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.	Case No. 82174

RESPONDENTS' ANSWERING BRIEF

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[1] Additional counsel for Respondents are identified below.

VERIFICATION

Under penalties of perjury, the undersigned declares that he is counsel for Respondents Westland Liberty Village, LLC and Westland Village Square, LLC; that he knows the contents of this Answering Brief; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010 and NRAP 21(a)(5).

DATED this 30th day of August, 2021.

/s/ *J. Colby Williams*
J. COLBY WILLIAMS

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. Respondents Westland Liberty Village, LLC and Westland Village Square, LLC are Nevada limited liability companies wholly-owned by Westland QOF #1 LLC and Westland QOF #2 LLC, respectively. The latter two entities are wholly-owned by A&D Trust Holdings, LLC and AFT Industry NV, LLC, which are private entities held by family trusts. No Westland entity is publicly-traded or has publicly-traded owners. The following counsel and law firms have appeared for the subject Respondents in the action below: John Benedict, The Law Offices of John Benedict; John W. Hofsaess, In-House Counsel for Westland Real Estate Group (admitted *pro hac vice*); Brian Barnes, Cooper Kirk, PLLC (admitted *pro hac vice*); and John P. Desmond, Dickinson Wright, PPLC.

DATED this 30th day of August, 2021.

CAMPBELL & WILLIAMS

By /s/ *J. Colby Williams*
J. COLBY WILLIAMS, ESQ. (5549)

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RESPONDENTS' ANSWERING BRIEF

Respondents Westland Liberty Village, LLC and Westland Village Square, LLC hereby submit their consolidated Answering Brief. For ease of reference, Appellant Federal National Mortgage Association will be referred to as "Fannie Mae," and Appellant Grandbridge Real Estate Capital, LLC will be referred to as "Grandbridge."[1] Respondent Westland Liberty Village, LLC and Westland Village Square, LLC will be referred to as "Westland."

I. JURISDICTION

Fannie Mae did not include a jurisdictional statement in its Opening Brief as required by NRAP 28(a)(4). Nevertheless, Westland does not dispute Grandbridge's jurisdictional statement. This Court has jurisdiction over the district court's entry of the preliminary injunction pursuant to NRAP 3A(b)(3).

II. ROUTING STATEMENT

Fannie Mae did not include a routing statement in its Opening Brief as required by NRAP 28(a)(5). Westland nonetheless does not dispute Grandbridge's routing statement. This matter is presumptively retained by the Supreme Court as a matter originating in business court that likewise presents as principal issues questions of first impression and statewide public importance. NRAP 17(a)(9) and (11)-(12).

[1] Grandbridge was formerly known as Cohen Financial, Suntrust Bank and Trust Bank. APP1338. For ease of reference, Westland will collectively refer to these entities as Grandbridge irrespective of the time period.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court correctly denied Fannie Mae's request for appointment of receiver and instead entered a preliminary injunction barring Fannie Mae from pursuing foreclosure proceedings and related adverse actions against Westland based on an alleged default where Fannie Mae's actions violated the parties' agreements, and Westland submitted substantial evidence demonstrating that no such default occurred.

2. Whether Fannie Mae's belated attempt to invoke the anti-injunction clause in the Housing and Economic Recovery Act ("HERA"), 12 U.S.C. § 4617(f) (the "Anti-Injunction Clause"), invalidates the preliminary injunction where the Anti-Injunction Clause does not apply to the type of relief granted by the district court, particularly when the Federal Housing Finance Agency ("FHFA") had no involvement in this dispute in its role as Fannie Mae's conservator.

3. Whether Grandbridge is bound by the preliminary injunction despite not being present at the October 13, 2020 hearing where Grandbridge is the agent of Fannie Mae and actively participated in the foreclosure proceedings against Westland.

IV. COUNTERSTATEMENT OF THE CASE

This matter arises out of an overzealous lender's inexplicable attempt to punish a community-minded investor in the Las Vegas valley. Westland invested $60.3 million in August 2018—through the assumption of $38.4 million in loans from

Fannie Mae and an additional $20-plus million in cash—to purchase two large multi-family communities with a troubled history of criminal activity and gang violence. Within the first year of ownership, Westland invested an additional $1.8 million on capital improvements to the properties, and that amount had increased to $3.5 million by the time the district court entered the preliminary injunction that is the subject of this appeal. Westland, moreover, did not miss a single debt service payment to Fannie Mae and, in fact, overpaid the mortgage by more than $550,000 in 2020. As a result of Westland's significant efforts and capital investment prior to the hearing on Westland's motion for preliminary injunction, the properties had over 80% occupancy, a reduced crime rate and a dedicated 32-member staff, all of which have drawn commendations from a Clark County Commissioner, the Nevada State Apartment Association, and the Las Vegas Metropolitan Police Department.

Notwithstanding Westland's large investment and the absence of a monetary default, Fannie Mae improperly sought access to the properties in July 2019 to conduct a property condition assessment in violation of the parties' loan agreements and, subsequently, demanded that Westland deposit an additional $2.85 million in escrow for repairs. Fannie Mae made this demand even though the operative loan agreements locked in the repair reserves at $143,319.30, and Fannie Mae held more than $1 million of Westland's money in other escrow accounts. When Westland objected to this unreasonable demand, Fannie Mae's loan servicer, Grandbridge, served a baseless notice of default and, thereafter, commenced the foreclosure

process.

Fannie Mae moved for the appointment of a receiver upon filing the instant lawsuit. Westland counter-moved for injunctive relief against Fannie Mae and Grandbridge to prevent the foreclosure and deleterious effects triggered by the wrongful default notice. The district court categorically rejected Fannie Mae's request for a receiver and granted Westland's counter-motion for injunctive relief, which merely sought to return the parties to the *status quo ante litem* by precluding Fannie Mae and Grandbridge from pursuing the adverse actions ostensibly available to it had the default notice been properly issued, which it was not. More specifically, the district court prohibited Fannie Mae and Grandbridge from foreclosing on the properties, interfering with Westland's ownership and operation of the properties, withholding insurance funds already owed to Westland prior to the default notice, and blacklisting Westland and its affiliates in connection with other loan funding and credit facility requests based solely on the default notice.

This appeal followed as did Fannie Mae's obstinate noncompliance with the preliminary injunction, which included multiple unsuccessful attempts to stay the district court's ruling. Having failed to block the preliminary injunction at every turn, Fannie Mae called for the cavalry in the form of its government conservator, Federal Housing Finance Agency ("FHFA"), to mount a last-ditch effort to unwind the district court's order. Specifically, FHFA moved to intervene in the district court as well as this appellate proceeding while simultaneously commencing an extraordinary

writ proceeding in this Court to dissolve the injunction against Fannie Mae.[2] Because the Court denied FHFA's motion to intervene in this appeal as a non-party, Fannie Mae now parrots FHFA's arguments in its Opening Brief. Not content to let Fannie Mae carry its water, FHFA has reinserted itself in this proceeding through the vehicle of an amicus brief.

The crux of Fannie Mae's and FHFA's argument is that 12 U.S.C. § 4617(f) of HERA—which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator"—prohibits the district court's grant of injunctive relief against Fannie Mae. But the Anti-Injunction Clause only applies when FHFA acts within the scope of its conservatorship powers, and the federal statute under which FHFA operates "does not authorize the breach of contracts." *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997). Moreover, Fannie Mae's and FHFA's reliance on the Anti-Injunction Clause also misses the mark because FHFA has made no showing that it took any affirmative action or gave Fannie Mae any directive that would be affected by the preliminary injunction. Indeed, FHFA had absolutely nothing to do with this dispute until the agency belatedly interjected itself months after the injunction had been entered.

[2] FHFA's writ proceeding is *Federal Housing Finance Agency v. Eighth Judicial District Court*, Case No. 82666 (the "Related Action").

V. COUNTERSTATEMENT OF FACTS

A. Westland Purchases The Properties.

On August 29, 2018, Westland Liberty Village, LLC and Westland Village Square, LLC purchased adjoining multi-family communities located at 4870 Nellis Oasis Lane and 5025 Nellis Oasis Lane, Las Vegas, Nevada (the "Properties") for $60.3 million. SA358.[3] The Westland entities are affiliated with the decades-old Westland Real Estate Group, which employs approximately 500 people and owns and operates over 38 communities in the Las Vegas valley. *Id*. In more than 50 years of operation, Westland Real Estate Group and its affiliates have never defaulted on a loan. *Id.*

As a condition of the purchase, Westland assumed loans of $29,000,000 and $9,366,000 (the "Loans") that were issued to the prior owner by Grandbridge (the successor to SunTrust Bank), and assigned to Fannie Mae (other than for loan servicing) before Westland's purchase. *Id.*; APP16-APP158; APP220-APP420; SA0688. Westland paid the remainder of the purchase price in cash such that Westland has well over $20 million of equity in the Properties. *Id*. At the time of purchase, Fannie Mae reaffirmed the sufficiency of the combined total Repair Reserve and Replacement Reserve balances of $143,319.30 based on a property condition assessment ("PCA") performed by CBRE. SA0643-SA0648; SA0654; SA0664; SA0668. There is no dispute that Westland satisfied this reserve funding.

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

B. Westland Rehabilitates The Properties At Great Expense.

Notably, Fannie Mae agreed to the reserve amounts at the time of purchase with knowledge that the Properties had been in a distressed condition for years due to poor management, exceedingly high levels of crime, and physical disrepair. SA0361-SA0362; SA0365-SA0372; SA0688-SA0689; SA0694-SA0696. The Properties, in fact, received a nuisance abatement complaint from LVMPD due to high crime levels while the Properties were in escrow. *Id.* For that reason, Westland advised Grandbridge prior to closing that a decline in occupancy would inevitably occur as evictions were necessary to address the high crime rate and the prior owner's poor management. *Id.*

From the date of purchase in August 2018 through September 2019, Westland invested $1.8 million solely on capital improvements, spent another $1.57 million on private security, took measures to clean up crime, added a dedicated 32-employee staff, and began improving integration with local community services. SA0361-SA0362. Westland's efforts in this regard received plaudits from multiple community leaders and government bodies. *Id.*

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

In mid-2019, Grandbridge, acting on behalf of Fannie Mae, demanded a PCA to which it was not entitled under the loan agreements. While all parties agree the loan agreements require a showing of deterioration before a PCA can be demanded, neither Fannie Mae nor Grandbridge have cited any evidence of deterioration to the

Properties. Instead, Fannie Mae based its PCA demand on a temporarily reduced occupancy rate—which, again, was the inevitable result of Westland's efforts to improve the Properties—when the loan agreements only allowed a PCA due to physical deterioration of the Properties. OB at 9-10. The contract language notwithstanding, Grandbridge retained an out-of-state vendor, f3, Inc. ("f3"), to perform a new PCA in September 2019 even though CBRE, a local vendor, had performed a PCA at the time of purchase just a year earlier. APP005-APP006.

On October 18, 2019, Fannie Mae (through Grandbridge) served a Notice of Demand (the "Demand") based on alleged maintenance deficiencies identified in f3's PCA reports. The Demand required Westland to deposit $2.85 million in the Replacement Reserve Account forthwith. APP1263-APP1268. Because Fannie Mae's "assessment" effectively meant the condition of the Properties deteriorated by $2.85 million in one year despite Westland's capital expenditures of $1.8 million during the same period, it was readily apparent that f3 artificially inflated the extent of necessary repairs by using different standards than those used by CBRE months earlier. Indeed, the PCA at the time of purchase did not treat routine maintenance on vacant units as requiring reserves whereas f3's PCA required $1.9 million be held in reserve for vacant units. SA0020-SA0342; *c.f.* APP001-APP013; APP503; APP814. By adopting this approach and deviating from the standards applied in the previous PCA in other respects, f3 caused the demanded reserves to skyrocket from $143,319.30 to $2.85 million even though the condition of the Properties had, by all

accounts, dramatically improved since the initial PCA.

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

Westland responded to the Demand on November 13, 2019 by objecting that the parties' agreements did not support Fannie Mae's Demand, reaffirming that it had improved the Properties' condition through more than $1.8 million of renovations, and noting that Grandbridge failed to provide an opportunity to perform the alleged necessary repairs as required by the loan agreements. SA0343-SA0348. Westland then attempted to resolve the dispute with Fannie Mae by providing its Strategic Improvement Plan for the Properties, which discussed Westland's ongoing plans to renovate the Properties, provided timelines for remaining renovations to be made, and addressed deficiencies identified by f3 that had already been corrected. SA0020-SA0342; SA-349-SA0355.

Westland's efforts to remedy the situation were summarily rebuffed when Fannie Mae's counsel forwarded a boilerplate Notice of Default and Acceleration of Note ("Default") on December 17, 2019 rejecting Westland's good-faith proposal and ignoring Westland's improvements to the Properties. APP1269-APP1277. Nearly seven months later, on July 14, 2020, Fannie Mae filed the Notice of Default and Intent to Sell alleging a default of the Loan Agreements because Westland did not deposit nearly $3 million into the Replacement Reserve Account upon Fannie Mae's unilateral demand. Incredibly, Fannie Mae took this action without seeking to re-inspect the Properties even though Westland had (i) invested an additional $1.7

million in capital improvements during the ten months since the September 2019 PCA, and (ii) completed a large number of work orders to prepare vacant units for rental. SA0359.[4]

E. Bad Faith Loan Servicing

Besides pursuing the deficient Default based on an improper PCA, Fannie Mae and Grandbridge routinely engaged in unscrupulous conduct when servicing the Loans. For example, contrary to Fannie Mae's assertions that Westland failed to disclose any improvements or repairs prior to f3's PCA or improperly denied access to the Properties, *see* OB at 21-22, the evidence demonstrates that Westland made numerous reserve reimbursement requests that attached detailed support for work performed before and after Fannie Mae demanded a PCA in mid-2019. SA0689-SA0690. Grandbridge, however, repeatedly failed to respond to Westland's requests, did not process requests in a timely manner, and refused to release Westland's funds. *Id.* Moreover, Fannie Mae did not seek access to the Properties between the time of f3's PCA and the filing of this action. SA0359.

Additionally, in February 2020, Grandbridge (without notice) stopped sending loan statements and auto-debiting Westland's monthly debt service payments, which forced Westland to guess at its floating monthly payments at the risk of a financial

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

default. SA0358-SA0360. To ensure that a miscalculation did not result in a default, Westland began mailing its monthly payments plus an additional ten percent (10%). SA0359; SA0669-SA0685. As a result, Westland had overpaid its mortgage by more than $550,000 between February 2020 and December 2020. *See infra* at Section V.I.

The most egregious example of Fannie Mae's and Grandbridge's misconduct was their refusal to release $951,407.55 of insurance funds from the Restoration Reserve earmarked for reconstructing two fire-damaged buildings at the Liberty Property. Westland completed the work at its sole expense and met all conditions for the release of Restoration Reserve funds well before the spurious Default. SA0362. Fannie Mae, though, withheld all of the insurance funds on grounds it had no obligation to release funds after a self-proclaimed event of default has occurred. *Id*. Setting aside that no default occurred in the first place, Westland had requested reimbursement of insurance funds on October 18, 2019—two months before Fannie Mae noticed the purported default on December 17, 2019—but Grandbridge failed to respond to the request. SA0721-SA0741. Fannie Mae, obviously, manipulated the reimbursement process through unwarranted delay and the belated invocation of provisions that had no application at the time of the reimbursement request.

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

Fannie Mae filed the instant action on August 12, 2020, and simultaneously

moved for the appointment of a receiver.[5] In response, Westland filed its counterclaim and moved for a preliminary injunction (supported by a fully-developed record of over 3,200 pages of exhibits and three sworn affidavits) to stop all foreclosure proceedings, to negate the effects of the wrongful Default, and to restore Westland's good name in the industry. On October 13, 2020, the district court held a lengthy hearing, denied Fannie Mae's request for a receiver, and granted Westland's countermotion for a preliminary injunction.[6]

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

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[5] Fannie Mae sought expansive receivership powers as evidenced by its 17-page proposed order listing 34 different "duties, rights, and powers" as well as eight separate acts that Westland would be enjoined from performing. SA0001-SA0019. Much of the injunctive relief Fannie Mae now characterizes as "mandatory" simply reflects the denial of powers it sought though the receivership application.

[6] Although Grandbridge had been served with Westland's answer, counterclaim and third-party complaint, Grandbridge requested a two-week extension to respond and, thus, did not appear or have notice of the motion for preliminary injunction prior to the October 13, 2020 hearing.

therefrom. APP1481-APP1482; APP1490-APP1492; APP1499-APP1505.

The parties submitted competing orders to the district court along with the hearing transcript and voluminous letters setting forth each side's positions as to content. SA0742-SA0748. The district court adopted Westland's proposed order in its entirety notwithstanding Fannie Mae's present contention that the order exceeds the scope of the district court's ruling at the hearing. *See Mortimer v. Pacific States Savings & Loan*, 62 Nev. 142, 153, 145 P.2d 733, 736 (1944) ("[The formal written order] must be taken as the best evidence of the court's decision. The fact that it was prepared by appellant is of no consequence. A court is presumed to read and know what it signs.").

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

G. Fannie Mae Asks This Court To Stay Enforcement Of The Injunction.

After appealing the injunction order, Fannie Mae moved first before the trial court, and then this Court to stay its enforcement. *See* 1/8/21 Motion to Stay. On February 11, 2021, the Court issued an order granting Fannie Mae limited relief. *See* 2/11/21 Order Granting Stay in Part and Denying Stay in Part. Specifically, the Court

stayed enforcement of the provisions requiring Fannie Mae to remove the notices of default and election to sell from the Properties' titles pending resolution of the appeal in the Related Action. *Id.* It otherwise denied the motion and left the remainder of the injunction order in place, thereby prompting Fannie Mae to seek reconsideration of the Court's order. *Id.* In denying the reconsideration motion on May 25, 2021, the Court recognized that the Order "prohibits Fannie Mae from" taking action and "merely places the parties in the same position as if the alleged default had not occurred." *See* 5/25/21 Order Denying Motions to Reconsider and Intervene.

H. FHFA's (Nonexistent) Role In The Underlying Events And The Related Action.

FHFA injected itself into this dispute for the first time following Fannie Mae's string of losses in the district court and this Court. FHFA, however, has never explained—and, in fact, cannot explain—how the underlying factual events and legal proceedings impact its powers as Fannie Mae's conservator. That is because FHFA had ***no*** role in the underlying dispute between Fannie Mae and Westland until it belatedly moved to intervene in this appeal, separately and simultaneously petitioned this Court for writ relief, later moved to intervene in the district court proceeding, and then unsuccessfully moved to dissolve the Order in that forum. While FHFA may earn points for its ability to multi-task, its timeliness is clearly lacking as the injunction had been in place for months and already preliminarily reviewed by this Court as part of Fannie Mae's stay motion before FHFA decided to act.

There is, moreover, no evidence in the record (either in this Court or the court below) that Fannie Mae engaged in the abovementioned actions in compliance with any policy or directive of FHFA. There is likewise no evidence in the record that FHFA directed, participated in or endorsed Fannie Mae's bad faith conduct towards Westland with respect to the Properties. There is, in fact, no evidence to suggest that FHFA even knew about the dispute between Fannie Mae and Westland until long after this litigation commenced in August 2020.[7]

I. Developments In The District Court Since The Filing Of This Appeal.[8]

As a result of Fannie Mae's obstinate refusal to comply with the terms of the injunction and, in particular, its failure to disburse the insurance funds from the Restoration Reserve, Westland moved to compel Fannie Mae's compliance with the

[7] FHFA's absence is explained by the fact that it has largely delegated authority over legal matters to Fannie Mae other than "[s]ettlements in excess of $50 million" for which Fannie Mae requires FHFA approval. SA1232.

[8] Westland respectfully requests that this Court take judicial notice of subsequent proceedings in the district court related to the preliminary injunction that affect the Court's consideration of this appeal. *See, e.g.*, *Mack v. Estate of Mack*, 125 Nev. 80, 92, 206 P.3d 98, 106 (2009) ("We have taken judicial notice of other state court and administrative proceedings when a valid reason presented itself."); *Pappas v. Bank of Am. 401(k) Plan for Legacy Co.*, 526 Fed. Appx. 785, *3 (9th Cir. 2013) ("We grant Plaintiffs' request for judicial notice of the *Layne* settlement agreement and related court documents because the documents are judicially noticeable and relate to events that occurred after the district court's fairness hearing.") (internal citations omitted); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971) ("[W]e take judicial notice of a number of developments since the taking of this appeal, called to our attention by the parties, since such circumstances may affect our consideration of the various issues presented.").

injunction in the district court. SA1056-SA1143. On the eve of the May 6, 2021 hearing, Fannie Mae finally disbursed $905,599.68 to Westland representing the amount of insurance proceeds it had calculated for the repairs of the fire-damaged buildings at the Properties. SA1144-SA1160. Additionally, Fannie Mae remitted $550,748.78 to Westland as reimbursement for the amounts it paid in excess of its monthly loan obligations due to Fannie Mae's and Grandbridge's bad faith loan servicing. *Id*.

Westland submits that Fannie Mae's newfound willingness to comply with the injunction and disburse Westland's funds arose from the fact that, in April 2021, Fannie Mae produced two new PCA reports for the Properties that were conducted at Fannie Mae's behest on March 4-5, 2021. SA0780-SA1055. The new PCA reports established that the appropriate amount for Westland's Replacement and Repair Reserve Accounts is, at most, a mere $436,005—which is more than $2.4 million less than the demand that led to Fannie Mae declaring default and commencing foreclosure proceedings against Westland. SA0798; SA0937. Indeed, given that the Repair and Replacement Reserve Accounts for the Properties currently contain $1,001,610.30—even after recently releasing nearly $1.5 million—there is no question that Westland's Repair and Replacement Reserve Accounts are overfunded by hundreds of thousands of dollars. SA1173-SA1180. In short, the new PCA reports commissioned by Fannie Mae confirm that it lacked any justifiable basis to

seek appointment of a receiver, declare default, and commence foreclosure proceedings in the first place.

VI. SUMMARY OF THE ARGUMENT

In a stunning display of arrogance, Fannie Mae contends it has the omnipotent power to unilaterally declare a default against Westland, commence foreclosure proceedings on the Properties, revoke Westland's ability to collect rents, and file suit demanding the appointment of a receiver, irrespective of whether the purported default is supported by the parties' contracts or the facts on the ground. In that regard, Fannie Mae effectively argues that the district court was required to don blinders and accept Fannie Mae's baseless declaration that Westland committed a default without examining whether such a default had, in fact, occurred. And, according to Fannie Mae, Westland has no ability to object to Fannie Mae's grossly unreasonable demands or insist that Fannie Mae abide by the letter of the loan agreements.

The district court, however, correctly determined that it was not obligated to take Fannie Mae's word for it, particularly when Westland conclusively demonstrated that, *inter alia*, (i) there had been no monetary default under the agreements, (ii) Fannie Mae's request for a PCA and corresponding Demand violated the parties' contracts by relying on reduced occupancy rates due to Westland's efforts to clean up the criminal element at the Properties rather than a physical deterioration of the Properties, (iii) Westland had invested millions of dollars improving the Properties and there was no evidence of deterioration to the Properties, and (iv)

Fannie Mae had failed to provide Westland with the opportunity to complete the requested repairs before serving the multi-million dollar Demand.

As a result, the district court categorically rejected Fannie Mae's request for a receiver and granted Westland's countermotion for injunctive relief, which merely sought to return the parties to the *status quo ante litem* had the defective Default not been issued. More specifically, the district court prohibited Fannie Mae from foreclosing on the properties, interfering with Westland's ownership and operation of the properties, withholding insurance funds already owed to Westland prior to the default notice, and blacklisting Westland and its affiliates in connection with other loan applications based solely on the default notice. While Fannie Mae incorrectly asserts this relief constituted a sweeping mandatory injunction, the record is clear that the district court simply enjoined Fannie Mae from foreclosing on Westland's properties or taking related adverse actions flowing from the improper Default that would have had dire and irreversible consequences on Westland's unblemished business record.

Because the district court's ruling is unassailable, Fannie Mae now moves to adopt the arguments invoked by the late-arriving FHFA premised on the so-called Anti-Injunction Clause in HERA. But the Anti-Injunction Clause only applies when FHFA acts within the scope of its conservatorship powers and, with limited exceptions that are not relevant here, does not grant FHFA (or Fannie Mae) the power to breach contracts. To that end, both this Court and the Ninth Circuit have

recognized that equitable relief is available in breach of contract cases brought against a federal conservator or receiver. Finally, neither Fannie Mae nor FHFA may invoke the Anti-Injunction Clause when FHFA had no involvement whatsoever in the underlying dispute—a dispute that has nothing to do with any FHFA actions taken to put Fannie Mae in a sound and solvent condition, which is FHFA's primary role as conservator.

For its part, Grandbridge attacks the district court for including it in the injunction because Grandbridge had not formally appeared and had not received notice of Westland's motion for injunctive relief prior to the October 13, 2020 hearing. Grandbridge specifically contends that the district court's order violated the notice requirements of NRCP 65(a) as well as its constitutional due process rights. Grandbridge, however, acts as Fannie Mae's loan servicer and agent with respect to the Loans and, in that capacity, actively participated in the wrongful conduct at issue. Accordingly, Grandbridge is appropriately bound by the injunction pursuant to NRCP 65(d) irrespective of the lack of notice prior to the October 13, 2020 hearing.

VII. ARGUMENT

A. Standard Of Review.

Westland does not dispute Fannie Mae's limited recitation of the applicable legal standard. Westland, however, strongly disagrees with Fannie Mae's suggestion that "[w]hether a default occurred is a question of *law* that depends upon interpretation of the parties' contract" and is subject to de novo review. *See* OB at 14, 23. Contract

interpretation is a question of law subject to de novo review only "[w]hen the facts in a case are not in dispute." *Lehrer v. McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008); *see also Barranco v. Woods*, 2019 WL 4956154, at *5 (D. Nev. Oct. 7, 2019) ("[W]hether the actions of a party constitute a material breach is generally a factual question.") (citing *Nevada First Bancorp v. Highland A.V.A., LLC*, 126 Nev. 742, 367 P.3d 803 (2010)).

Here, Westland raised numerous factual disputes related to the alleged deterioration of the Properties that prompted Fannie Mae's unwarranted Demand as well as Fannie Mae's ability to make the Demand under the loan agreements in the first place. As a result, the district court found that Fannie Mae had failed to prove a default under the loan agreements as Westland submitted substantial evidence that no deterioration to the Properties had occurred. Thus, the district court's factual determination that Westland had not breached the loan agreements in a manner to support the Demand and Default should be affirmed unless this Court determines the district court's ruling was clearly erroneous. *See Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) ("Factual determinations [related to a preliminary injunction] will be set aside only when clearly erroneous or not supported by substantial evidence); *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005) ("the district court's determination that the contract was or was not breached will be affirmed unless clearly erroneous[.]").

B. The District Court Did Not Abuse Its Discretion By Finding That Fannie Mae Failed To Prove A Default.

1. Fannie Mae's Demand and Subsequent Notice of Default Violated the Parties' Loan Agreements.

In an obvious attempt to oversimplify this dispute, Fannie Mae claims there are "no disputed issues of fact as to whether Westland defaulted as defined by the contract" because (i) the loan agreements allow Fannie Mae to inspect the Properties and require Westland to make deposits into the Repair Reserve and Replacement Reserve accounts, (ii) Fannie Mae demanded that Westland deposit approximately $2.85 million into such accounts, (iii) Westland did not comply with the Demand or deposit the funds, and (iv) the loan agreements state the failure by borrower to pay or deposit any amount required under the contracts is an "Event of Default."

While Westland acknowledges that it did not blindly comply with the Demand, Fannie Mae fails to consider or meaningfully address the district court's finding that the Demand was not justified under the loan agreements at the outset. Indeed, under Fannie Mae's view of the operative agreements, it has the unfettered right in its sole discretion to demand deposits into the Repair Reserve and Replacement Reserve accounts irrespective of whether there is a legal or factual basis to support the demands—and there was not. Given Fannie Mae's apparent belief that it (and not the district court) is the exclusive arbiter of what constitutes a default, it is little wonder that Fannie Mae only engaged in a superficial analysis of the substantive provisions of the loan agreements.

Here, Fannie Mae's Demand suffered from several glaring defects. ***First***, the loan agreements expressly prohibit Fannie Mae from making increased reserve demands on grounds that the existing reserves are purportedly "insufficient." Specifically, an "adjustment to deposits" for reserve schedules is permitted under Section 13.02(a)(3), but *only* at the time a loan is renewed or transferred, *i.e.*, at the time of purchase in August 2018 when Fannie Mae actually reduced the reserves for the Properties. APP084-APP085.[9] Fannie Mae cannot unilaterally adjust the deposits on a whim simply because it regrets not raising the repair and replacement schedules when Westland assumed the obligations under the loan agreements at the time of purchase.

Second, Section 13.02(a)(4) permits increases when the amount in the Required Repair or Replacement account is insufficient to perform the specific line items listed in the loan schedules when the loan is issued or assumed. Section 13.02(a)(4) also permits increases for Additional Lender Repair or Additional Lender Replacements provided they are "*repairs of the type listed* on the Required Repair Schedule" or "Required Replacement Schedule" but not specifically identified within

[9] Fannie Mae, in fact, modified the Liberty Village and Village Square schedules when Westland assumed the loan agreements. Although Fannie Mae did not alter the amounts of the monthly replacement funding, Fannie Mae revised the Required Repair Schedule for Village Square to reflect that no required repairs were necessary. APP1365; SA0656; SA0666. Fannie Mae likewise reduced the Required Repair Schedule for Liberty Village and clarified that there were only $9,375 of remaining repairs. *Id*. Those revisions resulted in total repair and replacement reserves for both Properties in the amount of $143,319.28, which Westland funded in compliance with the loan agreements.

those explicit schedules. APP085; APP108 (emphasis added). In this case, the scheduled items only identified a handful of minor repairs with a total value of $143,319.30 whereas Fannie Mae's $2.85 million demand requested wholesale changes far beyond that limited scope. SA0643-SA0648; SA0654; SA0664; SA0668. Moreover, if Fannie Mae categorized this drastic increase as Additional Lender Repairs or Additional Lender Replacements, Fannie Mae would still need to comply with Section 13.02(a)(9)(B), which incorporates the deterioration requirement of Section 6.03(c). APP088-APP090.

Third, under Section 6.03(c), Fannie Mae can only obtain a PCA when "the *condition* of Mortgaged Property has *deteriorated* (*ordinary wear and tear excepted) since the Effective Date*" of the loan. APP054 (emphasis added). Here, Fannie Mae admits it relied on a decline in "occupancy" as the purported deterioration, but "occupancy" is inconsistent with the loan agreements' definition of "condition of the Mortgaged Property." Indeed, Section 6.01(d) states the "condition of the Mortgaged Property" only applies to physical onsite conditions, including "the construction or condition of the Mortgaged Property or . . . any structural or other material defect" and "any damage other than damage which has been fully repaired." APP049. There is no mention of occupancy levels, which Fannie Mae concedes was the basis for obtaining the f3 PCA and demanding additional deposits from Westland. OB at 9-10.

Moreover, Fannie Mae's reliance on reduced occupancy levels ignores that this

temporary issue only emanated from Westland's efforts to reduce crime at the Properties with better security, stricter leasing guidelines, better coordination with law enforcement and the eviction of offending tenants. Importantly, Westland was *required* to undertake these measures to comply with Section 6.02(c)(3), which provides that Westland will "not engage in or knowingly permit, and shall take appropriate measures to prevent and abate or cease and desist, any illegal activities at the [Properties] that could endanger tenants or visitors, result in damages to the [Properties], result in forfeiture of the Land or otherwise materially impair the lien[.]" APP052.

Additionally, Fannie Mae did not—and could not—produce any evidence establishing deterioration since the effective date of the loans as opposed to conditions that already existed before Westland purchased the Properties. APP1429-APP1430. Put another way, the f3 report upon which Fannie Mae's Demand was premised did not account for the baseline condition of the Properties at the time of purchase.[10]

Fannie Mae attempts to minimize f3's error by shifting the blame back to Westland for allegedly not conducting sufficient due diligence to determine the condition of the Properties at the time of purchase. *See* OB at 24-25. This argument

[10] The f3 report similarly sought reserves for costs of routine maintenance, but Section 13.02(a)(5)(B) explicitly provides Fannie Mae "shall not disburse from the Repair Escrow Account the costs of routine maintenance." APP085. Fannie Mae, stated differently, was demanding that Westland deposit funds for routine maintenance that could never be reimbursed under the loan agreements.

misses the point entirely. Far from "irrelevant," the condition of the Properties on "the Effective Date" establishes the initial state of the Properties for the purpose of determining when PCAs and additional deposits are required after the time of purchase. Again, to the extent Fannie Mae believed the reserve accounts were deficient at the time Westland purchased the Properties, Fannie Mae was obligated to demand additional deposits before Westland assumed the loan agreements rather than unilaterally demanding millions of dollars based on the flawed f3 report or Grandbridge's faulty underwriting.

Fourth, assuming *arguendo* the PCA was properly conducted and the Demand was related to a condition listed in a schedule, Fannie Mae improperly failed to provide Westland an opportunity to complete identified repairs as required by Section 6.02(b)(3)(B) & (C) before mandating a multi-million dollar deposit. APP050-APP051; *cf.* APP1263-APP1268. Fannie Mae's decision to disregard Westland's contractual right to perform the identified repairs is particularly egregious since Westland provided its Strategic Improvement Plan for the Properties, which discussed Westland's ongoing plans to renovate the Properties, provided timelines for remaining renovations to be made, and addressed deficiencies identified by f3 that had already been corrected. SA0020-SA0342. Additionally, the reserve increase for required repairs was duplicative of the reserve increase for monthly replacement deposits attributable to deferred maintenance. SA0343-SA0348. For all of these

reasons, Westland was clearly entitled to challenge Fannie Mae's unreasonable and baseless Demand.

2. Westland did not Default Because There was no Deterioration to The Properties.

Notwithstanding that the f3 report was irreparably flawed at the time of its creation in September 2019, Fannie Mae fails to account for the fact that the f3 report was stale when Fannie Mae brought this receivership action in August 2020. Westland invested an additional $1.7 million in capital improvements to the Properties and addressed many of the issues raised by the f3 report between the September 2019 PCA and the filing of this lawsuit. SA0359; APP1557. Westland likewise completed a large number of work orders to prepare vacant units for rental as evidenced by the 2,200 pages of completed work orders from September 2019 through June 2020 that Westland submitted for the district court's consideration. *Id*.

Because Westland submitted "substantial evidence" regarding its improvements to the Properties both before and after the f3 PCA, the district court unequivocally found that there was no deterioration of the Properties as would be required to support Fannie Mae's Demand and Default. APP1558. To the contrary, the district court determined that "Westland had shown the opposite [of deterioration to the Properties] at this early stage, even without formal discovery." *Id*. Because Westland conclusively demonstrated the Properties had not deteriorated, the district court correctly found "there can be no default by Westland's not placing additional funds in those two accounts." *Id*.

Had Fannie Mae sought access to inspect the Properties prior to bringing this receivership action or requested information regarding Westland's continued improvements to the Properties, Fannie Mae likely would have realized its receivership application based on the out-of-date f3 report was meritless. But Fannie Mae did not and, true to form, now seeks to blame Westland for its own inaction by representing that "Westland did not allow any independent confirmation of the repairs they claim to have made[.]" *See* OB at 22. Fannie Mae even goes so far as to represent that "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." *Id.* at 21.

It is undisputed that Fannie Mae did not seek to inspect the Properties following the issuance of the f3 report until *after* Westland submitted its opposition and motion for injunctive relief, which placed Fannie Mae on notice that its receivership action was premised on incorrect and outdated information. In other words, Fannie Mae only sought to inspect (and, in fact, conduct another PCA) when the parties' dispute had already proceeded to litigation. Thus, Fannie Mae's contentions that Westland is somehow to blame for Fannie Mae's own ignorance of the Properties' condition when it filed this receivership action are completely baseless.

And, while Fannie Mae references in passing that it was eventually allowed to inspect the Properties, Fannie Mae tellingly neglects to mention the results of the

inspection. Indeed, in April 2021, Fannie Mae produced two new PCA reports for the Properties that were conducted one month earlier. SA0780-SA1055. Those reports indicated that the correct amount of Westland's Replacement and Repair Reserve Accounts is, at most, a mere $436,005. SA0798; SA0937. Put another way, Fannie Mae is pursuing this action to foreclose on the Properties for Westland's refusal to comply with the $2.85 million Demand when Fannie Mae's own PCA reports establish the Demand was inflated by more than $2.4 million. *Id.* Moreover, Fannie Mae's new PCA reports confirm that Westland's current Repair and Replacement Reserve Accounts for the Properties—which contain $1,001,610.30—are more than double the required amount. SA1173-SA1180. Because Fannie Mae's new PCA reports eviscerate its grounds for bringing this receivership action, Westland questions how Fannie Mae can, in good faith, continue to claim the district court's order constituted an abuse of discretion.

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

A preliminary injunction is meant to preserve the status quo and prevent irreparable harm pending a hearing. *Dangberg Holdings Nevada, L.L.C. v. Douglas County*, 115 Nev. 129, 146, 978 P.2d 311, 321 (1999). More specifically, "the sole purpose of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits," *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009), which is the "***last uncontested status [that] preceded the pending controversy***." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th

Cir. 2000) (emphasis added); *cf. Pickett v. Comanche Const., Inc.*, 108 Nev. 422, 430, 836 P.2d 42, 47 (1992) (vacating judgment and reinstating injunction enjoining foreclosure to return to last uncontested status). In this case, the last uncontested status existed prior to issuance of the Default. The district court, through its order, simply endeavored to protect Westland from the negative consequences that "flowed" from the Default while the parties litigate the ongoing trial court proceedings and this appeal.

The district court's order prohibits Fannie Mae from: (1) proceeding with any foreclosure proceeding or foreclosure sale; (2) interfering with Westland's enjoyment of the Properties, and (3) using a receiver to displace Westland. The first and third categories are self-explanatory; the second category prohibits Fannie Mae from impairing the use, marketable title, and benefits of the Properties for business. The relief prevents Fannie Mae from saddling Westland with anything other than standard fair lending practices for a non-default loan during this appeal. Thus, the injunctive relief ordered by the district court is prohibitory because—in the absence of a legitimate default—Westland is entitled to have its payments auto-debited, to receive loan statements, to maintain clean title to its property, to collect rent, and to submit reserve reimbursement requests to obtain its own funds out of escrow.[11]

[11] With respect to the insurance funds for the restoration of the two fire-damaged buildings, the injunction merely prevented Fannie Mae from blocking Westland's reimbursement requests based on the existence of the Default as there is no other reason for the money to be withheld. Fannie Mae has now complied with its

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

While Westland recognizes that an injunction compelling performance of a contract may be considered mandatory in certain circumstances, *see Dodge Bros. v. Gen. Petroleum Corp. of Nevada*, 54 Nev. 245, 10 P.2d 341 (1932), this is not such a case. Unlike *Dodge Bros.*— a brief, 90-year old opinion in which the underlying facts were not detailed—Westland did not seek, and the district court did not order,

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obligations under the injunction and released the funds that were due to Westland over a year ago.

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

The district court's injunction does not compel Fannie Mae to take any extraordinary action but, rather, prohibits it from punishing Westland based on the improvidently-issued Default, an act the district court plainly found lacked merit. Fannie Mae's contention that the district court's order is mandatory rather than prohibitory is incorrect.

D. Fannie Mae's Distorted Reading Of Paragraph 5(o) Does Not Inhibit Fannie's Mae's Business, Require Forced Contracting Or Compel Commercial Conduct With Non-Parties.

Fannie Mae misconstrues the meaning of paragraph 5(o) in an attempt to generate a "sky-is-falling" narrative regarding its purported lending obligations. Specifically, Fannie Mae claims "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." *See* OB at 38. Fannie Mae further asserts that paragraph 5(o) will result in forced contracting by requiring Fannie Mae to "enter unwanted long-term lending relationships" on favorable terms with Westland and its affiliates. *Id.* at 41. Neither contention is accurate.

Section 5(o) of the Order specifically provides that 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, including by placing Westland on "a-check," adding a fee to any loan quoted or adding an interest rate surcharge to such applications, ***based on the purported default that arose from failing to deposit the additional $2.85 million into escrow.***

APP1511 (emphasis added).

By its plain language, paragraph 5(o) simply prevents Fannie Mae from imposing adverse consequences on Westland and its affiliates based on the existence of the disputed defaults. Indeed, this Court agreed with Westland's interpretation of paragraph 5(o) when it denied Fannie Mae's stay request on grounds that paragraph 5(o) "does not extend so far as Fannie Mae asserts and merely places the parties in the same position as if the alleged default had not occurred." *See* Order Denying Motions to Reconsider and Intervene (on file). Nothing in paragraph 5(o) prevents Fannie Mae from utilizing the ACheck system with respect to other loans or loan applications related to Westland. This provision merely prohibits Fannie Mae from flagging Westland and its affiliates with a "do not process" label in the ACheck system based solely on the existence of the defective defaults. Accordingly, like the

other provisions of the district court's order, paragraph 5(o) accomplishes the district court's intended purpose of halting the adverse effects on Westland and its affiliates "flowing" from the notices of default entered by Fannie Mae.

Similarly, paragraph 5(o) does not require Fannie Mae to grant Westland and its affiliates "most-favored nation" status or to contract with Westland-related entities on improved terms under the threat of contempt sanctions. As this Court recognized when it denied Fannie Mae's motion for reconsideration, paragraph 5(o) only "prohibits Fannie Mae" from deviating from its standard lending practices with Westland on grounds the notices of default were entered on the subject properties. *See supra* Section V.G. Put another way, Fannie Mae may refuse to lend to Westland and its affiliates, but it may not refuse to lend if its reason for doing so is the existence of the purported notices of defaults that are the subject of the order.

Fannie Mae's contentions that paragraph 5(o) violates NRCP 65(d) by extending protection to non-party Westland affiliates also misses the mark. The penalties imposed by Fannie Mae as a result of the defective default notices not only impact the two Westland entities that are parties in this matter, but also impose the same negative effects on any other entity with which Westland is affiliated. It would defy common sense for the order to prevent adverse consequences flowing from the notices of default as to the two Westland parties in this case while allowing those same consequences to continue uninhibited with respect to the other entities in the Westland Real Estate Group which are indisputably not in default.

Thus, while NRCP 65(d) limits the parties whose conduct may be enjoined,[12] "[t]here is no general requirement that an injunction affect only the parties in the suit." *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987). To that end, "an injunction is not necessarily made overboard by extending benefit or protection to persons other than the prevailing parties in the lawsuit [ ] *if such breadth is necessary to give the prevailing parties the relief to which they are entitled*." *Id.* at 1170 (emphasis in original); *see also City of Chicago v. Barr*, 961 F.3d 882, 920-21 (7th Cir. 2020) ("a court may impose the equitable relief necessary to render complete relief to the [movant], even if that relief extends incidentally to non-parties.") (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Fannie Mae's contention that the district court exceeded its authority by protecting Westland affiliates from the adverse effects of the purported default notices is contrary to law as the inclusion of Westland's affiliates in paragraph 5(o) was necessary to grant complete relief.[13]

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[12] NRCP 65(d)(2) provides that injunctions may restrict the conduct of parties as well as non-party agents, servants, employees, and any "other persons who are in active concert or participation" with the party. Fannie Mae, however, complains that the order extends protections to non-party affiliates of Westland. As such, the issue of which parties may be enjoined (as opposed to protected) by the Order is not relevant here.

[13] Fannie Mae cites *Richards v. Jefferson Cty., Ala*, 517 U.S. 793 (1996) for the proposition that the district court lacked the power to issue orders concerning non-parties. The *Richards* court, however, addressed the application of res judicata and whether a party without notice of the proceeding could be bound by an adverse judgment. *Id.* Thus, *Richards* is inapposite where, as here, the sole question is whether the court may extend the benefits of injunctive relief to non-party affiliates of Westland.

In short, Fannie Mae's objection to paragraph 5(o) arises from its inexplicable desire to continue punishing Westland and its affiliates based on the spurious default notices. But the district court enjoined Fannie Mae from doing just that, and this Court unequivocally rejected Fannie Mae's overbroad interpretation of paragraph 5(o) that does not comport with the order's plain language or intent.

E. Westland Satisfied The Legal Standard For A Preliminary Injunction.

Again, "the decision whether to grant a preliminary injunction is within the sound discretion of the district court, whose decision will not be disturbed on appeal absent an abuse of that discretion." *Dangberg*, 115 Nev. at 142, 978 P.2d at 319. "A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion." *Stratosphere Gaming Corp. v. Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). "Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion." *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001). Based on the voluminous record below consisting of several affidavits and 3200 pages of exhibits along with the district court's well-reasoned order, Westland respectfully submits that the district court's order should be affirmed in its entirety.

Contrary to Fannie Mae's depiction of the underlying ruling, the district court's order clearly states that Fannie Mae failed to prove a default based on the deterioration of the Properties and, "[i]n fact, Westland has shown the opposite at this early stage, even without any formal discovery." APP1558. The district court

likewise recognized that all of the punitive actions engaged in by Fannie Mae flow from the defective Default, which Westland conclusively rebutted. APP1556-APP1568. For those reasons, the district court held that "Westland has shown a reasonable probability of success on the merits for the relief it seeks via Counterclaim in this case."[14] APP1560.

The district court likewise determined that Westland would suffer irreparable harm to its interests in real property, its personnel and its ongoing business in the absence of an injunction. APP1561. It also found that the prejudice to Westland was "much greater" than the prejudice, if any, to Fannie Mae if no injunction issued. *Id.* Because Westland easily met its "burden of proof [ ] through competent evidence," *id.,* Fannie's Mae's suggestion that the district court failed to analyze the appropriate legal standard for injunctive relief is simply wrong.

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

The district court ordered that the "Enjoined Parties may not interfere with Westland's enjoyment of the Properties pending a final determination" on the merits.

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[14] This, of course, directly contradicts Fannie Mae's contention that the district court "did ***not*** make any findings as to Westland's probability of success with respect to *their* Counterclaim." *See* OB at 48 (emphasis in original). Similarly, Fannie Mae repeatedly distorts the district court's observation that "questions of fact" exist as to the Default. In reality, the district court plainly found that "Fannie Mae failed to establish that any default has occurred, and when viewing the evidence and arguments Fannie Mae presents in the best light for it, at best for Fannie Mae there are substantial factual disputes related to whether any default occurred." APP1560. Thus, Fannie Mae's suggestion that this was a close call is revisionist history.

While Fannie Mae argues that "no allegations or evidence show that Fannie Mae has interfered or threatens to interfere with Westland's enjoyment of the Properties," *see* OB at 49, Westland conclusively demonstrated that the loss of real property, harm to the associated property rights, and curtailment of the business activities on the Properties constitutes irreparable harm. APP1313-APP1317. Not only did Fannie Mae cloud Westland's title to the Properties and impede marketability, but Fannie Mae also took affirmative steps to inhibit Westland's ability to collect rents and operate its business. *Id*.

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

G. The Anti-Injunction Clause In HERA Does Not Divest The District Court Of Jurisdiction To Enjoin Fannie Mae's Wrongful Conduct.

Fannie Mae devotes a section of its brief to rehashing the arguments made by FHFA in its amicus brief concerning the Anti-Injunction Clause, 12 U.S.C. § 4617(f). Fannie Mae's presentation on this issue adds nothing of substance to the arguments offered in FHFA's amicus brief, and Westland has concurrently filed a separate response to that brief. Moreover, Fannie Mae forfeited any argument concerning the Anti-Injunction Clause because it failed to timely present this issue to the district court. *See Einhorn v. BAC Home Loan Servicing, LP*, 128 Nev. 689, 693, 290 P.3d 249, 252 n. 3 (2012) ("A party may not raise new issues, factual or legal, that were not presented to the district court … that neither [the opposing party] nor district court had the opportunity to address.").

Regardless, for the reasons explained at length in Westland's response to FHFA's amicus brief,[15] Fannie Mae's reliance on Section 4617(f) is utterly without merit. This federal statute does not bar equitable relief in breach of contract cases except when FHFA formally repudiates a contract, it only applies when FHFA takes actions that are *necessary* to supporting its conservatorship mission to restore Fannie Mae to soundness and solvency, and it can only be invoked when FHFA adopts a policy or takes some affirmative action that is implicated by the challenged injunction. None of those conditions for application of the Anti-Injunction Clause

[15] In the interest of judicial efficiency, Westland will not restate those arguments here and instead incorporates its response to FHFA's amicus brief by reference.

are satisfied here, and FHFA's arguments to the contrary are no more persuasive when repeated by Fannie Mae.

H. The District Court Properly Denied Fannie Mae's Application For A Receiver Based On The Absence Of A Default.

Fannie Mae contends the district court erred by declining to appoint a receiver "on the basis that it found a question of fact regarding default and did not address the issue further." *See* OB at 50. This is a blatant misstatement of the district court's ruling. As discussed above, the district court did not just find a "question of fact" and instead determined that Westland "submitted substantial evidence that no deterioration of the [Properties] has occurred." APP1558. As a result, the district court held that Westland did not default by refusing to comply with Fannie's multi-million dollar Demand. *Id.* These findings are dispositive of Fannie Mae's receivership application.

For example, Fannie Mae asserts the district court was obligated to appoint a receiver under the Uniform Commercial Real Estate Receivership Act ("UCRERA") as codified in NRS 32.260(2)(a)-(b). But NRS 32.260(2)(a) only provides for the appointment of a receiver if it is "necessary to protect the property from waste, loss, transfer, dissipation or impairment," and the district court expressly found that there was no deterioration to the Properties. APP1558. Similarly, NRS 32.260(2)(b) allows a receivership if Westland "agreed in a signed record to appointment of a receiver on default," and the district court found that there was no default here. *Id*. Accordingly, the district court did not abuse its discretion by denying Fannie Mae's

receivership application when Fannie Mae failed to satisfy its burden of demonstrating deterioration to the Properties or a default based thereon.

The same analysis undercuts Fannie Mae's reliance on the Uniform Assignment of Rents Act ("UARA") as codified in NRS 107A.260(1)(a)(1) and (1)(a)(3). Indeed, each of the statutory provisions cited by Fannie Mae to support the appointment of a receiver depend on the existence of a default. Again, the district court determined that no such default occurred because there had been no deterioration to the Properties to justify Fannie Mae's egregious Demand. As such, the district court did not err by refusing to appoint a receiver under Nevada's version of UARA.

Finally, Fannie Mae cites, but does not seriously analyze, NRS 107.100 which states a receiver shall be appointed "where it appears [ ] that real property subject to the deed of trust is in danger of substantial waste or that the income therefrom is in danger of being lost[.]" Here, again, the district court's finding that Westland's submission of substantial evidence that the Properties were not in danger of substantial waste or deterioration negates any claim for a receiver under NRS 107.100. The district court's rejection of Fannie Mae's unsupported receivership application should be affirmed.

I. Grandbridge Is Properly Bound By The Preliminary Injunction Even Though It Did Not Appear In The Case Until After The District Court's Ruling.

Westland does not dispute that Grandbridge did not appear in the case—although it was required to do so by October 6, 2021—or have notice of the motion for preliminary injunction before the district court entered the injunction at the October 13, 2021 hearing. Grandbridge is nonetheless appropriately bound by the injunction because it is Fannie Mae's agent with respect to the Loans and participated in the underlying misconduct in concert with Fannie Mae. Indeed, Grandbridge's representations that "Fannie Mae and Grandbridge are each separate and independent parties," "are not 'interrelated' in any way," and "Grandbridge is not the agent of Fannie Mae" defy reality. *See* (Grandbridge) OB at 23.

Notwithstanding Grandbridge's weak attempts to distinguish the decision, this Court addressed this exact issue in *Hospitality International Group v. Gratitude Group, LLC*, 132 Nev. 980, 387 P.3d 208, 2016 WL 7105065 (Dec. 2, 2016) (unpub. disp.). Like Grandbridge, the enjoined parties in *Hospitality* objected that certain named defendants were not served until after the district court conducted a hearing and granted the preliminary injunction. This Court declined to invalidate the preliminary injunction against the later-served defendants because they were covered by NRCP 65(d), which is "the significant exception" to NRCP 65(a)(1) and provides that "[e]very order granting an injunction [ ] is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those

persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." *Hospitality*, 2016 WL 7105065, at *3. More specifically, the Court held that "[g]iven the interrelationship between the originally served and later-served defendants, and the apparent actual notice to the latter of the proceedings before and after entry of the January 5, 2016 order, the order is not invalidated by the delay in service on some of the named defendants whose activities the order may encompass." *Id.*[16]

So, too, here. At the outset, Grandbridge's statement that it is not an agent of Fannie Mae is simply not true. It is undisputed that Grandbridge is Fannie Mae's loan servicer with respect to Westland's Loans, *see* (Grandbridge) OB at 9 ¶ 25, and numerous courts (including this Court) have held that loan servicers like Grandbridge are the agents of the Enterprises, Fannie Mae and Freddie Mac. *See, e.g.*, *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 249-52, 396 P.3d 754, 756-58 (2017) (finding that loan servicer is a contractually authorized agent of Freddie Mac with standing to assert the Federal Foreclosure Bar); *Berezovsky v. Moniz*, 869 F.3d

[16] Grandbridge made its appearance in the case on October 19, 2020, which is more than a month before the district court entered the written preliminary injunction order. *See* (Grandbridge) OB at 12 ¶¶ 38-39. Thus, while Grandbridge may not have been present at the October 13, 2020 preliminary injunction hearing, there is no dispute it had actual notice of the preliminary injunction long before the written order was entered. Because Grandbridge had the opportunity to seek clarification or modification of the order, but never did, it should not be heard to complain about the order's scope at this late date. *See Hospitality*, 2016 WL 7105065, at *3 ("[A]n interested individual who is confused as to the applicability of an injunction to him or whether the scope of an order applies to certain conduct may request the granting court to construe or modify the decree.").

923, 933 (9th Cir. 2017) ("BANA is Freddie Mac's agent with respect to the Monizes' loan."); *Ditech Fin., LLC v. SFR Invs. Pool 1, LLV*, 793 Fed. Appx. 490, 492 (9th Cir. 2019) ("Ditech, as the loan servicer, acts as Fannie Mae's agent[.]").

Thus, Grandbridge would be properly enjoined pursuant to NRCP 65(d) even if it had not participated in the wrongful conduct in concert with Fannie Mae—but it did. Westland demonstrated through the submission of substantial evidence that Grandbridge, in concert with Fannie Mae, actively participated in the foreclosure proceedings and bad faith loan servicing against Westland that resulted in the preliminary injunction. *See supra* Section V.C-V.E. In that regard, Grandbridge's unsupported suggestion that the district court did not conduct a "fact-sensitive inquiry" regarding Granbridge's role is flatly contradicted by the voluminous evidentiary record supporting the injunction. Because the district court correctly determined that Grandbridge—Fannie Mae's loan servicer and agent—actively participated in the wrongful conduct in concert with Fannie Mae, Grandbridge is properly bound by the injunction pursuant to NRCP 65(d).

Grandbridge's half-hearted efforts to negate NRCP 65(d) and this Court's ruling in *Hospitality* are also unpersuasive. For example, Grandbridge contends that its due process rights have been violated despite the facts that Grandbridge, as a named party, had the opportunity to seek relief from the district court prior to this appeal and is currently receiving due process in this Court. Regardless, Grandbridge's status as an agent and active participant subject to NRCP 65(d)

obviates any due process concerns. *See Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000) ("The existence of such linkage [under Rule 65(d)] makes it fair to bind the nonparty, even if she has not had the separate opportunity to contest the original injunction, because her close alliance with the enjoined defendant adequately ensures that her interests were sufficiently represented.").

Grandbridge also appears to argue that NRCP 65(d) only extends to non-parties and not named defendants. But the Rule itself makes no such distinction, and this Court in *Hospitality* expressly held that later-served named defendants were properly bound by a preliminary injunction under NRCP 65(d). *Hospitality*, 2016 WL 7105065, at *3. The only legal authority Grandbridge cites for this faulty proposition is a cursory Ninth Circuit decision that does not come close to stating named parties cannot be enjoined under Rule 65(d). *See* OB 23 (citing *CFPB v. Howard Law, P.C.*, 671 Fed. Appx. 954, 955 (9th Cir. 2016) with no supporting analysis). Despite its absence at the October 13, 2020 hearing, Grandbridge is properly bound by the preliminary injunction.

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VIII. CONCLUSION

Based on the foregoing, Westland respectfully submits the district court's preliminary injunction should be affirmed.

DATED this 30th day of August, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answering 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it contains 11,148 words.

DATED this 30th day of August, 2021

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 30th day of August 2021, I caused true and correct copies of the foregoing Respondents' Answering Brief to be delivered to the following counsel and parties:

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