs for the Properties. Accordingly, Fannie Mae sent Defendants a demand to fund the reserve accounts for the Properties and make the repairs.

13. Defendants never paid the amount demanded to fund the reserve accounts and Fannie Mae accelerated the Loans.

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

Executed this 14th day of September 2020 at Collin County, Texas.

James Noakes

James Noakes

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Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Third Party Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

****

WESTLAND LIBERTY VILLAGE, LLC and WESTLAND VILLAGE SQUARE, LLC, Third Party Plaintiffs, vs. GRANDBRIDGE REAL ESTATE CAPITAL, LLC, a North Carolina Limited Liability Company, Third Party Defendants.	CASE NO.: A-20-819412-C DEPT. NO.: 4 **AFFIDAVIT OF SERVICE**

A copy of the Complaint and Summons in the above-entitled action were served on Defendant's Grandbridge Real Estate Capital, LLC registered agent on September 15, 2020. A copy of the Affidavit of Service is attached hereto as **Exhibit "1".**

DATED this_16th_ day of September, 2020.

LAW OFFICES OF JOHN BENEDICT

By: __/s/ John Benedict_____
John Benedict, Esq. (SBN 5581)
2190 East Pebble Road, Suite 260
Las Vegas, Nevada 89123
Email: John@Benedictlaw.com
Attorneys for Third Party Plaintiffs

Case Number: A-20-819412-C

EXHIBIT “1”

EXHIBIT “1”

SUMM

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DISTRICT COURT

CLARK COUNTY, NEVADA

****

WESTLAND LIBERTY VILLAGE, LLC and WESTLAND VILLAGE SQUARE, LLC, Third Party Plaintiffs, vs. GRANDBRIDGE REAL ESTATE CAPITAL, LLC, a North Carolina Limited Liability Company, Third Party Defendants.	CASE NO.: A-20-819412-C DEPT. NO.: 4 **SUMMONS FOR THIRD PARTY COMPLAINT**

SUMMONS – CIVIL

GRANDBRIDGE REAL ESTATE CAPITAL, LLC

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 21 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT(S): A civil Third Party Complaint has been filed by the Plaintiff against you for the relief set forth in the Third Party Complaint.

//

//

1. If you intend to defend this lawsuit, within twenty-one (21) days after this Summons is served on you, exclusive of the day of service, you must do the following:

(a) File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.

(b) Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators, each have 45 days after service of this Summons within which to file an Answer or other responsive pleading to the Complaint.

Submitted by:

LAW OFFICES OF JOHN BENEDICT

_/s/ John Benedict_____
(Signature)
Name: John Benedict, Esq.
Nevada Bar No. 005581
Address: 2190 E. Pebble Road, Suite 260
City/State/Zip: Las Vegas, Nevada 89123
Telephone: (702) 333-3770
Attorney for: Third Party Plaintiffs

STEVEN D. GRIERSON
CLERK OF COURT

By: _____ 9/3/2020
Deputy Clerk Date
Ofelia David
Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure, Rule 4(b).

AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, GEORGE FRANCO, being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received 1 copy(ies) of the Summons and Complaint, _____

_____

the 3RD day of September, 2020, and served the same on the 15TH day of September 2020 by:

(Affiant must complete the appropriate paragraph)

1. Delivering and leaving a copy with the Defendant _____ at (state address) _____

_____

_____.

2. Serving the Defendant _____ by personally delivering and leaving a copy with _____, a person of suitable age and discretion residing at the Defendant's usual place of abode located at (state address):

_____

_____.

(Use Paragraph 3 for service upon agent, completing A or B)

3. Serving the Defendant GREENBRIDGE ESTATE CAPITAL, LLC c/o CT CORPORATION SYSTEM by personally delivering and leaving a copy at (state address); 160 MINE LAKE COURT, STE 200 RALEIGH, NORTH CAROLINA 27615.

   a. With _____ as _____, an agent lawfully designated by statute to accept service of process;

   b. With LINDSEY BRUNSON, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (check appropriate method):

_____ ordinary mail

_____ certified mail, return receipt requested

_____ registered mail, return receipt requested

addressed to the Defendant _____ at the Defendant's last known address which is (state address):

_____

_____.

COMPLETE ONE OF THE FOLLOWING:

(a) If executed in this state, "I declare under penalty of perjury that the foregoing is true and correct."

_____

Signature of person making service

(b) If executed outside of this state: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

_____

Signature of person making service

A notary or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of LOS ANGELES
Subscribed and sworn to (or affirmed) before me on this 15th day of September 20 20, by GEORGE ERALCO proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.
Signature _____
Notary Public MARINE TER-POGOSYAN

MARINE TER-POGOSYAN
Notary Public - California
Los Angeles County
Commission # 2257424
My Comm. Expires Oct 1, 2022

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

FEDERAL NATIONAL MORTGAGE, Plaintiff,	)	CASE NO. A-20-819412-C
vs.	)	DEPT. NO. IV
WESTLAND LIBERTY VILLAGE, LLC, WESTLAND VILLAGE SQUARE, LLC, ET AL., Defendants.	)	**Transcript of Proceedings**

BEFORE THE HONORABLE KERRY EARLEY, DISTRICT COURT JUDGE

APPLICATION FOR APPOINTMENT OF RECEIVER ON OST; DEFENDANTS' OPPOSITION TO PLAINTIFF'S APPLICATION FOR APPOINTMENT OF RECEIVER ON OST; COUNTERMOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES;

TUESDAY, OCTOBER 13, 2020

APPEARANCES:

For the Plaintiff: BOB L. OLSON, ESQ.
(Via BlueJeans Videoconference)

For the Defendants: JOHN G. BENEDICT, ESQ.
(Via BlueJeans Videoconference)

RECORDED BY: REBECA GOMEZ, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript produced by transcription service.

TUESDAY, OCTOBER 13, 2020 AT 10:30 A.M.

THE CLERK: *Federal National Mortgage versus Westland Liberty Village, LLC*, case A-20-819412-C.

THE COURT: Okay. And can I have -- who is here for Federal National Mortgage?

MR. OLSON: Good morning, Your Honor. Bob Olson of Snell and Wilmer on behalf of the plaintiff.

THE COURT: Okay. And who is here for Westland Village, the other -- the defendants? Mr. Benedict?

MR. BENEDICT: Good morning, Your Honor. Yes. Good morning. John Benedict.

THE COURT: Good morning, Mr. Benedict. Okay.

All right. We have two Motions. Well, we have a Motion and a Countermotion. We have the plaintiff, Federal National Mortgage Motion for an Appointment -- well, it's an Application for Appointment of a Receiver. Correct? Yes.

MR. OLSON: Yes, Your Honor.

THE COURT: It's correct. After everything I've been through, it's correct. Okay. I will tell you, I read through all the exhibits. I mean, I've read through everything, but anything you feel you want to add or point out to me on your argument for an appointment of a receiver, at this point, and the receiver that you want,

Mr. Olson.

MR. OLSON: Thank you, Your Honor.

With respect to the receiver that the plaintiff would like, the plaintiff has selected Jacqueline Kimaz of Madison Real Estate Group. We were informed that Ms. Kimaz has worked with Fannie Mae in the past. She has experience as a receiver in Nevada with approximately 50 properties over the last 10 years. She is imminently qualified and Fannie Mae has complete confidence in Ms. Kimaz of Madison Real Estate.

THE COURT: Okay.

MR. OLSON: I don't know if Your Honor has any additional questions concerning Ms. Kimaz or Madison --

THE COURT: No. I -- you know, I'm very familiar. I've had, unfortunately, experiences with working with receivers. I'm finally winding one down right now. So, I'm very familiar with the caselaw in appointing a receiver and the criteria.

So, anything you want to -- you know, anything you want to add on why you feel like, under the caselaw, that a receiver should be appointed at -- you know, that somehow these two properties are in danger of being -- you know, getting -- suffer irreparable harm, being lost, so that Fannie Mae's interests are not being protected? I mean, --

MR. OLSON: Well, Your Honor, I think the focus --

THE COURT: -- I've looked through everything, including all of the exhibits for you. I don't -- one was 1,670 or something and all the stuff. I mean, it's like doing a lawsuit from the beginning, but I understand. And why is it -- I think I need to understand a little bit better why Fannie Mae, or your client, thinks that they're not, you know, doing an adequate job right now? Because you know receivers are very expensive. They -- as you know under the caselaw, they are not necessarily favored. They can be -- they'll cost both parties.

I'm just winding one down on a case that -- and now, of course, they're all fighting about how much the receiver gets, what the receiver did that was right. We have experts coming into court saying the receiver didn't do this, didn't do that. So, it is not a small investment. It's -- then takes it out of the hands of the people who are the defendants who paid for this property. I think my notes said -- didn't they put 20 million down? Am I right, Mr. Benedict? Did you clients put 20 million down?

MR. BENEDICT: We have 20 million invested --

THE COURT: Yes.

MR. BENEDICT: -- in the property in total.

THE COURT: Right now. Correct?

MR. BENEDICT: We've invested --

THE COURT: Yeah.

MR. BENEDICT: -- three and a half million and another one and a half million, since we took it over in August of 2018.

THE COURT: Right. Correct.

And, then, I read all the exhibits. I happen to have a trial -- I don't know, pre-Covid, you guys -- I don't know if time goes fast here, with Sportsman's Manner who, some of your exhibits, Mr. Benedict, I'm familiar with. When Metro comes in and writes those letters, I -- it was like déjà vu a little bit because that was a huge thing on Sportsman's Manor. I don't know if you guys know where it is but it's on Boulder Highway and it's a very unfortunate death case. Someone was -- you know, due to criminal activity. So, I understand all that.

My biggest concern, Mr. Olson, is why it is that you think this Court should exercise its discretion and say: You know what, these people who put a lot of money in it, are still doing it, have gotten accommodations for -- I mean, they -- and I get it's a high -- I don't want to say a high crime, but it is an area where Metro -- they -- you know, what Metro does is they spot certain areas, I don't know if you know but I know from all of the testimony now, that -- looking at the statistics, that due to the population and due to the people that come there, they can be more -- more crime can occur. That's why I was familiar

when I saw the exhibit.

So, why is it that -- because -- why is it that you think the defendants can't be protecting the interests of Fannie Mae?

MR. OLSON: Your Honor, very simple. We have got a contract. As Your Honor noticed reviewing it, it's a pretty long and --

THE COURT: I noticed.

MR. OLSON: -- detailed contract.

THE COURT: Yes.

MR. OLSON: But the contract essentially provides that if there is a property condition assessment performed on the property that identifies repairs, the defendants are required to deposit into the appropriate reserve account adequate funds to ensure completion of those repairs. And, at the time of the PCA, that was $8,245,000, approximately.

The defendants have simply refused to do so. They allege that they have made additional repairs to the property since then of 1.7 million. I would note that that is a deficiency of 1.1 million, based upon the numbers in the PCA, and Fannie Mae does not have the opportunity to go out and inspect the property and confirm whether or not those repairs have been made.

THE COURT: That's basically a question --

MR. OLSON: The --

THE COURT: -- of fact, isn't it? Isn't whether -- what -- first of all, when I read through it all, Fannie Mae gets to unilaterally decide what the repairs should be and say, even though they've kept up all the reserves, everything they contracted for, and say: Okay, in our opinion, you need to add -- what did you say, 8,245,000 more to protect --

MR. OLSON: Two million eight hundred --

THE COURT: Two million -- okay.

MR. OLSON: -- forty-five.

THE COURT: Okay. I thought you said eight. I thought -- two million something. I'm --

MR. OLSON: Yeah. Approximately 2,845,000.

THE COURT: Okay. So, that -- and their --

MR. OLSON: Well, Your Honor, the contract says they have to fund those accounts. And the purpose behind those accounts is to ensure that there are funds available to keep the -- or to maintain and improve the property, --

THE COURT: Right.

MR. OLSON: -- to ensure that there's funds available to pay the lienholders, the potential lienholders against the property so we don't end up with a property lien, and it's there to ensure that the property is maintained in a safe and good condition in accordance with Fannie Mae's objective, which is to foster competitive,

liquid, efficient, and resilient national housing finance market, and support sustainable homeownership and affordable rental housing.

THE COURT: And that's --

MR. OLSON: And Fannie Mae simply wants to make sure that the properties are maintained in that fashion. The defendants have, basically, snubbed their obligations under the contract to fund that by saying: You know, we're not going to fund it. Instead, here's our strategic plan and this is how we intend to address the concerns you've raised. But, Your Honor, that's not contemplated by the contract. It clearly isn't. The --

THE COURT: Now you're asking to interpret the terms of the contract. Correct?

MR. OLSON: Oh, the contract is pretty straightforward. But, yes, Your Honor. And we think the contract provides that if there's a PCA, and there's shown to be a change in the condition of the property, that they have to post the adequate funds into our reserve account to cover those changes.

Moreover, Your Honor, it's required under section 6.2 of the Loan Agreement that has a lot of provisions requiring the defendants to maintain and repair the property. And, you know, they're just -- they're not doing it in the manner that Fannie Mae's contract says they are

to do it. Rather, they simply have kind of taken the cowboy approach and said: This is how we're going to address the issue and, if you don't like it, that's your problem.

Now, with respect to the appointment of a receiver, Your Honor, I don't think the Court's discretion is as limited as Your Honor seems to be suggesting. The caselaw really isn't that relevant because Nevada has a number of statutes that govern the appointment of the receivers, including the Uniform Commercial Real Estate Receivership Action, which I think was adopted by the Nevada Legislature in 2017. And, if you look through the UCLE, you're going to -- or UCRERA, my apologies, you'll see that there are instances where the Court may appointment a receiver and there are instances where the Court -- or what the statute says is if the party is entitled to the appointment of a receiver. And the word may is used and the word entitled is used in the same section. For example, NRS 32.260 subsection 1 says: These are the cases where a court may appoint a receiver.

THE COURT: But it's all fact specific.

MR. OLSON: Subsection 2 --

THE COURT: Is it not? Is it not --

MR. OLSON: Well, --

THE COURT: -- depending on facts? At least every

receivership I had, it's fact specific because the point of the receivership is to make sure that, you know, in your case, Fannie Mae is not -- you know, has protected their interest. It's -- there's not, let's say in this case, Fannie Mae has a right or it's a mandatory right to a receiver. Correct?

MR. OLSON: Well, Your Honor, the statute requires two factual findings by the Court in order for plaintiff to be entitled to the appointment of a receiver.

THE COURT: Okay.

MR. OLSON: The first is that it's in connection with the foreclosure or other enforcement of a mortgage.

THE COURT: I'm sorry. Say it again. You faded out.

MR. OLSON: It is connection with enforcement or foreclosure of a mortgage.

THE COURT: Okay. But we don't have --

MR. OLSON: And, in this case, Fannie Mae has initiated foreclosure proceedings.

THE COURT: Okay.

MR. OLSON: We recorded the Notice of Default and the Election to Sell in August. It's about time that we can file and serve the Notice of Sale.

So, that's the first finding: Is there a foreclosure proceeding pending? And the answer is: Yeah.

And we would ask Your Honor to so hold.

Then, there are a number of options under that subsection that the Court can select from one of to appoint a receiver. The first that I wanted to discuss is subsection (b) of section 2 of NRS 32.260. That requires a finding that the mortgagor agreed in a signed record to the appointment of a receiver.

THE COURT: The -- do it again. The mortgagee --

MR. OLSON: Again, the mortgage --

THE COURT: Holder --

MR. OLSON: The mortgagor, or the borrower, --

THE COURT: Oh, okay.

MR. OLSON: -- agreed in a signed record to appointment of a receiver on default.

THE COURT: Upon default. So --

MR. OLSON: If you look at --

THE COURT: -- this is on default. Okay. This is if there's a finding --

MR. OLSON: Yeah. Well, --

THE COURT: -- of default. I agree with that.

MR. OLSON: Correct. You have to have an event of default in order to initiate the foreclosure proceeding.

THE COURT: Correct.

MR. OLSON: And, in this case, section 3(e) of Exhibits 3 and A, which are the Deeds of Trust, fully

provides that the borrower, in this case were the two defendants, agreed to the appointment of a receiver as a remedy upon a default.

THE COURT: Okay. So, once --

MR. OLSON: So, I think, Your Honor, --

THE COURT: It all keys on the default. Okay.

MR. OLSON: I think that's a safe statement, Your Honor.

THE COURT: Well, at least that's what I thought reviewing it.

MR. OLSON: There has to be --

THE COURT: Okay. That's fine. Okay.

MR. OLSON: And we went through the papers why we think there's an event of default because the obligation is to fund the account and the defendants have refused to do that.

THE COURT: And you don't think --

MR. OLSON: The second is --

THE COURT: -- there's a question of fact on the obligation -- on what that obligation is to fund the account? You think -- I mean, when I read your stuff, it almost sounded like you, Fannie Mae, said unilaterally: We've got this -- what is it? F3? I'm sorry, you guys. I've read it all.

MR. OLSON: Yeah.

THE COURT: What's the 2019 -- I have so many notes here. I apologize, Mr. Olson. What is the report from the -- I got it. I got it. Oh.

MR. OLSON: I believe you're referring to the --

THE COURT: The September 2019 PCA Report prepared by Small F3, Inc. That's where you came up with the 2.7 million. Correct?

MR. OLSON: Correct, Your Honor. It's 2.8, but --

THE COURT: I have 2 -- maybe I did it wrong. I put 2.7. I could -- either way. It can be 2.8 if -- there were a lot of exhibits, Mr. Olson. So, I did the best I could to sift through over 1,200 or some. Okay.

So, --

MR. OLSON: I understand, Your Honor. This is a -- it's a very paper-intensive case thus far.

THE COURT: I -- that's a nice way to say it. I agree. Which -- but I understand on the -- okay. So, all right. So, based on that, you're saying then these property owners are in default because we have this report that says more funds should be put in the reserve. And do they have any remedy to say, wait a minute, we've done this, we've done that, to have -- to make that a question of fact whether there is a breach of that?

MR. OLSON: Well, Your Honor, I think there's no doubt there's a breach of it.

THE COURT: It's -- you know, I've done a lot of contract stuff, as you know, and I'm like: Wait a minute. I've not seen one where a client can unilaterally say: We've decided you breached, you're going in default, and we want a receiver.

MR. OLSON: Well, Your Honor, first is we were unable to have a meaningful discussion as to how --

THE COURT: Meaningful? Okay.

MR. OLSON: Meaningful. As to how to address this. It just didn't get anywhere, unfortunately.

THE COURT: Well, that's why you get lawsuits, huh?

MR. OLSON: The second I would add --

THE COURT: Okay.

MR. OLSON: Exactly. But I would also add, Your Honor, that if you look at some of the exhibits for the counterclaim, for example, Exhibit N, which includes their strategic -- Westland's strategic --

THE COURT: Yeah, I have it right here as a matter of fact.

MR. OLSON: I apologize. I forgot the name of the --

THE COURT: It's called their Improvement Plan for Liberty Village, dated November 27th, 2019. I actually read through it.

MR. OLSON: Yeah. That's it. Your Honor, if you look at page 7, they broke down --

THE COURT: I got it. Okay.

MR. OLSON: They broke down the repairs to the interior of the unit by what was requested in the F3 Report versus what they thought was due.

THE COURT: Correct.

MR. OLSON: And this goes to show that there is a default. They say the F3 PCA identified $1,908,760 of repairs. That's in the third table on that page --

THE COURT: No, I'm looking at it, as we speak, Mr. Olson. I have all these -- I'm looking at it. And?

MR. OLSON: And then it -- if you go immediately to the right, there's the Westland budget for the same unit. Their budget amount is $1,218,125.12. Now, the interior unit's not all of the items that were identified in the PCA. They were items in connection with the communities and the exterior. But, if you just focus on the interior of the unit, we say it was a million-nine. They say it was a million-two. How much did they deposit? Zero. They didn't even make a good faith effort to try to deposit what they viewed the repairs as being.

THE COURT: Okay. Did they do any efforts on their own?

MR. OLSON: They are claiming that. We have been

trying to organize an inspection of the property by F3 and we're getting a lot of grief from the defendant because, primarily, they want [indiscernible] inspect the property for Fannie Mae and that's something that they're --

THE COURT: Okay. Well, that's a whole different issue. That -- that's a -- okay. All right.

MR. OLSON: Clearly, Your Honor, but we're -- we haven't been able to arrange an inspection of the property to verify anything.

THE COURT: Okay. Well, maybe that's an area that should be going forward in discovery, as opposed to -- but okay. That makes sense.

MR. OLSON: Well, it is an obligation under the contract, 6.03(b), I believe, that they're to make the property available for inspections by Fannie Mae.

THE COURT: I --

MR. OLSON: Not doing it.

THE COURT: So that could be asserted in the lawsuit as another breach and, if there's damages that result from it, that's what contract -- okay. Anything else you want to add? I wanted to make sure I understood the mandatory.

MR. OLSON: Well, --

THE COURT: I get it. Okay.

MR. OLSON: Okay. You know, similar argument

under the Uniform Assignment of Rents Act, 107A.260 (a)(1) and (a)(3), uses the same language as the Uniform Commercial Real Estate Receivership Act in that we're entitled if there's a showing. And, under that statute, it says we're entitled if the assignor is in default and, you know, we've been talking about the default. They failed to fund any of the reserve account. And the assignors agreed in a signed document to the appointment of a receiver. And they've done just that. Section 6.3 -- I'm sorry. Section 3(c), I believe, of the Deed of Trust.

And, similarly, we sent out in November of -- excuse me, December of 2019, a Demand under NRS Chapter 117A for all of the rents and they have not been honoring that. That's additional cause under subsection 3 of that statute for the appointment of a receiver.

Your Honor, we have also briefed NRS 107.100 subsection (b) that says, quote:

> Shall appoint a receiver if the property is in danger of substantial waste or may become insufficient to discharge the debt.

In this case, we're gravely concerned that the value of the property is going to deteriorate if certain repairs aren't made, aren't made in a workmanlike manner and, you know, they need to be made in accordance with the contract, just not in some [indiscernible] manner.

Finally, Your Honor, under the NRS Chapter 32.010, that statute says the Court may appoint a receiver if the property is danger of loss -- of being lost, removed, materially injured, or the condition of the mortgage has not been performed. We've got conditions of the mortgage that haven't been performed, and we think the failure to make the repairs and put the money into the deposit to ensure that the repairs are made is a danger of the property being lost.

Your Honor, the allegation that they've cured their default by making some repairs, you know, they haven't proven that they've made every repair on the PCAs that were assembled. And, moreover, as we went over a couple of times, Fannie Mae hasn't had the opportunity to inspect that property. And we're getting pushback from them about inspecting it.

THE COURT: Well, maybe that's something that needs to be resolved in discovery. Right, Mr. Olson? Because you certainly can go to the Discovery Commissioner and say, we have a right, you know, and do a motion on that. I agree with that --

MR. OLSON: Your Honor, that's one alternative. The other is if it's an additional breach of the agreement.

THE COURT: Well, then, that's -- you prove that up --

MR. OLSON: I mean, this is --

THE COURT: -- and then you prove your damages for Fannie Mae. That's what breach of contract. I understand that, too. Okay.

MR. OLSON: You know, I can go into some of the points they've raised in the Opposition if Your Honor would like.

THE COURT: Well, let Mr. Benedict speak then, because I read through -- like I said, I pulled out and I, as best I could, did a whole lawsuit, I felt like, in one Motion to Appoint Receiver and, actually, his Countermotion for a TRO. But let me hear -- I understand your side better why you were saying it was mandatory. It was based on the default or what you feel is an appropriate -- okay.

So, Mr. Benedict, if you want to add to -- once again, I read everything as best I could, as you -- I know you live with it, but what you would like to add and why you feel I should not appoint a receiver.

MR. BENEDICT: Well, thank you, Your Honor. First of all, starting with your initial question to Mr. Olson, there is no default. This is --

THE COURT: Yeah.

MR. BENEDICT: -- a loan that is in full compliance. I mean, if you start from the premise that's a default, then, of course, --

THE COURT: Yeah.

MR. BENEDICT: -- all the cards are going to fall in the house of call -- of cards. Yes, the statute says, you know, under a situation if there's a default, there's a right to receiver. Yes, the statute says if there's a default there's a right to an assignment of rents. Yes, the statute says there's a right to file an NOD. But what the statute doesn't say, and what I think we've established overwhelmingly, is that there is no default. This is a loan that is fully compliant. All the payments have been made. All of the monthly payments have been made and then some.

We have -- as we established through affidavit and backup, we have invested -- the client has invested over -- before there was ever a PCA, before there was ever this report, had invested $1.8 million in improvements, before there was ever any reports to respond to. And, somehow, between August of 2018 and September of 2019, if you're to believe the face of the report, then the value of the property, the amount of the improvements, after we put $1.8 million into it, went down by $2.8 million. And that's just impossible to have occur. And it didn't occur.

And, since the PCA, my client has established and put in another $1.7 million, for a total of $3.5 million. And, in addition to that, as the Court alluded to at the

beginning, has spent substantial sums cleaning up the property, --

THE COURT: Right.

MR. BENEDICT: -- getting the criminal element out of there, working with Metro, working with community leaders. Heck, they even bought a commercial center next door to weed out that criminal element. One point -- almost $1.6 million in security services alone. Plus, it employs 32 fulltime employees to operate this premises. Mr. Olson would suggest that there's some kind of shotty operations going on here and that we're ignoring the obligation to keep the property up or --

THE COURT: What happened?

THE COURT RECORDER: That's on their end.

[Technical issues with audio/visual from 10:57:07 a.m. until 10:53:18 a.m.]

MR. BENEDICT: -- circular reasoning where they start with a default that they created after a unilateral modification to the agreements and now they're running with it.

Now, why do I say that there's unilateral modifications to the agreements? There are two ways -- there are two times that a PCA can be asked for and entered upon. One is that change of ownership. And when my client assumed this loan in August of 2018, there was a PCA that

was done by a different firm that was done under the guidance and oversight of this particular servicer, the same servicer that's on it now, and the parties agreed in the Loan Schedule 1 to keep the reserve of $143,000 total for both properties.

THE COURT: That's how they came up with that amount.

MR. BENEDICT: That's a bargain for --

THE COURT: Okay. Okay.

MR. BENEDICT: And that's the agreed upon amount. There is nothing in that contract that allows the Fannie Mae to come a year later and unilaterally increase that by 20-fold. It doesn't exist in the contract. That's called a unilateral modification. And, so, Mr. Olson says, well, there was pushback because we didn't just jump through whatever hoop they placed in front of us and put on top of the three and a half million dollars another two and a half million dollars, or whatever random number they assigned to it. The fact of the matter is the agreement doesn't require that, their agreement that they drafted. And that is called out specifically in section 13.02(a)(3) of their contract that they drafted, which should be construed against them.

THE COURT: Do it again. Thirteen -- I have it --

MR. BENEDICT: It's the --

THE COURT: Thirteen --

MR. BENEDICT: Yeah, 13.02(a)(3). It says --

THE COURT: Okay. Hold on. I've --

MR. BENEDICT: -- that --

THE COURT: A -- okay. Adjustments to Deposits, I got it.

MR. BENEDICT: Adjustments to the deposits upon the transfer of a property owner, which had -- occurred in August and they didn't ask for anything. It did not occur in September, when they're asking -- when they put the PCA out, and they start making demands, and then they put us in default. And, secondly, it says: Option nine of a 10-year loan. Well, we're not in year nine. Okay? So, those two provisions are expressed and they're bargained for.

Additionally, in 13.02(a)(4), --

THE COURT: Yes. The insufficient funds one.

MR. BENEDICT: Insufficient funds, there is an agreed upon amount for $143,000 that must be used to -- for insufficient to cover the cost. But, here, the repairs had been completed, they're in progress, and they've been communicated.

And Mr. Olson says that they don't know what we did. Your Honor, I feel for you. Part of the 2,000 pages you had to flip through were all the repair receipts and backup that we gave them to show them that the work has

been done, indeed has been done. And this, Your Honor, --

THE COURT: And we actually went through it, Mr. Benedict. I will tell you. My law clerk and I spent many, many, many hours going through matching up and trying to figure out what they wanted done from their report to what was done. So, I understand that.

MR. BENEDICT: Well, I appreciate that and my client, who has $60 million invested, and the hundreds of families that have decent housing as a result of my client who has been in the business for 50 years, has 10,000 units under management and ownership in Las Vegas alone, it's not its first rodeo, Your Honor. And, so, they are complying with their obligations under the law. They are complying with their obligations with Fannie Mae, from whom they have many other loans. And, so, this Notice of Default is a big problem to them.

THE COURT: Yeah.

MR. BENEDICT: And, frankly, they don't like it very much. They haven't had a Notice of Default in 50 years of being in business and they don't like it very much on what we firmly believe and have argued is a pretty concocted, unilateral modification of the contract that they drafted in order to declare a default and then to have all of the circular reasoning follow from there.

So, we think that their argument about that they

should -- that they have a right to raise these reserves by $2.8 million after the fact are -- is completely contrary to the contract that they drafted, 13.02(a)(4), if you follow it, flows through. It talks about section 6.03, the condition of the mortgaged property.

THE COURT: Yes.

MR. BENEDICT: And it's without question at this point, Your Honor, that there has been no showing by Fannie Mae of deterioration of this property whatsoever. Their sole basis for arguing waste as one -- under their statute -- statutory argument, or deterioration, which is a defined term in their contract, that does not involve lower occupancy on the property, but that's exactly what they rely upon. They rely upon the fact that occupancy went down. Well, what happened, Your Honor, is you've been through this drill and you've lived in Las Vegas a long time. When you're throwing criminal element out of your property, the occupancy is going to go down. It went down. My client reported it and it was forthright about that. All the time that the occupancy went down, my client paid the mortgage in full. Never asked for a break, never paid it short, never did anything. Paid it in full. Paid all the operating expenses in full.

And, so, now that they move for -- they started this process in December of 2019, only to file something in

August on an order shortening time, in that time, we've established to the Court that the occupancy rate is back up to 80 percent where the presale rate was. So, in that interim, exactly what we knew, because we are experienced operators and owners, would happen happened. You got rid of the criminal element. You started putting money back into the property to make it safe. You made the units better for people to live in and occupancy will go up, and that is exactly what has happened.

And now that it's gone up, and now that we've invested all of this money, and now that we fixed the problem that they had well before we were involved for years and years and years at that property, now they want to say we're in some kind of technical default and file a foreclosure notice against us to take the property back. That is just wrong and the arguments that Mr. Olson has made, respectfully, under the statute, I can address them, but they all start from the premise that there is a default and, at the very --

THE COURT: Well, and I got that, Mr. Benedict. Did you notice that's why I had Mr. Olson explain to me -- I got that it all stemmed from the default.

MR. BENEDICT: okay. And, so, --

THE COURT: I just want you to understand that I didn't -- I had an issue with it when I was reading

everything, but Mr. Olson did clarify it. So, I do follow you, Mr. Benedict.

MR. BENEDICT: Okay.

THE COURT: Does that make sense? I follow that.

MR. BENEDICT: So I don't need to --

THE COURT: It all stems from the default notice. And --

MR. BENEDICT: And --

THE COURT: Then the question is: Is it -- who makes the determination whether they were -- whether your client was in default?

MR. BENEDICT: Well, we believe that under the face of the documents that we've bargained for that says there's a --

THE COURT: You're not. This -- yes.

MR. BENEDICT: -- reserve of 143,000, that we're not in default and that they can't put us in default for not paying $2.8 million. And, on top of that, Your Honor, as we established in our papers, on top of all of that, it's not just the 143,000. We're paying, between the two properties, almost $30,000 a month for these repair and construction reserves. There's a total of 432,000 in one -- for one property, 236,000 for the other property, and that doesn't even address the $1 million of an insurance claim that we funded the work for that they, in turn, kept

the money for.

So, there is no waste or fear of losing this property or not having it have its value. There's $20 million of equity.

THE COURT: Yeah.

MR. BENEDICT: There's $6 million -- $5 million that we invested in two years there, plus they're holding onto an additional 1.6 or 7 million dollars in these reserve accounts. So, I totally don't understand the argument that says there's waste or there is some kind of uncertainty that would allow for the drastic remedy of an appointment of a receiver. Respectfully, we don't need it --

THE COURT: And then there was --

MR. BENEDICT: We have the folks in place to do the work. They're doing an excellent job. We don't need the additional expense and, at the end of the day, Your Honor, we think that the Court sees this for what it is. At best for Fannie Mae, it's a factual dispute --

THE COURT: Yeah.

MR. BENEDICT: -- that we do not need a receiver. We need this Notice of Default lifted and the injunction entered so that we can protect our property and not lose it. It's unique and we are more than happy to slug this out with Fannie Mae, if that's what they want to do in

discovery, but you can't hold a -- call a default and then hold a gun to our heads and then say: Well, but we're going to take your property back while you figure it out. The Court, respectfully, can stop that and should do so, both under the facts, the law, and certainly sitting in equity.

THE COURT: And that segues into your Countermotion for the TRO where, basically, it would be a preliminary injunction, at this point. Correct? To stop their default proceedings. Correct?

MR. BENEDICT: It would be. Yes, Your Honor. It does.

THE COURT: They're all intertwined, at least going through all this, I could see. Okay.

MR. BENEDICT: And, so, may I address that to the Court?

THE COURT: Yes. You can go ahead and, then, I'll give Mr. Olson a chance because it -- I do understand it's all intertwined. That I --

MR. BENEDICT: Right.

THE COURT: That I have. Okay.

MR. BENEDICT: So, on the injunction side, you've summarized it perfectly, which is it's a preliminary injunction to --

THE COURT: It is.

MR. BENEDICT: -- stop the Notice of Default. We -- we've set everything out. I don't want to repeat what I just said. We have -- you've -- I've already established -- and the affidavits in support and the exhibits in support establish our substantial investment. The reserves, the PCA that is trying to increase it by 2.8 million when there's $143,000 tab.

The -- as the Court knows, the standard is likelihood of success on the merits --

THE COURT: The reasonable probability -- yeah, of likelihood of success on the merits and, of course, the irreparable harm. But we have property, so I understand that.

MR. BENEDICT: And balancing the hardships.

THE COURT: Correct.

MR. BENEDICT: And, respectfully, in opposition, those are not really addressed by my opponent. They simply say there's a default and, therefore, we're entitled to do what we've done. And if you undermine that premise, then I believe their argument completely falls.

Likelihood of success on the merits, we believe that, respectfully, they sidestep that; that we're not trying to convince the Court that we are going to win on our Counterclaim, although we feel very strongly that we will. What we're saying is the one cause of action on the

other side is a claim for right of receiver. They, in furtherance of that, filed the NOD. The NOD -- we've established that we believe that there's more than enough to establish that the status quo, which is our client, who has $20 million plus and all of these, you know, 32 employees fulltime, and security forces, and so forth, who has been accommodated in writing by the municipalities and by Metro, that they should be allowed to maintain the status quo, which is to operate the property, and that we've established the success of disproving the default, although it's my opponent's obligation to prove there's a default. On -- at this stage, we believe we've more than shown likelihood of success. Irreparable harm is, frankly, straightforward.

THE COURT: Right.

MR. BENEDICT: It's the -- the property is unique. It's --

THE COURT: It's property.

MR. BENEDICT: -- real estate and we have a myriad of investment, we have processes, and people in place, and things that we've done that would mean that we would be irreparably harmed. And, at this early stage, with no discovery, and with nothing really other than Fannie Mae's say-so, taking the property from us would cause irreparable harm.

And balancing the hardship follows pretty substantially with that. We've established that without giving any credence to the property increasing in value, just due to, you know, increase in values in the valley -- if you just take what we paid for it and what we have in it, we'd have over $25 million at stake here, Your Honor. I know monitory is not a irreparable harm, but, in real estate, of course, the value cannot be understated and uniqueness. And, therefore, the $25 million does go to the balancing of hardships; whereas, on the other hand, we've made all of our payments and Fannie Mae can only point to its claim that it claims that its report is correct, our report isn't correct, and that we haven't done enough to bring these properties up to their standard. Even if that were true, respectfully, that's not what their documents say. They don't have a right to do that. And, secondly, we respectfully represent to the Court and believe we established enough to get the preliminary injunction that we have done substantial work. You've gone through it. You've seen it.

And the final point is that Fannie Mae has not been able to point this Court to one case where other than a breach of the Note served as the basis or a Notice of Default or a receivership. They've pointed you to breach of promissory note cases, cases where they -- that the

borrower agreed that they were in violation or there was a bargained for specific amount that wasn't paid like in --

THE COURT: Right. And they didn't pay that specific amount. We read those cases, yes.

MR. BENEDICT: That has never -- that is not what we have here, Your Honor. What we have here is a manufactured default after you --

[Technical issues with audio/visual from 11:08:51 a.m. until 11:09:07 a.m.]

THE COURT RECORDER: Mr. Benedict?

MR. BENEDICT: Your Honor, is --

THE COURT: Unfortunately, Mr. Benedict, your internet is kind of going in or out. I've heard most of --

MR. BENEDICT: We ask the Court to access -- oh, sorry about that. I'm showing a good signal. Is that better?

THE COURT: Yes. Thank you. I can hear you. I don't care if your mouth doesn't work the same, as long --

MR. BENEDICT: Okay. I apologize.

THE COURT: -- as I can hear you. You --

MR. BENEDICT: That would be a little bit funny with the words coming out.

I'm done. Just the Court has to assess the bonds. We ask for a $1,000 on the basis that Fannie Mae has not been harmed in the least and this de minimis bond would

more -- that, plus the million-seven they have in reserve, and us continuing to make payments, more than protects them. Thank you.

THE COURT: Okay. All right. Mr. Olson.

MR. OLSON: Your Honor, there's a number of points that I wanted to address. I'll start with the very last one that was made and that is that Fannie Mae has presented this Court with no caselaw demonstrating that this is an event of default that would justify a foreclosure or a receiver. I would submit to Your Honor that is, in fact, not the case. We've provided Your Honor with citations to at least three cases that deal with -- or, excuse me. Two cases that deal with the failure to fund reserve accounts or reserve escrow accounts or repair escrow account. The first is the *Bierton versus Brown Deer Apartments Housing Associates* case out of the Court of Appeal from Minnesota in 2010, which held that it is immaterial of the shortage, and it was referring to an escrow account, is lesser than what was demanded when no payment at all is made. So, in that case, the Court held that the failure to fund the reserve account by the borrower constituted an event of default.

Similarly, in the case of *Peny and Company versus Food First Housing Development Fund*, which is in the papers, it's out of New York from 2013, the Court held that

the continued failure to pay imposition deposit within 20 days after written notice constituted an event of default permitting the mortgagee to demand full payment of the principal and interest under the loan document.

I believe, Your Honor, also that there was a third case out of Utah, and that was *American Savings and Loan Association versus Blomquist*, which held that when a mortgagor specifically agrees to pay sums as estimated by the mortgagee into a reserve account, a partial payment, even if the difference is de minimis, is inadequate and entitles the mortgagee to declare the entire debt due.

So, the failure to fund these escrow accounts is, in fact, Your Honor, an event of default.

THE COURT: Yes. It's my understanding, when I read those cases, isn't that the original funding, which we have talked about, the 143, not additional funding when I read those cases or am I not --

MR. OLSON: If I recall correctly, the Minnesota case was additional funding, Your Honor.

THE COURT: I don't -- my notes don't say that, but that's okay. I did notice a distinction when I read those cases. Okay.

MR. OLSON: Thank you, Your Honor. You know, there's a lot of argument here that the -- this is a default that was manufactured by Fannie Mae and there's

been a unilateral modification of the loan documents. Your Honor, the first thing to clear up is there has not been a modification of the loan documents by Fannie Mae other than what has been presented to Your Honor in [Indiscernible] and that is copies of the loan documents, as well as the first six amendments to the Liberty Village Loan Agreement. There have been no efforts to unilaterally modify the loan documents. They say that the loan is fully compliant. Well, Your Honor, I would submit it's not. They have not funded the escrow account, as required.

They've, instead, tried to effectuate a cure of a default by doing something else that's not contemplated by the contract. And the caselaw that we've cited says that, you know, when a contract says this is what you do when there's a default and you do it, you don't go out and do something else and allege that you've complied with the terms of the contract.

I wanted to --

THE COURT: So what you're doing, Mr. Olson, you're basically doing a Motion to Dismiss, as far as a legal argument that I should find as a matter of law that there was a breach and, based on that, by me looking at the contract deciding that there was a breach, your client is entitled to a default. Since they're entitled to a default, at this point, you want a receiver. Isn't that,

basically, if you follow your argument? Because you're arguing whether there was or was not a breach of these loan agreements. Correct?

MR. OLSON: Your Honor, I think, clearly, there's a breach of the Loan Agreement and --

THE COURT: But that --

MR. OLSON: -- in the Reply --

THE COURT: But wouldn't I have to determine that as a matter of law? Because that's a question of fact --

MR. OLSON: Well, I mean, --

THE COURT: I mean, that's -- that would be, to me, a Motion to Dismiss -- I mean, I think -- as I read everything as I did it, it's like: Wait a minute. You -- because your whole default is based on the breach. Okay?

Now, I could see if they didn't fund it or anything, if they didn't do -- they hadn't been paying their escrow account at all, you know, I mean, there's certain things. I'm not even sure if there's a genuine issue of material fact, so maybe it would be more of a summary judgment. I don't know if there's defenses. As you know, we're just in the beginning of this case. I felt like I had -- I know it sounds silly, but I felt like I had a whole case, Mr. Olson. Does that make sense to you? In the beginning, as best I could, but when I -- because I do understand on the receiver if there's a default, but I

really could not understand how this Court could say, basically, by -- and I'm, you know, that there's no dispute as to whether there was or was not a breach by this client. I mean, especially on -- there's no specific amount. It's -- when you -- I mean, I did the best I could to try to go through and put the different sections of the agreement together.

But, as Mr. Benedict said, which was what I was thinking in terms of, at the very minimum, there's a factual dispute on whether there is a default by these defendants on that funding of the escrow.

MR. OLSON: Well, Your Honor, I don't think there's a factual issue of the default.

THE COURT: How could you not think so?

MR. OLSON: And the reason I say that --

THE COURT: Yeah.

MR. OLSON: -- is, you know, I mean, look at the contract's language on property condition assessments, the section 6.03(c).

THE COURT: 6. -- I've got -- hold on.

MR. OLSON: I believe there's a page number on the bottom of 39.

THE COURT: I don't -- go ahead. Just tell me why you think -- because I looked through, obviously, the sections you were -- which were basically Article 13 and --

what's the next section on the default that I looked through? Default -- I've got it all here, Article 14. I don't know what -- I apologize. I don't have in front of me an Article 6 that would say it's not a question of fact on those two sections. So, hold on, Mr. Olson. Let me see if my law clerk -- obviously, we couldn't bring all of the exhibits in here. We did a lot on computer on a spreadsheet, to be honest. Hold on one second.

It's under his -- it would be his Appendix.

THE LAW CLERK: Yeah.

THE COURT: Give us just one second, Mr. Olson. There's so much. I want to make sure I follow what you're saying.

MR. OLSON: Your Honor, the relevant agreements are attached as Exhibits 1 and 6 to the Complaint, if that helps.

THE COURT: Right. Well, we also have your Appendix. Oh, we have the Complaint. Hold on. We also have your Appendix, you know, that was done afterwards. Where's the Complaint? I apologize -- we have so much stuff in front of us, I -- those are all the Motions. Give me a second. Okay. We don't have the Appendix -- we don't have all the exhibits to the Complaint. So, we don't have -- I just went through the Complaint, Mr. Olson. Not all the exhibits, but we'll find it.

In your exhibit list -- hold on. We want the Agreement. Here. The Loan -- no, go back. Yeah. Is it page 143 you said to look at of the Agreement?

MR. OLSON: Your Honor, I'm looking at Exhibit 6, page 39.

THE COURT: Exhibit 6, page 39. Oh, okay. Let me -- is there a bates number?

MR. OLSON: I've got page 39 on the bottom of it. But, no, it's not bate stamped, Your Honor.

THE COURT: Okay. I -- hold on. Let me see. That's not it. That's -- it's the -- can I ask? Is it the Liberty Village Multifamily Loan and Security Agreement that starts on page 201 that you -- in your exhibit -- you know your Supplemental Exhibits? Is it -- that the right place to go?

MR. OLSON: No.

THE COURT: No. Okay.

MR. OLSON: It's either Exhibits 1 or 6, Your Honor, attached to the Complaint.

THE COURT: We don't have those exhibits from the Complaint. We just --

THE LAW CLERK: I have the Appendix.

THE COURT: I have the Appendix of Exhibits to the Complaint. That's what I was referring to. So, which one do you think it is? We have all those.

Exhibit 1 is Village Square Multifamily Loan and Security Agreement, 143 pages.

MR. OLSON: That one will suffice, Your Honor.

THE COURT: I assume that -- my impression is the two properties were similar, were almost the same documents. Right? Okay. So, page --

MR. OLSON: That is correct, Your Honor.

THE COURT: At least when I compared them, Mr. Olson, they looked the same. So, we need to look at page 39 of Exhibit -- okay. Let's see if we can find it.

MR. OLSON: Or 39 of Exhibit 1.

THE COURT: Okay. We're almost there. Thirty-nine, it starts: Covenants, Insurance -- section 9.02.

MR. OLSON: No. This would be section 6.03(c).

THE COURT: Okay. So go the other way. 6.03 -- we'll get back to it. Six -- here's 6.01 or 6.02, 6. --

MR. OLSON: Yeah. I mean, the Agreement has page 30 on the bottom --

THE COURT: 6.03 is the Mortgage Loan Administration Matters Regarding the Property. Is that in section (a)?

THE LAW CLERK: No, in section (c), Property.

MR. OLSON: No. It's -- it would be Exhibit 1 --

THE COURT: Okay. Section (c), Property Conditions Assessment?

MR. OLSON: Correct.

THE COURT: Okay. All right. We got it. Thank you. I'm --

MR. OLSON: Great.

THE COURT: -- looking at it right now. Okay.

MR. OLSON: And that section says: If in connection with any inspection of the mortgaged property, and there was an inspection in July when occupancy rates were down to about 44 percent, lender determines that the condition of the mortgaged property has deteriorated, ordinary wear and tear expected since the effective date, lender may obtain at borrower's expense a property condition assessment of the mortgaged property. The lender's right to obtain the property condition assessment pursuant to the section 6.3(c) shall be in addition to any other rights or remedies 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 defined in section 13.02(a)(9)(b).

THE COURT: And they did allow -- that's how you got your report, your F3 Report. Correct?

MR. OLSON: Correct. And --

THE COURT: So they did allow that. Correct?

MR. OLSON: Yeah, and the defendants, they objected to paying for it, but they didn't object to us going in and conducting the inspection and that's --

THE COURT: Well, it doesn't say who pays for it. So, --

MR. OLSON: -- in their Counterclaim.

THE COURT: Does it say they paid for it?

MR. OLSON: But, Your Honor, then if you go back --

THE COURT: The lender may obtain at borrower's expense. Okay. All right.

So, then, you go to the section I talked about as to what the assessment is, correct, of what were repairs? 13. -- what I have in front of me, 13.02. Correct? Yes. Section 4, which talks about insufficient funds, because that's what it refers to. Right? 02 --

MR. OLSON: 13 -- correct.

THE COURT: I've got it front of -- 13.2(a), Accounts, Deposits, and Disbursements.

MR. OLSON: Yeah. And, then, subsection 4 deals with --

THE COURT: Right. Insufficient funds.

MR. OLSON: -- insufficient deposits.

THE COURT: Correct.

MR. OLSON: And that says, you know, if you don't have enough funds to cover the PCA, you have to deposit the balance within 30 days.

THE COURT: Okay.

MR. OLSON: And Fannie Mae sent out hat notice.

But I also wanted to point out, Your Honor, that the additional deposits are also appropriate under section 6.02(b)(3) sub(b) and (c) of the Agreement. They're on pages 26 and 27, or they've got the marking of 35 and 36 on the bottom.

THE COURT: Okay. All right.

MR. OLSON: But the bottom line is Fannie Mae obtained the PCA, we sent out a Notice of Demand that they be funded or that the reserve accounts be funded by the amounts described in the PCAs. That was on October 17. There's 30 days under the contract to respond, which takes you to November 17 -- I'm sorry. It was October 18 --

THE COURT: 19. Okay. I've got the Improvement Plan. It's dated here. I thought F3 was -- is November 27th, 2019. You're talking about Exhibit N?

MR. OLSON: No, Your Honor. I'm talking about the PCAs. The PCAs were on September 9 through 11 and then on October 18th --

THE COURT: Hold on. Hold on. Let me find it. It's in here somewhere. Okay. Oh, and the deficiencies

and they came up with the 2.8 million. Okay. Yes. I know what you're talking about.

MR. OLSON: Yeah.

THE COURT: Okay.

MR. OLSON: Then we --

THE COURT: So, --

MR. OLSON: -- sent out the letter of the -- the Notice of Demand and the response wasn't in compliance with the Notice of Demand, but, rather, it was the Westland Strategic Improvement Plan from November 27. And then --

THE COURT: Right. That's Exhibit 9 saying: Here's what think is accurate.

MR. OLSON: Yeah.

THE COURT: Yeah. No, I've got that.

MR. OLSON: And then on December --

THE COURT: Okay.

MR. OLSON: And they do admit that there are repairs needed. They identify, as I pointed out --

THE COURT: Yeah.

MR. OLSON: -- previously, 1.2 million versus 1.9 to the interior of the unit.

THE COURT: No. I think what they're arguing is: We agree there's repairs, but we don't unilaterally -- like you decide we want all these repairs and if we don't do it, we're in default. I think that's the question of what

would be considered under the Agreement, what were the repairs, which I just had a receiver fighting over same property, slum landlord, what repairs, you know, somebody had security guards, somebody else said, no, we didn't. You know, I've actually had a lot of experience just from a big receivership I did.

So, I think what they're saying is: We understand that you have the right to do that, but it's a question of whether you can't just say, this is what we want, and if you don't give us what we want, then you're in default.

MR. OLSON: Well, Your Honor, first we need to point out they didn't give us anything.

THE COURT: Well, but they gave you what they had -- were doing, and gave you information to assist you, you as the lender, to understand that they are taking care of the property, what their duties are, they are funding, and doing things --

MR. OLSON: But, Your Honor, that --

THE COURT: That's how I interpreted it.

MR. OLSON: -- is something --

THE COURT: If you look at the invoices and everything they did, Mr. Olson, they did a lot.

MR. OLSON: Well, and I think --

THE COURT: It may not have been enough --

MR. OLSON: -- that's what they --

THE COURT: -- to Fannie Mae, but they did.

MR. OLSON: Yeah. I think that the goal behind the Strategic Plan was is to let us do it our way, we want to do it in a manner --

THE COURT: Yeah.

MR. OLSON: -- that is inconsistent with --

THE COURT: And I get the impression that the goal of Fannie Mae is --

MR. OLSON: And --

THE COURT: -- let me do it my way. So, I've got one person on one end going: It's going to be our way or the high -- and I'm being nice. I'm being facetious a little bit. Right? And the other people: Let it do our way. And I think that's why we're here in litigation, to be very honest. I don't know why -- no, not I guess. It's very obvious. I get that. Okay.

MR. OLSON: Yeah. And, then, I would point out, section 6.02 also requires that the property be maintained.

THE COURT: No. I don't think they're disputing that the property shouldn't be maintained. I think they're showing -- they gave us many, many exhibits showing me what they're doing besides their initial 20 million investment.

What is this 1 million insurance policy? I just had a note on -- what is that? What is the 1 million that your client got in insurance proceeds? Was that --

MR. OLSON: My understanding is that there was some fire damage on some of the units --

THE COURT: Oh, fire damage.

MR. OLSON: -- and the insurance company delivered to Fannie --

THE COURT: Okay.

MR. OLSON: -- Mae approximately a million dollars to put into a reserve account for the repair of those units.

THE COURT: Okay. So, then did Fannie Mae give it for those repairs, give it to the defendant so that those repairs can be done?

MR. OLSON: Fannie Mae's position is it has no obligation to do so under the contract.

THE COURT: Oh goodness.

MR. OLSON: And I believe --

THE COURT: Okay.

MR. OLSON: -- the 6th Amendment to the contract in section 17 provides that if there's any kind of a default under the Agreement, we don't have to do it.

THE COURT: Okay. That makes no sense.

MR. OLSON: But, Your Honor, I'd also point --

[Technical issues with audio/visual from 11:26:34 a.m. until 11:26:44 a.m.]

THE COURT: Whoop, we lost you. Uh oh.

[Pause in proceedings]

THE COURT: Where -- are they gone or?

[Pause in proceedings]

[Case continues at 11:29:32 a.m.]

THE COURT: Unfortunately, BlueJeans went down, but we're back. Is Mr. Olson there and Mr. Benedict both?

MR. OLSON: Yes, Your Honor.

THE COURT: Okay. Sorry. BlueJeans just went down on us. I don't know if they have a time limit or what. I'm not sure, for us. Okay.

MR. BENEDICT: John Benedict is present and [indiscernible].

THE COURT: Okay. Thank you very much. Okay.

I am -- here is my ruling on the Plaintiff's Motion for Appointment of Receiver. I feel there is a factual dispute on whether there is a default by defendant in this case, so there is no mandatory statute that says I must report -- appoint a receiver, as I feel there is a dispute, a factual dispute whether there is or is not a default. When I go to the other cases where I can use my discretion, I have to find that the properties would be in danger of being lost or suffer irreparable harm. And I -- based on all the facts that I've reviewed, including the argument, I do not feel that these properties are -- fit the criteria, the factual, to have a receiver appointed

under that and I am not going to appoint a receiver. I'm denying it.

As far as the Defendants' Countermotion for a Preliminary Injunction Regarding the Notice of the Foreclosure, I applied the 65 standard as well as the NRS -- what's the other one? I always -- 33.010 standard. I do find that, at this point, there is irreparable harm and that standard is met because it is property. I also find that there is a reasonable probability of success on the merits as far as what -- there's a question of fact as to whether there was a default, etcetera. So, I do not want the default to go forward. So, I am granting the Countermotion by plaintiffs for the preliminary injunction under NRS 65, NRS 33.010.

Mr. Benedict, will you prepare the Order for the Countermotion for Preliminary Injunction? And you both can decide who wants to do the Order for the Motion -- denying the Motion for Appointment of Receiver.

Thank you very much, counsel.

MR. OLSON: Your Honor, --

THE COURT: And the bond --

MR. OLSON: Your Honor, I have a question.

THE COURT: Hold on. Let me finish. I've got to get through -- I'm also going to set a bond of $1,000 for the preliminary injunction.

MR. OLSON: Your Honor, I do have a question concerning the preliminary injunction. You stated that you do not want the default or the foreclosure to go forward. I just wanted to clarify that.

THE COURT: I don't --

MR. OLSON: Fannie Mae --

THE COURT: I'm stopping the Notice of Default. Didn't you enter -- didn't your client -- let me look at my notes. Didn't they enter a Notice of Default?

MR. OLSON: We did, Your Honor.

THE COURT: Okay. I want to stop -- I'm stopping Fannie Mae from going forward with anything based on that Notice of Default.

MR. OLSON: Your Honor, what I was going to suggest, and I've heard your ruling, is right now Fannie Mae is at the stage where it can record a Notice of Sale. Fannie Mae has not done so and I was inquiring whether Your Honor would just simply order that Fannie Mae is prohibited at this time from recording the Notice of Sale.

THE COURT: Yes. Because that would --

MR. OLSON: Thank you.

THE COURT: -- flow, Mr. Olson, from my reasoning. And I thank you for helping me with that, with all the things I'm going through.

Honestly, counsel, I appreciate everything. I've

-- I did my very best to go through it all and I know you all work very hard. And thank you for the pleadings, because my job is hard but it's even harder if you don't give me good pleadings like both of you did. So, I did want to thank both of you. Can I tell you? From the bottom of my heart. It's hard enough when you don't get good pleadings. Thank you. Have a good day.

MR. BENEDICT: Thank you, Your Honor, for your time.

PROCEEDING CONCLUDED AT 11:33 A.M.

* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER