IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellant, vs. WESTLAND LIBERTY VILLAGE, LLC, and WESTLAND VILLAGE SQUARE, LLC, 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 OPENING BRIEF

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

NRAP 26.1 Disclosure Statement

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the Justices of this Court may evaluate possible disqualification or recusal.

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

Snell & Wilmer L.L.P. has represented Fannie Mae in this matter since its inception.

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Introduction and Summary of the Argument

Federal National Mortgage Association ("Fannie Mae") brought suit against Westland Liberty Village, LLC and Westland Village Square, LLC (together, "Westland") after a severe drop in occupancy followed by an inspection of Westland's two multi-family properties revealed that the properties needed $2.8 million in necessary repairs. The loan documents, under which Westland owes more than $37 million and which govern the parties' rights and responsibilities, explicitly provide that Fannie Mae has: (i) a right to inspect the Properties, (ii) a right to demand an increase in reserves to address property condition issues, and (iii) that Westland's failure to pay that demand is a payment default and an automatic default event. The loan documents further provide that Fannie Mae is entitled to an appointment of a receiver upon Westland's default. Here, Westland failed to deposit the $2.8 million in reserves as the loan documents require, which failure constituted a default. Accordingly, Fannie Mae promptly applied for the appointment of a receiver after initiating this action.

Westland, however, convinced the district court to deny the appointment of a receiver and issue sweeping injunctive relief based on

its unsubstantiated claims that it had made many of the repairs at issue. And, rather than enforcing the terms of the loan documents – the parties' contract – the district court evaluated Westland's claims of repairs and concluded that there was a "question of fact" as to whether Westland had defaulted. Crucially though, the district court based its equivocal question-of-fact conclusion on the possibility that Westland had unilaterally made some of the repairs – not whether Westland had defaulted as defined by the Loan Documents. In doing so, the district court wholly ignored the parties' contract and instead substituted its own vague notions of what constitutes a default. The district court's refusal to apply the terms of the agreements that establish the parties' rights and obligations is an error of law, and Fannie Mae appeals from the district court's Order Granting Westland's Motion for Preliminary Injunction and Denying Application for Appointment of Receiver (the "Order").

In addition to denying Fannie Mae's application for appointment of a receiver and enjoining the foreclosure sale of the subject properties, the Order grants various and sweeping injunctive relief in favor of Westland, which was neither part of Westland's motion nor the court's hearing.

Those provisions, added by virtue of Westland's including them in the proposed order they submitted to the district court, impose a wide-ranging host of affirmative obligations on "Fannie Mae, including, without limitation, Fannie Mae's servicers, agents, affiliates, representatives, officers, managers, directors, shareholders, members, partners, trustees, and other persons exercising or having control over the affairs of Fannie Mae (collectively the "Enjoined Parties")", including ordering the Enjoined Parties to rescind Notices of Default, withdraw Notices of Demand, disburse more than $1.4 million to Westland, and give Westland and their affiliates preferential lending status with respect to unrelated and future loans. These overextensive provisions, which go far beyond the two Westland properties at issue and improperly force the Enjoined Parties to lend or refinance in the future to strangers to this litigation, against their will and in frustration of statutory missions, are unsupported by (1) the evidence before the district court, (2) the district court's findings, and (3) state and federal laws.

Fannie Mae therefore appeals from the from the granting of the wide-ranging, unsupported, mandatory injunctive relief and the denial of its application for receiver.

Statement of the Issues

1. Whether the district court erred as a matter of law by disregarding the parties' contractual rights and obligations under the loan documents in determining whether Westland had defaulted.

2. Whether the district court abused its discretion by issuing an injunction requiring Fannie Mae and other Enjoined Parties to perform a host of affirmative obligations, including disbursing money and engaging in future lending activity, with Westland and its non-party affiliates.

3. Whether the district court abused its discretion by denying Fannie Mae's application for a receiver, which was explicitly provided for as a remedy under the Loan Documents.

Statement of the Case

I. Nature of the Case

This appeal arises from Westland's default under the terms of the Loan Documents and Fannie Mae's subsequent application for the appointment of a receiver.

II. Proceedings Below

Fannie Mae filed its Application for Appointment of Receiver on August 12, 2020, requesting that a receiver be appointed over the

Properties based on Westland's defaults. Fannie Mae also asserted that without a receiver, the Properties may continue to suffer significant damage and diminution in value. On August 31, 2020, Westland opposed the Application and filed a Counter-Motion for Temporary Restraining Order and/or Preliminary Injunction ("Countermotion") seeking to prevent Fannie Mae from proceeding with its foreclosures of the Properties. Specifically, Westland requested that the court "prevent[] and enjoin[] Plaintiff from conducting any foreclosure proceedings, foreclosure sale, or appointing a receiver related to the Properties pending a determination of the rights and obligations of the parties pursuant to the Loan Agreements." APP1309.

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

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

APP1503.

The court clarified that its ruling would only prohibit Fannie Mae from recording a Notice of Sale: "I'm stopping Fannie Mae from going forward with anything…." APP1505. The district court declined to make factual findings or legal conclusions when there was a factual dispute on the record. APP1504.

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

process loan payments consistent with the terms of the loan agreement); return funds Westland voluntarily paid in excess of the non-default monthly debt service payments, which excess funds Westland paid between February 2020 and the present; disburse loan collateral currently held in the Restoration Reserve Account, which total more than $900,000 retract or strike the Notice of Demand; rescind the Notices of Default and Acceleration of Note, dated December 17, 2019; and interfere with Fannie Mae's right to choose or reject its business counterparties by forcing it to treat unspecified Westland entities favorably in relation to other or new loans, including by not "blacklisting"[2] any Westland entity on new loan or loan refinancing applications, not adding a fee to any loan quoted and not adding an interest rate surcharge to such applications.

The district court set a bond in the de minimis sum of $1,000.00. APP1581. Fannie Mae timely appealed on November 30, 2020. APP1585. Westland posted their $1,000 bond on December 1, 2020.

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

Factual Background

I. The Loan Documents and Related Agreements.

On November 2, 2017, Westland Village Square's predecessor-in-interest and Fannie Mae's predecessor-in-interest (SunTrust Bank) entered the "Village Square Loan Agreement" setting forth the terms of a mortgage loan of **$9,366,00.00**. APP002, APP016-158. The loan also included the "Village Square Note" in that amount, together with interest and the "Village Square Deed of Trust"[3] to secure repayment. The Village Square Deed of Trust encumbers the "Village Square Property," which includes an apartment complex known as the "Village Square Apartments." APP002, APP160-193.

On the same date, Westland Liberty Village's predecessor-in-interest and Fannie Mae's predecessor-in-interest (again, SunTrust) executed the "Liberty Village Loan Agreement" for a mortgage loan of **$29,000,000.00**. APP 003, APP220-420. The loan also included the "Liberty Village Note" that amount, together with interest, and the

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

"Liberty Village Deed of Trust" [4] to secure repayment. APP004, APP421-27. The Liberty Village Deed of Trust encumbers the "Liberty Village Property," which includes an apartment complex known as the "Liberty Village Apartments." APP004, APP428-56. SunTrust assigned both Loans to Fannie Mae, and Westland subsequently assumed the obligations under the Village Square and Liberty Village Loan Documents. APP4-5, APP462-82.

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

Following Westland's assumption, Fannie Mae noticed a dramatic drop in the occupancy rates at the Village Square Property and Liberty Village Property (collectively the "Properties"). APP1447 (noting the drop in occupancy from approximately 80% to 45% during the year that Westland managed the Properties). Westland admitted that the occupancy rates had declined and that their affiliates had to inject substantial money into the Properties to cover their monthly debt service obligations due to low occupancy. APP1304-05. As such, Fannie Mae

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

requested inspection of the Properties in July 2019 pursuant to its right under Section § 6.02(d)[5] of the Loan Agreements. APP1447.

Based on the July 2019 inspections, Fannie Mae determined that property condition assessments ("PCAs")[6] were necessary to determine the extent of the Properties' deterioration. Fannie Mae requested access to the Properties to perform the PCAs, which Westland granted to Fannie Mae and its expert, f3, Inc. ("f3"). APP483-1254. The PCAs indicated the need for immediate repairs totaling $2,845,980 ($1,092,835 for Village Square and $1,753,145 for Liberty Village), many of which involved safety issues. APP493, 801.

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

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

Due to the substantial repairs needed, the cost of those repairs, and the fact that the repair escrow accounts held only $106,217 (Village Square) and $246,047 (Liberty Village) respectively, to cover the cost, Fannie Mae delivered the PCAs to Westland, together with an October 18, 2019 Notice of Demand for each Property, outlining Westland's obligations to make the repairs and to deposit a total of $2,845,980 ($1,092,835 for Village Square and $1,753,145 for Liberty Village) into certain repair and replacement accounts within the thirty (30) days required by the Loan Agreements.[7] APP 1255-68. The Notice of Demand also advised that the Monthly Replacement Reserve Deposits were being

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

> **(4) Insufficient Funds.** Lender may, ***upon thirty (30) days' prior written notice to Borrower***, require an additional deposit(s) to the Replacement Reserve Account or Repairs Escrow Account, or an increase in the amount of the Monthly Replacement Reserve Deposit, if Lender determines that the amounts on deposit in either the Replacement Reserve Account or the Repairs Escrow Account are not sufficient to cover the costs for Required Repairs or Required Replacements, or, pursuant to the terms of Section 13.02(a)(9), not sufficient to cover the costs for Borrower Requested Repairs, Additional Lender Repairs, Borrower Requested Replacements, or Additional Lender Replacements….

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

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

Westland failed to meet their obligations under the Loan Documents by failing to make adequate repairs and refusing to fund the repair and replacement accounts, instead attempting to unilaterally avoid their obligations by replacing the requirement that they pay into the Reserve Accounts approximately $2.845 million with merely submitting a strategic improvement plan – essentially, a proposal for making repairs. APP1409-18. In doing so, Westland admitted that the Properties needed repairs of at least $1,218,125.12. APP1415. Westland has not funded the Reserve Accounts pursuant to the October 18, 2019 Notice of Demand, which constitutes a payment default and an automatic event of default.[8] Westland also failed to provide Fannie Mae with any

[8] (a) **Automatic Events of Default**. Any of the following shall constitute an automatic Event of Default: (1) any failure by Borrower to pay or deposit when due any amount required by the Note, this Loan Agreement or any other Loan Document.
-and-

evidence of the repairs Westland claims they completed or access for Fannie Mae to analyze the purported repairs, which was necessary to determine the Properties' condition. Westland's refusal forced Fannie Mae to initiate this action.

Westland Liberty Village then sought to compel Fannie Mae to reimburse it for repairs that were made to fire-damaged apartment units, even though Westland is in breach of the Loan Agreements by failing to fund the required $2.845 million into the various reserve accounts and has refused to allow inspection. But Westland's monetary defaults permit Fannie Mae to withhold any disbursements from the collateral accounts, including the Restoration Reserve Account.[9] Because the

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(b) … any failure by Borrower to perform any obligations under this Loan Agreement or any Loan Document that is subject to a specified written notice and cure period, which failure continues beyond such specified written notice and cure period as set forth herein or in the applicable Loan Document. APP092-93, 296-97.

[9] Section 14.02(b) of the Liberty Village Loan Agreement states, "[i]f an Event of Default has occurred and is continuing, Borrower shall immediately lose all of its rights to receive disbursements from . . . any Collateral Accounts." APP094-95, 298-99, 374, 389 (§§ 14.02(b) and 17.03(a)(1)).] Section 17.03(a)(1) likewise provides that Fannie Mae is not "obligated to disburse funds from the Restoration Reserve Account if an Event of Default has occurred and is continuing. *Id.*

Events of Default are continuing,[10] Westland was not entitled to disbursement of funds from the Restoration Reserve Account.[11]

Standard of Review

Contract interpretation presents a question of law subject to de novo review. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015); *Fed. Ins. Co. v. Coast Converters*, 130 Nev. 960, 965, 339 P.3d 1281, 1284 (2014).

The granting of a preliminary injunction lies within the discretion of the district court and is reviewed for an abuse of discretion. *Clark Cty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996). "While the granting of a preliminary injunction lies within the discretion of the district court, the reasons for its issuance must be sufficiently clear." *Id.*, 112 Nev. at 1150, 924 P.2d at 719 (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 118–19, 787 P.2d 772, 775 (1990)). Likewise, "'the appointment of a receiver is an action within the trial court's sound

[10] Westland disputes the default, and the district court found that there was a "question of fact" as to whether there is a default.

[11] On May 4, 2021, Fannie Mae paid Westland the total sum of $1,456,348.46 in full compliance with the Order and to avoid contempt proceedings in the district court.

discretion and will not be disturbed absent a clear abuse.'" *Med. Device All., Inc. v. Ahr*, 116 Nev. 851, 862, 8 P.3d 135, 142 (2000). But, where the district court applies the wrong law or legal standard, that issue is a purely legal question, subject to de novo review. *Staccato v. Valley Hosp.*, 123 Nev. 526, 531, 170 P.3d 503, 506 (2007) (citing *Milton v. State, Dep't of Prisons*, 119 Nev. 163, 68 P.3d 895 (2003)).

Argument

I. The District Court Erred as a Matter of Law by Failing to Apply the Terms of the Loan Documents – the Parties' Contract.

In concluding that there was a "question of fact" as to whether Westland had defaulted, the district court wholly departed from the parties' contract and instead substituted its own unspecified definition of "default." Indeed, there are no disputed issues of fact as to whether Westland defaulted as defined by the contract.

Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy. *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226–27 (2009); *NAD, Inc. v. Dist. Ct.*, 115 Nev. 71, 77, 976 P.2d 994, 997 (1999) (stating "parties are free to contract in any lawful matter"). Here, the Loan Documents, which establish the parties' respective rights and

obligations, impose a continuing obligation that Westland pay all expenses for the Properties' maintenance and provide that Westland's failure to maintain the properties is an automatic Event of Default. APP050.[12] The Loan Documents empower Fannie Mae to enforce this obligation to maintain the Properties by allowing it to: (1) inspect the Properties and, if necessary, to repair and maintain the Properties; and (2) require Westland to make additional deposits into the Repairs Escrow Accounts and/or to increase the Monthly Replacement Reserve Accounts. APP085, 289 (§ 13.02(a)(4)). 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 of Default under the Loan Documents. APP092-93, 296-97.[13] If the required amount is deposited into the Repairs Escrow Accounts and the Monthly Replacement Reserve Accounts, absent an

[12] "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."

[13] 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."

Event of Default, disbursements may be made from those accounts once the repairs are made. If all of the required repairs are made and there is not an Event of Default, the Loan Documents provide that any funds remaining in the Repairs Escrow Account may be disbursed to the Borrower. APP090, 294.

A. The Loan Agreements Entitle Fannie Mae to Inspect the Properties, Obtain PCAs, and Demand Additional Deposits.[14]

As described and quoted above, the Loan Agreements unambiguously entitle Fannie Mae to inspect the Properties, a right Fannie Mae initially exercised when, following Westland's assumption of the Loan Documents, there was a dramatic drop in the occupancy rates from 80% to 45%. APP1447. This concerned Fannie Mae because the significantly declining occupancy rates signaled that the Properties were deteriorating and reducing the Properties' income and the value of Fannie Mae's collateral, thereby jeopardizing payment of the loans secured by the Properties. APP1447. Further, Fannie Mae was concerned about the potential for safety issues that could affect the

[14] Because the specific provisions are quoted at length above, Fannie Mae does not repeat them here.

tenants, including potential perils and the fact that the deteriorating conditions indicated that the Properties were not meeting Fannie Mae's objective to provide affordable and safe housing to low- and moderate-income individuals, to provide a sustainable community, and to cultivate opportunities to improve lives. APP1447. For example, breaks in concrete walkways were tripping hazards, stairways had damaged landings, step pads, and handrails, and smoke detectors were missing in most of the vacant units. Indeed, Westland acknowledged that Fannie Mae's concerns were justified by admitting that the occupancy rates declined and that Westland had to inject their own money into the Properties to cover their monthly debt service obligations. The Loan Agreements also entitle Fannie Mae to obtain PCAs to address the deteriorating condition of the Properties under the Loan Documents, a right it first exercised in September 2019.

The Loan Agreements likewise entitle Fannie Mae to demand additional deposits from Westland based on the PCAs. The 2019 PCAs indicated that immediate repairs totaling $1,092,835 for Village Square and $1,753,145 for Liberty Village were needed, many of which repairs involved health and safety issues. APP493, 801. The majority of those

repairs concerned apartments at Village Square and Liberty Village that were vacant and "down" (unleasable). APP491. The PCAs also detailed a Replacement of Capital Items Schedule which showed the escalating cost of capital improvements at the aging properties. APP508.

Following delivery of the PCAs to Westland, there was only $106,217 in the Repairs Escrow Accounts for Village Square and $246,047 in the Repairs Escrow Accounts for Liberty Village. APP1447-48. In other words, the Repairs Escrow Accounts for the Properties only contained a fraction of the $2,845,980 that would be necessary to remediate the issues identified by the PCAs. APP1447-48. Thus, Fannie Mae was entitled to demand that Westland deposit a total of $2,845,980 pursuant to section 13.02(a)(4) of the Loan Agreements. APP085, 289.

B. Westland Breached the Agreements by Failing to Fund the Reserve Accounts.

The deadline for making the payments described in the Notices of Demand was November 17, 2019. It is undisputed that Westland failed to make the payments by that time and were in default pursuant to section 14.01(a)(1) 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." APP092. Thus, Westland has been in payment default under the Loan since at least November 17, 2019.

C. Westland's Default Was Clear and Material.

While Westland does not and cannot dispute the above facts, Westland has argued that the default is not material because, among other things, they were current on their monthly loan payments and there was no "payment default." That argument ignores the clear contractual provisions defining Westland's failure to deposit the repair funds as an Event of Default. Further, their failure to pay $2,845,980 pursuant to the October 18, 2019 Notices of Demand – is indeed 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." APP092.

D. Westland's Position That the Alleged and Unconfirmed Repairs Somehow Cured the Default Is Unsupported and Led the District Court to Error.

Westland admits they did not make the payments as required by the October 18, 2019 Notices of Demand. Instead, and in lieu of making the required payments, they sent Fannie Mae a Strategic Improvement Plan for Liberty Village and Village Square (the "Plan") outlining their plan to rehabilitate the Properties. APP1408-18. Westland apparently

believed this alternative action, which acknowledged the property issues identified in the PCAs, replaced the unambiguous contractual requirement to cure their defaults under the Loan Documents. Westland alleges they made repairs worth $1.8 million before the PCAs were completed and $1.7 million after the PCAs were completed.[15] But importantly, Westland continued to refuse to provide evidence of the repairs or allow Fannie Mae to inspect the Properties to confirm the repairs.[16]

Westland's argument that its unconfirmed repairs cured their defaults fails for several reasons. First, Westland admits 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

[15] Westland has not identified how much of this was spent on each of the properties and likely included the repairs made to the fire damaged units which were not included in the 2019 PCAs.

[16] Indeed, had Westland provided evidence of the repairs and permitted Fannie Mae to inspect the Properties and confirm the repairs Westland had claimed to complete, Fannie Mae might have never been forced to initiate this action. Westland's utter refusal, however, while also failing to make the required deposits left Fannie Mae no choice but to pursue legal remedies. Fannie Mae was only able to inspect the Properties after moving to compel the inspection before the district court.

accelerated the Loans.[17] Instead, they purported to replace their contractual obligation to make deposits of approximately $2.8 million with providing a "Plan"—a proposal that was not in the Loan Documents or ratified by Fannie Mae. Second, Westland did not allow any independent confirmation of the repairs they claim to have made or demonstrated that the repairs described in the PCAs were completed. Finally, there is no evidence that the repairs had been completed when Fannie Mae issued the Notices of Demand in October 2019. Thus, Westland continued to be in default of their obligation to fund the reserve accounts.

E. The District Court Erred by Refusing to Enforce the Contract.

The district court stated that, after comparing the work orders Westland provided against the repairs described in the PCAs, it could not determine whether the repairs had been completed. APP1478-79. On that basis, the court concluded that there was a "question of fact" as to whether there was a default.

[17] Once a loan is accelerated, monthly payments are not adequate to bring the loan current because the effect of acceleration is that the entire amount of the loan is due. Here the entire amount due under the loans exceeds $37 million.

This is error. Whether a default occurred is a question of *law* that depends upon interpretation of the parties' contract. The Loan Documents define the parties' rights and obligations and define events of default. That Westland did not comply with their contractual obligations in favor of a "cure" they created – which is nowhere permitted in the contract – does not excuse or cure their default under the contract. This legal error is compounded by the fact that Westland fought vigorously to prohibit Fannie Mae from inspecting the Properties to confirm the alleged repairs, presumably because the repairs had not been completed at that time. Indeed, even if the district court were sympathetic to Westland's claims of completed repairs (which in any event does not negate or cure the default), it is a manifest error to credit Westland's claims while they continue to prevent any confirmation of the repairs and continue to exclude Fannie Mae from inspection of the Properties – which is itself a breach of the Loan Documents. Indeed, Fannie Mae was forced to file a motion to compel inspection of the Properties, as Westland's exclusion continued even after an NRCP 34 notice was served for both Properties. Rather than a *question* of fact, the court interpreted

Westland's allegations as though all factual issues had been resolved – in Westland's favor, without proof.

The repairs Westland now claims to have made to the Properties do not cure Westland's defaults under the Loan Documents. The district court abused its discretion by denying Fannie Mae's application for the appointment of a receiver on the basis of unproven allegations.

F. Westland's Claims That the Properties Were in Disrepair When They Purchased Them Is Irrelevant.

Westland also argued in the district court that finding them in default is somehow unfair because the Properties were in a state of disrepair when Westland purchased them. Indeed, Westland claims 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." APP1303. But Westland knew or should have known the Properties were distressed at the time they assumed the Loans. And, if true, this fact should have motivated Westland to closely examine the Properties' condition, and familiarize themselves with the Loan Documents before purchasing the Properties and assuming the Loan Documents. Westland was solely responsible for conducting due diligence and should have done so, as they

are a sophisticated business organization run by a parent company (Westland Real Estate Group) that has a long history of multifamily housing experience.

Westland's position ignores that Westland 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. If the Properties were in poor condition when Westland purchased them, that does not excuse them from the contractual obligations Westland assumed voluntarily. *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" and "[i]gnorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations"). Westland cannot be permitted to shift to taxpayers (in the form of Fannie Mae and its conservator, FHFA) the cost of its failure to conduct sufficient due diligence prior to acquisition and assumption.

II. The District Court Abused Its Discretion by Issuing Injunctive Relief That Is Mandatory and Disfavored Without Satisfying the Applicable Standards.

Fannie Mae also challenges the broad mandatory injunctive relief included in the Order, which imposes a host of affirmative and onerous obligations on Fannie Mae and other Enjoined Parties without support, and without satisfaction of the exacting standards required for injunctive relief.

A. The District Court Issued a Sweeping Mandatory Injunction.

A preliminary injunction can take two forms – prohibitory or mandatory. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009). A prohibitory injunction – the most common type – prohibits a party from taking action and "merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983). The purpose is to preserve the status quo. *N.D. ex rel. Parents v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010). In contrast, a mandatory injunction is one that goes beyond maintaining the status quo and "orders a responsible party to take action." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015); *Dodge Bros. v. Gen. Petroleum Corp. of Nev.*, 54 Nev.

245, 10 P.2d 341, 342 (1932) (recognizing that a "mandatory injunction" is one that requires an individual to do a particular act, such as compel performance of a contract); *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996) (holding that a mandatory injunction "orders a responsible party to 'take action.'"). Indeed, restoring, rather than merely maintaining the status quo, requires a mandatory injunction. *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Mem'l Gardens, Inc.*, 88 Nev. 1, 4, 492 P.2d 123, 124 (1972).

For example, in *Marlyn Nutraceuticals*, the district court had ordered the defendant to stop manufacturing and distributing the challenged product and to recall its already-distributed products. 571 F.3d at 879. The Ninth Circuit vacated the recall aspect of the order, ruling that enjoining the defendant to recall products it had already distributed was mandatory because it "went beyond the status quo pending litigation" and instead required the defendant to take an "affirmative step." *Id.*; *see also, e.g.*, *Garcia*, 786 F.3d at 740 (requiring Google to take the affirmative action to remove and keep removing a particular video whenever it was uploaded was an impermissible mandatory injunction); *State v. Ducker*, 35 Nev. 214, 127 P. 990, 994

(1912) (reversing injunction requiring the delivery of water in the possession and under the control of defendants to the plaintiffs was a mandatory injunction); *Elliott v. Denton & Denton*, 109 Nev. 979, 982, 860 P.2d 725, 727 (1993) (vacating mandatory injunction requiring the return of an impounded car).

Here, the challenged Order includes mandatory provisions that: (1) vacate Westland's default by requiring that the Enjoined Parties rescind the Notices of Demand and Notices of Default even though the district court merely found that there was question of fact as to the default; (2) require Fannie Mae to disburse $1,456,348.46 million to Westland upon a finding that Westland "may" ultimately be able to show a breach of contract, effectively awarding the equivalent of a pre-judgment writ of attachment without any compliance with NRS Chapter 31; (3) reverse Fannie Mae's prior foreclosure activity rather than simply halt it; and (4) force Fannie Mae to make undisclosed and unspecified financial accommodations to Westland's unidentified non-party affiliates by requiring favorable treatment for future lending activity regardless of circumstances and unrelated to the present case.

Indeed, section 5(o) of the Order in particular directs that the Enjoined Parties may not take

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

APP1565 (emphasis added). In other words, the Order requires that the Enjoined Parties treat Westland ***and all of its related entities*** in ways that are not "adverse" to those entities ***in relation to new and other loans***, *i.e.*, not the loans at issue in this case. In addition to such a stunning overreach of relief, the Enjoined Parties face serious and irreparable injury as a result of being forced to enter future contracts with Westland and any of its related entities under terms mandated in the Order. The Enjoined Parties should not be under such court-imposed dictates in how they are to engage in future lending activity with Westland and all their affiliates. In addition to the serious and irreparable harm the Enjoined Parties face to their safety and soundness under this injunction, they also risk contempt sanctions based on any "adverse" treatment of future lending with any of Westland's affiliates.

In effect, the injunction holds hostage all otherwise discretionary business decisions regarding Westland and their many affiliates unrelated to this litigation.

Mandatory injunctions are "particularly disfavored" and carry a higher burden – they should be denied "unless the ***facts and law clearly favor*** the moving party." *Garcia*, 786 F.3d at 740 (emphasis added); *Leonard v. Stoebling*, 102 Nev. 543, 551, 728 P.2d 1358, 1363 (1986) (holding that a court should "exercise restraint and caution in providing this type of equitable relief."). They are permissible only when "extreme or very serious damage will result" that is not "capable of compensation in damages," and the merits of the case are not "doubtful." *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017).

In sum, the injunction provisions purport to compel specific performance of a wish list Westland has already attempted to enforce with the court's contempt powers. None of these activities merely maintains the status quo but instead direct a broad array of affirmative activity far beyond the parameters of this lawsuit and should be reversed on appeal.

B. The Mandatory Provisions of the Injunction Are Unsupported and Overreaching and Should Be Reversed on Appeal.

The district court gravely erred in issuing such expansive and sweeping mandatory injunctive relief because injunctions of that type do not satisfy (or even purport to satisfy) the exacting standard for mandatory injunctive relief. *See Garcia*, 786 F.3d at 740 (holding that the burden to support a mandatory injunction is "doubly demanding" and should be denied "unless the facts and law clearly favor the moving party").

Here, the district court did not conclude that the facts and the law "clearly favored" Westland with respect to the relief it afforded. Rather, it stated: "I feel there is a ***factual dispute*** on whether there is a default." APP1503 (emphasis added). But, as discussed in detail above, the district court's assessment of whether Westland had defaulted was the product of its improperly substituting its own view of what constituted a default rather than the contractual terms.

The district court further stated that there was "a reasonable probability of success on the merits as far as what – there's a question of fact as to whether there was a default." APP1504. Indeed, even the

problematic written order that Westland prepared and the district court signed concluded only that "there are substantial factual disputes related to whether any default occurred" and that Fannie Mae's pursuit of foreclosure "***may*** amount to a breach of contract, failure to service the loan in good faith, and ***may*** support the other claims and damages in Westland's Counterclaim." APP1560 (emphases added). The court at no time made any findings with respect to the mandatory injunctive relief provisions challenged here sufficient to support the array of mandatory injunctive relief it ordered – disbursing $1.4 million in insurance proceeds and payments Westland voluntarily made, making new loans, and rescinding Notices of Default. The district court held that it "applied the 65 standard as well as the NRS … 33.010 standard" and found that there was the potential for "irreparable harm and that standard is met because it is property." APP1504. This irreparable harm clearly refers only to the prospective sale of the Properties and ignores the risk of irreparable harm that could occur if the Properties were allowed to deteriorate further without a receiver's oversight. The district court's order contains no findings or conclusions to support the following injunctive relief in particular: requiring that Fannie Mae and other

Enjoined Parties rescind the Notices of Demand and Notices of Default and reverse rather than halt foreclosure activity; disburse more than $1.4 million to Westland; and make undisclosed and unspecified accommodations to avoid "adverse[ly]" impacting Westland's unidentified non-party affiliates by requiring that the Enjoined Parties treat them favorably with respect to future lending activity unrelated to the present case.

C. If the Injunction Is Enforced as Westland Intends, Fannie Mae Could Face Contempt or Be Forced to Enter New Multi-Year, Multi-Million-Dollar Lending Transactions with Other "Westland Entities" Against Federal Law.

This overextensive and vague provision goes beyond barring retaliation against the two Westland properties at issue and improperly and illegally forces Fannie Mae to lend or refinance in the future to strangers to this litigation, against its will, in direct frustration of its statutory mission, and at the peril of violating the legal requirements to operate in a safe and sound manner. Any refusal to lend to any affiliate of Westland for any reasons be deemed an "adverse action." This requires that the Enjoined Parties treat Westland and non-party "Westland entities" in particular ways, including what fees or interest Fannie Mae

can charge in relation to new and other loans, i.e., not the loans at issue in this case, purports to prohibit Fannie Mae from using its ACheck system to regulate its lending activity in accordance with its business practices and its mission, and prohibits Fannie Mae from taking "any adverse action[s]" against Westland or its affiliates.

1. Enjoining Fannie Mae from Using Its ACheck System Undermines Its Underwriting Process and Ability to Fulfill Its Mission.

Some background and explanation are helpful to understanding the implications of enjoining Fannie Mae from using its ACheck system. Fannie Mae is a government-sponsored enterprise but is neither the government nor a government agency. Initially chartered in 1938, Fannie Mae does not make loans directly to prospective borrowers, but operates as a private corporation in the "secondary market" providing liquidity to lenders by purchasing loans the lenders originate. Congress has confirmed that Fannie Mae's "continued ability … to accomplish their public missions is important to providing housing in the United States and the health of the Nation's economy." 12 U.S.C. § 4501; see also *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 557 (2017) (discussing Fannie Mae's role as a purchaser of mortgages). To fill the nationwide

gap in multifamily financing, particularly for affordable rental housing, Fannie Mae created a separate business division dedicated to purchasing multifamily loans from originators.[18] Fannie Mae sought to enhance underwriting standards in the multifamily space and in 1988 initiated the Delegated Underwriting and Servicing ("DUS") program to expand its purchases of individual multifamily loans.

The standard industry practice is for a multifamily loan purchaser to underwrite each loan prior to deciding whether to purchase or guarantee the loan from the originator. In contrast, DUS is a unique business model.[19] Under the DUS model, pre-approved lenders are authorized to underwrite, close, and sell loans on multifamily properties to Fannie Mae without prior Fannie Mae review. *Id.* In other words, pre-approved DUS lenders who abide by rigorous credit and underwriting criteria originate loans, and Fannie Mae is contractually obligated to purchase conforming loans under the DUS program. *Id.* As a policy

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[18] Delegated Underwriting & Servicing (DUS®) – (available at https://multifamily.fanniemae.com/media/6241/display). The Court may take judicial notice of the Guide and these publicly available materials. *See Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 445 P.3d 846, n.3 (2019) (taking judicial notice of servicing guide).

[19] https://capitalmarkets.fanniemae.com/media/4046/display

matter, underwriting and servicing guidelines and standardized loan documents facilitate delegation and create efficiencies in originating and closing loans that enable lenders to respond to customers rapidly, with the authority to approve a loan within prescribed parameters.

One of the gatekeeping tools the DUS program employs for underwriting purposes requires the originating lender to perform an "Applicant Experience Check" or "ACheck" for the borrower, each key principal of the borrower, each guarantor, and any person who owns or controls any entity key principal.[20] If the result of the ACheck is "continue processing," the lender proceeds with the application. *Id.* If the response is "do not process," it is an indication that the DUS lender "need[s] to have direct communication with Fannie Mae" before proceeding to underwrite a mortgage loan.[21] *Id.* By requiring further inquiry in the delegated model of the DUS program, this tool allows Fannie Mae to address with the DUS lender any concerns it may have with a borrower, sponsor, principal, guarantor, or key principal before new financing is provided by a DUS lender. This is an important risk

[20] Multifamily Selling and Servicing Guide (January 1, 2021) (*available at* https://mfguide.fanniemae.com/fnmf-pdf/download) (at § 307).
[21] ACheck responses are kept confidential within the program.

management tool to reduce potential losses on new loan transactions delivered to Fannie Mae.

The injunction requires that the DUS lender and Fannie Mae forego part of this prudent underwriting process to their financial and regulatory detriment. This directly undermines Fannie Mae's ability to operate its programs in a prudent, safe and sound manner (as required by statute), thus increasing the risk of loss to Fannie Mae. The injunction similarly undermine DUS lenders, who share in the risk of loss on DUS loans the lender delivers to Fannie Mae. Further, the injunction vitiates the federal statutes and regulations governing the operations of Fannie Mae by forcing Fannie Mae to act in contravention of those laws and regulations and be subject to regulatory hazards and sanctions. Finally, there is the real potential of the injunction being abused by allowing Westland to threaten contempt in an attempt to leverage favorable terms as to dozens of related entities.

The form of order Westland submitted and the district court entered directs that Fannie Mae may not put any "Westland entity … on a-check" for any new loan or refinance. APP1565. Though Fannie Mae had no opportunity to brief this issue, owing to Westland's never actually

having moved for this relief, it appears that Westland intends that Fannie Mae be broadly prohibited from employing the ACheck system as to any "Westland entity," including entities created after the injunction was entered and entities outside the state of Nevada. In light of how the DUS program works, section 5(o) inhibits use of one of Fannie Mae's most important and prudent risk management tools to ensure it can review loans before purchasing them, rather than being forced to buy them sight-unseen, as appears to be a result of the injunction. Westland should not be permitted to use this litigation to force Fannie Mae to disregard knowledge and information that have a bearing on safe and sound credit decision-making and engage in unwanted lending to unspecified and undisclosed Westland affiliates under threat of contempt.

2. The Injunction Requires Forced Contracting, Which Is in Direct Contravention of Nevada Public Policy.

Nevada public policy supports the "the greatest freedom of contracting, and contracts, when entered into freely and voluntarily." *Royce Int'l Broad. Corp. v. Gordon & Rees, LLP*, 134 Nev. 1005, 429 P.3d

656 (2018).[22] "Nevada has long recognized public interest in protecting the freedom of persons to contract." *Id.* (citing *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 187, 300 P.3d 124, 128 (2013)). Indeed, it is "hornbook law that the freedom of contract entails the freedom not to contract." *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 333 (6th Cir. 1997); *Shelley v. Trafalgar H. Pub. Ltd. Co.*, 973 F. Supp. 84, 89 (D.P.R. 1997) ("The freedom not to contract should be protected with the same zeal as the freedom to contract."); *Lugassy v. Lugassy*, 298 So. 3d 657, 659 (Fla. Dist. Ct. App. 2020) (recognizing that the "freedom of contract entails the freedom not to contract," and reversing a district court order requiring the defendant to enter future lending contracts).

This Court should reverse and vacate section 5(o), which violates the right not to enter unwanted long-term lending relationships, which have the real potential to result in more litigation.

[22] Forced contracting also flies in the face of 12 U.S.C. § 4617(f), which prevents courts from restraining or affecting FHFA's exercise of its conservatorship authority. *See infra*, Section II.D.

3. The Injunction Improperly Compels Affirmative Commercial Conduct with Non-Parties, Whether Presently in Existence or Not, and Outside of Nevada, Inconsistent with NRCP 65(d).

The injunction is overextensive because it is not only affirmative instead of prohibitive, but because it affirmatively compels Fannie Mae to deal with entities that are not parties to this case. Worse yet, it compels Fannie Mae to do these things everywhere (outside of Nevada) and with entities Westland may form that do not even exist at present. This case is vastly narrower – Defendants in this action, Westland Liberty Village, LLC and Westland Village Square, LLC, are Nevada single-purpose entities. Yet the injunction ignores that relevant narrowness and context by categorically prohibiting Fannie Mae and other Enjoined Parties from taking "any adverse action against any Westland entity" in relation to any other loans and new loans and refinancing applications. The injunction thus purports to prevent Fannie Mae from regulating its own lending relationships with countless entities not party to the litigation – wherever and whenever those compelled loans happen.

While the injunction does not specifically identify what counts as a "Westland entity," Westland's demands to Fannie Mae make clear its

intent to enforce it expansively. Westland Real Estate Group's business model involves incorporating single-purpose entities for each property or project, meaning that there are dozens of Westland LLCs throughout Nevada and California, with new Westland entities being (or capable of being) created for each new undertaking. Indeed, based on a search of the Secretary of State's business records, there appear to be more than 50 entities that could be Westland affiliates in Nevada alone, with additional entities in California. Moreover, Westland could and likely will incorporate new LLCs that were not even in existence at the time the injunction was issued, and yet argue that these new entities would be under the injunction's umbrella.

But requiring Fannie Mae to enter into unrelated loan agreements with non-party entities relating to properties not connected with this case far exceeds the scope of NRCP 65(d). A court ordinarily does not have power to issue orders concerning non-parties. *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 798 (1996) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.") (internal citations omitted). Here, no "Westland entity" other than the two named Westland Defendants was a

party in the district court. Fannie Mae should not be restricted in its dealings with the more than 60 non-party entities (and counting).

4. Section 5(o) of the Injunction Is a Gross Abuse of Discretion Because the District Court Made No Findings or Conclusions to Support the Extraordinary Injunctive Relief It Granted.

The record is clear that the district court never even considered the injunctive relief ordered in section 5(o), let alone that it made appropriate findings in satisfaction of the injunctive relief standard, as this relief was never before the district court until Westland submitted its proposed form of order. Following Fannie Mae's application for the appointment of a receiver, Westland opposed the application and counter-moved to enjoin any foreclosure sale of the Properties. APP1291-1324. But nowhere in the thirty pages of its opposition and countermotion did Westland ask for the relief in section 5(o) or even mention loans involving non-parties, future lending activity, refinancing of unrelated loans, or ACheck. APP1291-1324. None of those subjects were addressed at the hearing or supported by argument or evidence, and the motion does not even include the term "ACheck."

As such, the district court's focus was enjoining a foreclosure sale pending the adjudication of the parties' rights and obligations. It did not

conclude that the facts and the law "clearly favored" Westland with respect to its affiliates' "ACheck" status with Fannie Mae. The district court did not take any evidence or make any findings or conclusions about future loans outside the litigation involving non-parties, let alone of the type required to justify injunctive relief. As such, this provision cannot stand.

D. The Injunction Is Void *Ab Initio* Because the District Court Lacks Jurisdiction to Restrain FHFA's Powers or Functions as a Conservator.

The preliminary injunction purports to preclude Fannie Mae and any entity "having control over the affairs of Fannie Mae," which includes FHFA as Fannie Mae's conservator, from taking resolution actions regarding loans presently in default, and from taking "any adverse action against any Westland entity in relation to other loans." The injunction is void *ab initio* because under 12 U.S.C. § 4617(f), the Court lacked jurisdiction to enter an order restraining or affecting FHFA's powers or functions.[23]

[23] The injunction is also the subject of an original writ proceeding before this Court brought by FHFA. *See FHFA v. Eighth Jud. Dist. Ct.*, No. 82174 (2021). FHFA has represented that it intends to seek leave to submit an amicus curiae brief in this appeal addressing in detail the application of 12 U.S.C. § 4617(f).

FHFA's organic statute—the Housing and Economic Recovery Act of 2008 ("HERA") Pub. L. No. 110-289, 122 Stat. 2654 (2008), 12 U.S.C. § 4501 *et. seq.*—grants FHFA as Conservator broad statutory authority to carry on and operate Fannie Mae's business, to collect obligations owed Fannie Mae, and to preserve and conserve Fannie Mae's assets. *See* 12 U.S.C. § 4617(b)(2)(B)(i), (iv). HERA also provides that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f).

Under § 4617(f), courts cannot enjoin the "lawful exercise of FHFA's power as conservator of the Enterprises" in relation to particular assets. *See, e.g.*, *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 990, 992-93 (9th Cir. 2013); *Leon Cty., Fla. v. FHFA*, 700 F.3d 1273, 1276 (11th Cir. 2012). Here, the injunction purports to "restrain or affect" FHFA's statutory powers to "operate" Fannie Mae, to "perform all [of Fannie Mae's] functions in [Fannie Mae's] name," to "collect all obligations and money due" Fannie Mae, and to "preserve and conserve the assets and property of" Fannie Mae. *See* 12 U.S.C. § 4617(b)(2)(B). For example, the injunction prohibits activities furthering foreclosure on Westland's two properties securing the two defaulted loans. *See* Inj. §§ 1-3, 5(b)-(c)). It

also prohibits FHFA and Fannie Mae from taking unspecified "adverse actions" with respect to Westland's *entire* portfolio, not just the two properties within this Court's jurisdiction. *Id.* §§ 4, 5(d)-(o).

Even if the injunction purported only to constrain Fannie Mae to actions the loan documents allow, § 4617(f) would bar it. Applying the substantially identical provision in 12 U.S.C. § 1821(j), the Second Circuit held that courts lack "equitable jurisdiction to compel [a Resolution Trust Corporation receiver] to honor a third party's rights … under state contract law." *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994). In denying a motion to enjoin an Federal Deposit Insurance Corporation receiver from selling property in an alleged breach of a contract, one federal court explained that it disagreed "that this Court has jurisdiction to enjoin the sale … on the basis that allowing the sale to go forward would be a breach of contract." *Mile High Banks v. F.D.I.C.*, No. 11-cv-01417-WJM-MJW, 2011 WL 2174004, at *4 (D. Colo. June 2, 2011). The Court held that "regardless of whether the sale would breach any contract, such breach is immaterial to the Court's analysis of whether it has jurisdiction to enjoin the sale," and it could not grant the requested injunctive relief. *Id.* Nor would it matter if Defendants claimed to lack

an adequate damages remedy. "To hold that the lack of an adequate alternative remedy renders § 1821(j)'s bar … inoperative would … be tantamount to rendering the provision entirely ineffective." *Nat'l Tr. for Hist. Pres. v. FDIC*, 995 F.2d 238, 239 n.1 (D.C. Cir. 1993).

The limitations § 4617(f) imposes are jurisdictional. As this Court has recognized, "jurisdictional" issues address the court's authority to hear a case, to render a decision, or to award certain relief. *See, e.g.*, *Major v. State*, 130 Nev. 657 (2014) (authority to order appellant to pay restitution was a "jurisdiction[al]" question); *State v. Eighth Jud. Dis. Ct.*, 111 Nev. 1023 (1995), ("the district court exceeded its jurisdiction by granting the motion to stay [an] order" excluding a party from licensed gaming establishments). Federal appellate decisions leave no doubt that § 4617(f) and § 1821(j), are jurisdictional bars. *See, e.g., Cty. of Sonoma,* 710 F.3d at 990 (under Section 4617(f), "courts have no jurisdiction" to grant injunctive relief against FHFA as Conservator). And "jurisdictional issues can be raised at any time." *Barber v. State*, 131 Nev. 1065, 1069 (2015) (citing *Landreth v. Malik*, 127 Nev. 175, 179 (2011)).

The injunction purports to exercise jurisdictional power that a valid federal statute withdrew long before this action was commenced. The injunction was void from its inception, and this Court should dissolve it.

E. The Injunction Does Not Satisfy Even the Prohibitory Injunction Standard and Should Be Reversed on Appeal.

Even if the Court were to treat these injunction provisions as merely prohibitory, which they are not, the injunction does not pass muster. Finding that there are issues of fact as to the parties' claims does not by any standard support the sweeping mandatory injunctive relief the district court ordered in Westland's favor.

A preliminary injunction is available upon a showing that the party seeking the injunction enjoys a "reasonable probability of success on the merits" and that the non-moving party's "conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy." *Sobol v. Capital Mgmt. Consultants*, 102 Nev. 444, 446, 726 P.2d 335, 336 (1986). The Court "may also weigh the public interest and relative hardships of the parties ..." *Id.* The ultimate purpose of the preliminary injunction is to preserve the status quo so as to prevent irreparable harm. *Dixon v. Thatcher et al.*, 103 Nev. 414, 415,

742 P2d 1029 (1987). The irreparable harm must be articulated in specific terms by the issuing order. *Dep't of Conservation v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005).

Here, the district court did not rule on each legal element underlying the injunction with respect to this relief. Specifically, it concluded that Westland faced irreparable harm if the foreclosure sale was to proceed because of the potential loss of property. APP1504, 1561. However, the court did ***not*** make any findings as to Westland's probability of success with respect to *their* Counterclaim or hold that any aspect of the injunction – except the foreclosure sale – satisfied the irreparable harm prong.

While the district court concluded that there were "questions of fact" (not the applicable standard) regarding Westland's default such that the court did not appoint a receiver or allow foreclosure to proceed, it made no affirmative findings or conclusions in *favor of Westland's Counterclaim*, noting only that they "may" be able to demonstrate a breach. APP1560. Likewise, the court did not find whether the alleged harms to Westland outweighed the alleged harms to Fannie Mae with respect to the "enjoined activities" other than the foreclosure. Moreover,

while the stated purpose of the preliminary injunction is to maintain the status quo, the Order in fact imposed upon Fannie Mae a host of affirmative obligations, none of which are supported in the Order. Instead, the Order effectively gives Westland their best day in court after merely concluding that they "may" be able to support their claims.

F. The "Quiet Enjoyment" Provision of the Injunction Should Be Vacated Because It Is Unsupported by Law or Fact.

The Order also provides that the Enjoined Parties "may not interfere with Westland's enjoyment of the Properties…." APP1562. But no allegations or evidence show that Fannie Mae has interfered or threatens to interfere with Westland's enjoyment of the Properties. As such, Westland had no basis to seek and the court had no basis to issue an injunction concerning quiet enjoyment. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 105 (1983) (holding that a party seeking injunctive relief must establish that it is "likely to suffer future injury"). The meaning of this provision is also entirely unclear and fails to put any Enjoined Party on notice of what activity is enjoined. *Ojeda-Enriquez v. Warden*, 2017 WL 7915501, at *1 (Nev. App. Dec. 14, 2017) (holding that because the violation of an injunction is subject to punishment, an

injunction must provide explicit notice of precisely what conduct is outlawed). And "quiet enjoyment" does not apply to the parties' relationship but is rather an obligation of a landlord to tenants. *See Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008); *L.V. Oriental v. Sabella's*, 97 Nev. 311, 313, 630 P.2d 255, 256 (1981).[24]

III. The District Court Abused Its Discretion by Denying Fannie Mae's Application for a Receiver in Derogation of the Parties' Contract.

In addition to the Loan Documents, at least three sets of Nevada Statutes support the appointment of a receiver: (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.*; and (3) NRS 107.100. Notably, the district court denied the application for a receiver on the basis that it found a "question of fact" regarding default and did not address the issue further. The district court abused its discretion by denying Fannie Mae's application in light of Westland's default status, as established above.

[24] If Westland meant by this provision to enjoin the foreclosure, it is entirely duplicative of the prior provision which explicitly enjoins foreclosure.

A. The District Court Was Required to Appoint a Receiver Under the UCRERA.

UCRERA provides, in relevant 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.[25]

[25] NRS 32.260(2).

Fannie Mae is entitled[26] to appointment of a receiver under NRS 32.260(2) 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) are present. Fannie Mae has initiated foreclosure proceedings, and at least two of those factors are present here.

First, Westland "agreed in a signed record to appointment of a receiver on default"[27] so NRS 32.260(2)(b) is satisfied. The Village

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[26] This 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 State v. American Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990) (discussing that "may" is a permissive, rather than a mandatory term).

[27] NRS 32.260(2)(b).

Square Deed of Trust and Liberty Village Deed of Trust contain Westland's explicit recorded consent to the appointment of a receiver upon an Event of Default. Because Westland is in default under the Loan Agreements, Fannie Mae is entitled to the appointment of a receiver under NRS 32.260(2). APP176-77, 439-40.[28]

The Properties are also subject to waste and dissipation under NRS 32.260(2)(a). The statute does not articulate what constitutes "waste," but the Restatement (Third) of Property teaches 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." Restatement (Third) of Property § 4.6(a)(4). Here, the PCAs noted over $2.8 million in repairs necessary on the Properties. Westland refused to allow Fannie Mae to confirm that any repairs had been made, so Fannie Mae had no alternative but to conclude that waste

[28] § 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.").

(as documented by the PCSs) continued to exist. Moreover, Westland materially failed to uphold their obligations to Fannie Mae and have refused to deposit the additional amounts to the Repairs Escrow Accounts to address these needed repairs. This is both waste and dissipation of the Properties. These failures entitle Fannie Mae to a Receiver under NRS 32.260(2).

B. The District Court Was Required to Appoint a Receiver Under the UARA.

Fannie Mae is also entitled to the appointment of a receiver under NRS 107A.260(1)(a)(1) and (1)(a)(3). APP176-77, 439-40.[29] 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. *Id.* 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. *Id.*

Here, Westland failed to pay Fannie Mae all rents after they defaulted under the Loan Documents. The Loan Documents entitled

[29] NRS 107A.260.

Fannie Mae to demand that Westland pay all rents after the occurrence of a default. APP298-99, 389. On December 17, 2019, Fannie Mae demanded the proceeds of any and all rents, based on Westland's defaults. Westland admits – as they must – that 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." This misses the point. There is no provision in the Loan Documents, or in any statute, that limits Westland's 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. In fact, this situation is precisely the circumstance under which appointment of a receiver is crucial. Once Westland defaulted, and Fannie Mae demanded rents due to Westland's default, Westland had *cumulative* obligations to pay the accelerated note *and* to pay all rents. Westland has not paid to Fannie Mae all rents they have received since December 17, 2019.

Moreover, the Security Instruments provide that Fannie Mae is entitled to the appointment of a receiver upon an Event of Default that

has occurred and is continuing. APP176, 439. Westland's express consent to the appointment of a receiver is undisputed. APP176, 439 (". . . Borrower, by its execution of this Security Instrument, expressly consents to the appointment of such receiver . . . .") Fannie Mae is entitled to the appointment of a receiver because Westland defaulted on their obligation to pay all rents, they continue to withhold all rents from Fannie Mae, and they agreed in the executed Security Instruments to the appointment of a receiver in these instances.

Fannie Mae adequately demonstrated that a receiver is needed to protect its interest in the Properties.[30] Likewise, the PCAs established that the Properties were in desperate need of substantial repairs and that Westland objected to Fannie Mae's demands. APP1303. In addition, even Westland admits that they had not been able to collect any rents at the Properties sufficient to cover its monthly debt service obligations. APP1304. If Westland was unwilling to put up necessary reserves to pay for needed repairs, as required by the Loan Documents, and could not cover their monthly debt service obligations from the rents they are

[30] The outstanding principal balances on the loans are approximately $28,616,584.64 and $9,244,785.28, respectively.

collecting, then Fannie Mae's interest in each of the Properties was in danger, and the district court abused its discretion by refusing to appoint a receiver.

Westland's arguments to the contrary are unpersuasive. Their contention that their parent company, Westland Real Estate Group, has a long history of multifamily housing experience is irrelevant. APP1304. All that suggests is that Westland should have performed its own due diligence on the Properties, and that Westland should have understood the terms of the Loan Documents. *Campanelli*, 86 Nev. at 841. Second, Westland's claim that many of the issues identified in the PCAs "pre-existed the Loans" because the Properties 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. The fact that Westland knew the Properties were distressed at the time they assumed the loans supports Fannie Mae's reasoning for requiring Westland to pay an additional deposit into the Repairs Escrow Accounts and to increase the Monthly Replacement Reserve Accounts. Over a year after Westland 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" subsequently to repair the Properties 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, Westland's 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. APP1305. When Westland failed to make Fannie Mae's requested repairs and to fund the Repairs Escrow Accounts or increase the Monthly Replacement Reserve, Westland defaulted on the loans. Westland's default rendered the pre-default payment schedule inoperative. Thus, Westland's monthly payments made after they defaulted on the Loans were, in fact, partial payments of the full loan balances and not satisfactory to cure their defaults on the loans.

The district court abused its discretion by disregarding the contract in evaluating whether Westland defaulted, and by its resulting denial of the application to appoint a receiver.

Conclusion

For the foregoing reasons, the district court erred as a matter of law by failing to apply the terms of the parties' contract. This Court should vacate the preliminary injunction and reverse the district court's denial of Fannie Mae's application for a receiver.

DATED: June 22, 2021

SNELL & WILMER L.L.P.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the OPENING BRIEF complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 10,506 words.

Finally, I hereby certify that I have read the **APPELLANT'S OPENING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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 OPENING BRIEF** 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/ Kelly H. Dove
An Employee of SNELL & WILMER L.L.P.

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