IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellant,

vs.

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

Respondents.

Supreme Court Case No. 82174

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

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

MOTION TO ENLARGE THE LENGTH OF FEDERAL NATIONAL MORTGAGE ASSOCIATION'S REPLY BRIEF

Kelly H. Dove (Nevada Bar No. 10569)
Nathan G. Kanute, Esq. (Nevada Bar No. 12413)
Bob L. Olson, Esq. (Nevada Bar No. 3783)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252

Attorneys for Appellant Federal National Mortgage Association

Declaration of Counsel in Support of Motion

1. Federal National Mortgage Association ("Fannie Mae") filed its Opening Brief on June 22, 2021, which contained 10,506 words and was under the limit prescribed by NRAP 32(a)(7)(A)(ii).

2. On June 29, 2021, the Federal Housing Finance Agency filed its Amicus Brief.

3. On August 30, 2021, Westland Liberty Village and Westland Village Square ("Westland") filed its Answering Brief.

4. Also on August 30, 2021, Westland filed an "Answering Brief to the Amicus Brief."

5. On August 31, 2021, this Court issued a Notice of Rejection, rejecting the Answering Brief to the Amicus Brief because it was not accompanied by a motion for permission for leave. The Notice directed Westland to re-file the document with a motion for permission within 5 days.

6. On August 31, 2021, Westland re-filed the Answering Brief to the Amicus Brief without a motion for permission.

7. Though the additional Answering Brief was not accompanied by a motion for permission, the Court apparently accepted the Brief, as it was filed on August 31, 2021, and has not been rejected.

8. The collective length of Westland's two Answering Briefs exceeds the length permitted under NRAP 32(a)(7)(D) for an Answering Brief.

9. Accordingly, Fannie Mae's Reply Brief must respond to the arguments raised in the two Answering Briefs.

10. Fannie Mae's counsel has worked diligently to make the Reply Brief as concise as possible.

11. As discussed in the Briefs and motion practice in this case, a great deal is at stake in this case. For example, Westland is seeking more than $125 million in damages against Fannie Mae. The injunction in place materially inhibits Fannie Mae's ability to fulfill its mission by selecting the borrowers with whom it does business, in a division where the loans at issue are, as here, often involve tens of millions of dollars.

12. Fannie Mae respectfully requests a total of 13,000 words to adequately address the arguments in Westland's two Answering Briefs.

13. In accordance with NRAP 32(a)(7)(D), a copy of the Reply Brief is attached as Exhibit 1.

DATED: October 20, 2021

s/ Kelly H. Dove
Counsel for Federal National Mortgage Association

Introduction

Appellant Federal National Mortgage Association ("Fannie Mae") respectfully requests leave to enlarge the length limitation of its concurrently-filed Reply Brief to allow adequate ability to respond to Westland's separate Answering Brief filed in response to the Amicus Brief. Undersigned counsel recognizes that enlargement of page limits is generally disfavored and thus rarely seeks such relief. However, the circumstances support the requested relief because the Reply Brief must address two Answering Briefs filed by the same party concerning important questions of law affecting a controversy involving $125 million in claimed damages, as well as tens of millions of dollars in potential future loans.

Argument

Nevada Rule of Appellate Procedure 32(a)(7)(D) provides that the maximum length of a Reply Brief is 7,000 words, or in other words, half of the permitted length of an Opening or Answering Brief. Fannie Mae respectfully requests that it be permitted a Reply Brief of 13,000 words to respond to Westland's two Answering Briefs.

First, as discussed above, it is necessary for Fannie Mae to respond to two Answering Briefs, which necessitates additional length.

Second, a great deal is at stake in the underlying dispute and appeal. The underlying dispute involves multi-family property loans totaling more than $40

million and an injunction that requires Fannie Mae to perform a host of affirmative activity, including likely extending additional credit to Westland without the "pause" afforded by the A-Check system, all in derogation of its federally mandated mission.

Undersigned counsel has made substantial effort to make the Brief as concise as possible, and moves for additional length only upon concluding that Fannie Mae could not adequately present the issues without the requested additional length.

Conclusion

In light of the Reply Brief's responding to two Answering Briefs, the import of the underlying appeal, and the litany of injunctive relief imposed against Fannie Mae, Fannie Mae respectfully requests that the Court permit its concurrently-filed Reply Brief to be up to 13,000 words in length.

DATED: October 20, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove
Kelly H. Dove
Nevada Bar No. 10569
Nathan G. Kanute, Esq.
Nevada Bar No. 12413
Bob L. Olson, Esq.
Nevada Bar No. 3783
Nevada Bar No. 14049
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorneys for Appellant Federal National Mortgage Association

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On October 20, 2021, I caused to be served a true and correct copy of the foregoing **MOTION TO ENLARGE THE LENGTH OF FEDERAL NATIONAL MORTGAGE ASSOCIATION'S REPLY 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/ Maricris Williams
An Employee of SNELL & WILMER L.L.P.

4863-2530-0736

EXHIBIT 1

EXHIBIT 1

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 REPLY BRIEF

Kelly H. Dove (Nevada Bar No. 10569)
Nathan G. Kanute, Esq. (Nevada Bar No. 12413)
Bob L. Olson, Esq. (Nevada Bar No. 3783)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
nkanute@swlaw.com
bolson@swlaw.com
kdove@swlaw.com

Attorneys for Appellant Federal National Mortgage Association

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

Table of Contents

Page

Table of Contents
(continued)

Page

Table of Contents
(continued)

Page

Table of Authorities

Page

Federal Cases

Table of Authorities
(continued)

Page

Table of Authorities
(continued)

Page

State Cases

Table of Authorities
(continued)

Page

Federal Statutes

State Statutes

Rules

Introduction

The primary mission of Fannie Mae,[2] a Government Sponsored Enterprise, is "to facilitate equitable and sustainable access to homeownership and quality affordable rental housing across America."[3] Among other things, Fannie Mae expands access to "multifamily housing for millions of people across the U.S." and ensures "affordable and workforce rental housing is available in all markets . . . ."[4] Fannie Mae is also focused on helping to provide "safe, quality rental housing."[5]

Fannie Mae is unlike a private lender – the favorable financing terms its borrower business partners seek come with obligations that make them uniquely accountable for ensuring that the multifamily properties they operate are maintained in a condition consistent with Fannie Mae's mission. As such, among other obligations, Fannie Mae

---

[2] Terms and parties herein use the same definitions as set forth in the Opening Brief.

[3] https://www.fanniemae.com/about-us/who-we-are.

[4] https://www.fanniemae.com/about-us/what-we-do. "More than 90 percent of the apartments [Fannie Mae] finance[s] are 'workforce housing', and are affordable to families earning at or below 120 percent of the area median income (AMI) – the teachers, first responders, and service workers who are an essential part of their communities." https://multifamily.fanniemae.com/.

[5] https://multifamily.fanniemae.com/.

requires borrowers to give it and its servicers the authority to monitor loan performance and property condition closely.[6]

Though Westland is comprised of sophisticated entities specializing in multifamily properties, whose principals and affiliates financed the purchase of multifamily housing through Fannie Mae many times before the loans at issue here, it nevertheless purports to express surprise and frustration in its Answering Brief concerning Fannie Mae's broad contractual authority to ensure that the properties it finances provide "safe, quality rental housing." Its Brief presents a caricature of, in its words, an "overzealous lender" who wishes to "punish a community-minded investor in the Las Vegas valley," coupled with an over-heated recitation of ultimately irrelevant details. Unsurprisingly, such hyperbole is not supported by the record and, importantly, attempts to erase Fannie Mae's rights under the Loan Documents to ensure that the Properties – securing nearly $40,000,000 in loans – are maintained consistent with its mission and not at risk of deterioration and default or putting its residents at risk.

---

[6] *See id.*

The district court's order, declining to find Westland in default despite these clear contractual provisions and enjoining not only Fannie Mae but others from exercising rights clearly permitted by the Loan Documents, is incorrect and unsupported by the record. The order must be reversed because it is, among other things, without basis under the undisputed terms of the parties' agreements or the applicable federal and state law.

First, the district court did not enforce the contractual language binding Westland based on the undisputed facts. Instead, the Court improperly considered whether Westland had unilaterally made certain repairs *after the default*, which was irrelevant to the specific contractual obligation at issue, and thus to Westland's default – and untested by discovery even if it were not. Westland's Answering Brief, in again recounting its belated repairs, seeks to lead this Court into the same error that resulted in the runaway injunction.

Second, the injunction violates 12 U.S.C. § 4617(f), which prohibits courts from enjoining FHFA's powers and functions as Fannie Mae's Conservator. This bar deprived the district court of any power to order the injunctive relief in the preliminary injunction seeking to restrain

FHFA in its exercise of those powers here, including FHFA's power to operate Fannie Mae. Contrary to Westland's arguments, there are no relevant exceptions to the application of Section 4617(f) here. Moreover, Section 4617(f) is jurisdictional and can be raised at any time, and dissolving the injunction would not irreparably harm Westland.

Third, the sweeping injunctive relief in Westland's favor should be vacated on multiple alternative grounds. The injunction improperly imposes a multitude of affirmative obligations and extraordinary prohibitions on the Enjoined Parties.[7] Westland labors to describe these obligations and prohibitions as merely preserving the status quo. However, interim relief in ongoing litigation that involves not merely staying but rescinding notices of default, withdrawing notices of demand, disbursing more than $1.4 million to defendants, and affording defendants and their affiliates preferential lending status with respect to unrelated and as yet unissued, future loans, bears no resemblance to

[7] "Enjoined Parties", under the Order, includes "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." By definition, the "control" portion of the Order includes FHFA.

preserving the status quo. Each of these provisions requires affirmative action by Fannie Mae and cannot easily be undone, if at all – even if Fannie Mae ultimately prevails. Accordingly, a heightened showing of Westland's entitlement to this extraordinary affirmative relief was required, but not shown, here.

In fact, the injunctive relief the district court ordered is so extreme that the circumstances here could not support it, even if the district court had attempted to apply the correct standard. The district court effectively gave Westland everything it sought in its counterclaims and more, while it was supposed to, if warranted, freeze the parties' positions as they were at the time – not alter those positions by reversing the status quo and awarding the disbursement to one party of millions of dollars from the other. As the district court did not apply the heightened standard in issuing its extraordinary preliminary injunction, and the injunctive relief ordered is an abuse of discretion regardless, the Court should vacate the injunction.

Finally, in denying appointment of a receiver, the district court again discarded multiple provisions of the parties' contract, which terms established that Westland was in default, and Fannie Mae – consistent

with its mission to foster quality, sustainable, and affordable rental housing – was entitled to the appointment of a receiver over the Properties as a result. The district court erred in refusing to apply and enforce the terms of the Loan Documents, instead elevating Westland's post hoc claims of following an extra-contractual repair process of its own design to excuse default and negate entitlement to property management by a neutral and competent receiver.

This Court should reverse.

Argument

I. Westland Ignores the Loan Documents' Terms, Asserting That It Could Make the Necessary Repairs That the Properties Undisputedly Needed without *First* Depositing the Contractually Mandated Reserve and Escrow Amounts.

Westland argues that Fannie Mae seeks to "oversimplify this dispute," Ans. Br. 21, but, in reality, it is Westland that overcomplicates matters to distract from what is in fact a clear (and thus simple) breach of the Loan Documents. Although Westland argues at length about the repairs it claims to have made to the Properties before and after the September 2019 PCA, these arguments do not address – let alone refute – the following undisputed, dispositive facts:

- The Loan Documents permit Fannie Mae to demand that Westland make additional deposits to the reserve and escrow accounts "*if [Fannie Mae] determines* that the amounts on deposit … are not sufficient to cover the costs for Required Repairs or Required Replacements …." APP085 (Section 13.02(a)(4) (emphasis added)).
- Based on the September 2019 PCA, Fannie Mae determined that that additional deposits to the reserve and escrow accounts were needed to fund approximately $2.8 million in identified repairs to the Properties. APP1256–68.
- Instead of funding the contractually mandated reserves, Westland issued a November 2020 "Strategic Improvement Plan," which likewise identified extensive repairs that the Properties required, including over $1.2 million – *by Westland's own estimate* – needed to make hundreds of vacant units "rent ready." APP1415.
- Even though the amounts that Westland estimated far exceeded the approximately $350,000 in combined reserves on deposit,

APP1448, Westland acknowledges that it never added any funds to the reserve and escrow amounts. Ans. Br. 8, 21.

Ultimately, because a failure "to pay or deposit when due any amount required by the" Loan Documents is "an automatic Event of Default," APP092, Westland was in breach, and thus defaulted.

Westland seeks to avoid this inevitable conclusion with three main arguments. First, it repeatedly claims that Fannie Mae could not "unilaterally" increase the repair reserve and escrow amount. Ans. Br. 17, 22. Second, Westland asserts that there is a factual dispute regarding whether there was a default. Finally, Westland raises a catalogue of irrelevant issues that neither negate nor cure its breach of contract.

Each is without merit, as set forth in detail below.

A. Under the Loan Documents, Fannie Mae Has Sole Discretion in Determining When Additional Reserve Amounts Are Required.

Conspicuously missing from Westland's assertion that Fannie Mae could not "unilaterally" increase the amount of required reserve funding is any meaningful discussion of the relevant contract provisions. But as the Opening Brief addresses, the Loan Documents require Westland to maintain and repair the Properties, while entitling Fannie Mae to

confirm that maintenance through inspections and PCAs and, when necessary, demand, *at its discretion,* that Westland make additional deposits to fund needed repairs. *E.g.*, Op. Br. 17–19.

Specifically, under Section 6.02(b) of the Multifamily Loan and Security Agreement, Westland is required to keep the Properties "in good repair and marketable condition;" "restore or repair promptly, in a good and workmanlike manner, any damaged part of the" Properties; and, with respect to any needed repairs identified by a PCA conducted "pursuant to Section 6.03(c), promptly" commence the repairs "in accordance with [Fannie Mae's] timelines …." AP050–51 (Section 6.02(b)(2), (3)(b)).

Section 6.03(c) permits Fannie Mae to "obtain, at [Westland's expense], a property condition assessment of the" Properties if, "in connection with any inspection of the [Properties], [Fannie Mae] determines that the condition of the [Properties have] deteriorated (ordinary wear and tear excepted) …." APP054. Section 6.03(d) thus permits Fannie Mae or its agents or designees to inspect the Properties, "including in connection with any Replacement or Repair …." APP052.

To ensure there will always be sufficient funding for needed repairs and prevent deterioration of the multifamily rental properties, Section 13.01 requires the borrowers to initially fund a "Replacement Reserve Account" and "Repairs Escrow Account" and make monthly deposits into the Replacement Reserve Account. APP082 (Section 13.01(a), (b)). When Westland makes a needed repair, it must *first* "pay all invoices for the Replacement and Repair", even if the funds in reserve are not sufficient, "*prior* to any request for disbursement" from the applicable reserve. *Id.* (Section 13.01(c) (emphasis added)).

Moreover, it is foreseeable that, for various reasons, reserve and escrow accounts may not contain sufficient funds to cover all potential repairs. Section 13.02(a)(4) thus permits Fannie Mae to demand that Westland deposit additional funds into the reserve and escrow accounts and to also increase its monthly, recurring deposit:

> 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 . . . .

APP085 (emphasis added). This provision is underscored by Section 13.02(a)(9)(B), which states that *"[n]othing in this Loan Agreement shall limit Lender's right to require an additional deposit* to the Replacement Reserve Account or an increase to the Monthly Replacement Reserve Deposit for any such Additional Lender Replacements or an additional deposit to the Repairs Escrow Account for any such Additional Lender Repair." APP089–90 (emphasis added).

The Loan Documents' unequivocal language establishes that Fannie Mae has sole discretion in determining whether Westland needs to increase the amounts on deposit in the reserve and escrow accounts to fund additional needed repairs. And, as with standard maintenance, when Fannie Mae determines that "Additional Lender Replacements" or "Additional Lender Repairs" are required, Westland must pay for those repairs out of pocket and then seek reimbursement from Fannie Mae through "disbursements" from the reserve and escrow accounts. APP089 (Section 13.02(a)(9)(B)). These contract terms are essential to Fannie Mae's mission to finance "safe, quality rental housing."

Critically, Westland failed to comply with this contractually mandated process. Following Fannie Mae's July 2019 inspection of the

Properties and the subsequent September 2019 PCA by f3, Fannie Mae determined that the Properties needed substantial repairs that would cost an estimated $2.8 million. The accounts, however, held only $106,217 and $246,047 for Village Square and Liberty Village. APP1448. Fannie Mae thus invoked its authority under Section 13.02 and demanded that, within 30 days, Westland deposit a total of nearly $2.8 million in the accounts for both Properties and to increase its monthly deposit in the reserve account. APP1448; APP1257.

Westland never complied with that demand and never funded the reserves. Ans. Br. 8, 21. It instead contends that the f3 PCA "artificially inflated the extent of necessary repairs …." Ans. Br. 8. Westland, however, has not – and indeed cannot – point to any provision of the Loan Documents that permits it to challenge or reject Fannie Mae's assessment of how much additional funding is needed to fund the reserve and escrow accounts. Accordingly, the proper course of conduct for Westland was to fund the reserves as required, conduct the needed repairs, obtain reimbursements from Fannie Mae, and, if the accounts remained over-funded once the repairs were completed, seek further

disbursement from Fannie Mae. But under its contractual obligations, Westland could not simply ignore the reserve-funding demands.

Westland similarly attempts to gloss over its breach by arguing that, even after the f3 PCA, it continued to invest millions of dollars in the Properties and eventually made most of the required repairs. Even if true, Westland's assertion wholly misses the point of Fannie Mae's contract claim. Nothing in the Loan Documents permits Westland to unilaterally make identified repairs. Rather, as established above, Westland must operate on Fannie Mae's timelines and, if demanded by Fannie Mae, add funds to the reserve and escrow accounts. This latter requirement, which is the crux of this dispute, is undeniably a material term of the Loan Documents, which declare that "any failure by [Westland] to *pay or deposit* when due *any amount* required by" the Loan Documents "shall constitute an *automatic* Event of Default …." APP092 (Section 14.01(a)(1)) (emphasis added).

Because Westland failed to make the contractually mandated deposits into the reserve and escrow accounts within 30 days of Fannie Mae's demand, Westland is in automatic default under the Loan Documents.

B. There Is No Factual Dispute That Additional Reserve Amounts Were Needed, as Westland's Own Strategic Improvement Plan Noted Significant Necessary Repairs.

The application of the terms above should have been the full extent of the district court's analysis, but Westland flooded the court with thousands of pages of work orders as evidence of the repairs it had allegedly completed on the Properties. Ans. Br. 10 at n.4.; APP1557. This tactic unfortunately led the district court to error, wherein it admittedly attempted to match the needed repairs identified in the f3 PCA with the repairs that Westland *later* made to the Properties. APP1477–78 ("My law clerk and I spent many, many hours going through matching up and trying to figure out what they wanted done from their report to what was done."). This flawed approach led the district court to erroneously conclude that there was a "question of fact" regarding whether Westland was in breach of the Loan Documents. *E.g.*, APP1467, 1503; APP1560.

But that conclusion misses the forest for the trees for at least two reasons. First, even the district court's order acknowledges that the work orders that Westland submitted exclusively reflect repairs purportedly performed *post*-default, "from September 2019 through June 2020 …." APP1557. And Westland similarly asserts that it "invested an additional

$1.7 million in capital improvements during the ten months since the September 2019 PCA ...." Ans. Br. 9–10. Accordingly, none of the evidence that Westland submitted or that the district court considered undermines the f3 PCA's conclusion that the Properties needed $2.8 million in repairs – rather, the evidence reinforces that fact. The assertion that Westland *belatedly* made certain repairs to the Properties also does not undermine the fact that the September 2019 PCA accurately documented the Property deterioration *seen in the July 2019 inspection*.

Second, for the reasons addressed above, it also is irrelevant whether Westland eventually made some or all the repairs identified in the f3 PCA. *Funding the reserve and escrow accounts within 30 days of Fannie Mae's notice of demand is a material term of the Loan Documents and a pre-condition to even initiating the repairs.* APP085, 89 (Section 13.02(a)(4), (9)(B)); APP092 (Section 14.01(a)(1)). By only analyzing the state of the Properties *a year after* Fannie Mae issued its Notice of Demand requiring increased reserve and escrow funding, the district court erased these material terms from the parties' contract and thus erred as a matter of law. *See Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64,

64 P.3d 472, 473 (2003) ("Interpretation of a contract is a question of law that we review de novo.").

This conclusion is also underscored by the fact that Westland's own documents demonstrate its acknowledgment that millions of dollars of repairs were needed. Specifically, of the $2.8 million in repair estimates under the f3 PCA, over $1.9 million consisted of the estimated costs for getting the combined 577 *vacant* units across both Properties in "rent ready" condition, including addressing critical issues such as plumbing, roof leaks, fire damage, damaged drywall, and missing appliances and smoke detectors. APP503, 814. Westland's "Strategic Improvement Plan" issued two months after the f3 PCA could not and did not deny the need for these critical repairs. APP1414. In fact, *Westland's own plan* estimated that it would cost $1,218,125.12 to repair those same vacant units. APP1415. And this figure does not capture the full cost of making the repairs identified under the f3 PCA, which also identified damage and issues to the Properties' common areas. Indeed, Westland asserts it spent over $1.7 million on the Properties *since* the PCA. Ans. Br. 9–10.

At bottom, Westland's Strategic Improvement Plan and its own work orders demonstrate that it was fully aware that the cost of the

needed repairs, even under its own estimates, far exceeded the approximately $350,000 in combined funds in the reserve and escrow accounts. Accordingly, even if Westland had a right under the Loan Documents to challenge the *amount* of the additional funds needed to be deposited in the accounts – which it does not – it unquestionably had to deposit *at least* the $1.2 million in repair costs that Westland itself estimated (minus the $350,000 already in reserve). Yet, Westland admittedly did not deposit *any* additional funds into those accounts.

These undisputed facts, consisting of Westland's own evidence, conclusively establish that Westland failed to satisfy a material term of the Loan Documents and is in automatic default of those contracts.

C. Westland Raises Several Irrelevant Considerations Meant to Distract from Its Undisputed Failure to Fund the Reserves and Resultant Breach of the Loan Documents.

Westland also summarily raises several issues that are either irrelevant to its breach of the Loan Documents or misconstrue those contracts. Each is without merit.

Westland first argues that under Section 13.02(a)(3) of the Loan Documents, amounts deposited in the reserve and escrow accounts can *only* be increased when a loan is renewed or transferred. Ans. Br. 22.

Nothing in Section 13.02(a)(3) purports to establish the *sole* instance in which Fannie Mae may demand that additional funds be deposited. APP084–85. And, as addressed above, other provisions clearly establish that Fannie Mae may demand additional deposits when it determines that additional repairs must be made. APP085 (Section 13.02(a)(4)).

Westland also argues that the terms "Additional Lender Repair" and "Additional Lender Replacements" refer only to specific types of repairs under the Loan Documents and that some of the repairs identified in the f3 PCA exceeded the scope of those types of repairs. Ans. Br. 22–23. But "Additional Lender Repairs" is open-ended, referring to "repairs of the type listed on the Required Repair Schedule" and "that are advisable by [Fannie Mae] to keep the Mortgaged Property in good order and repair …." APP108. And, again, Westland did not have the right to challenge what repairs are necessary. This issue is also irrelevant because, as addressed above, Westland failed to deposit any additional funds. So, even if the $2.8 million estimate was too high, Westland is still in breach. Moreover, Westland failed to raise this argument below and has failed to even develop it on appeal by, for instance, specifying which identified repairs purportedly fell outside the contracts' scope.

This issue is therefore waived. *See Dolores v. Emp. Sec. Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018) ("Issues not argued below are deemed to have been waived and will not be considered on appeal." (citation omitted)); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is [a party's] responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Next, Westland asserts that the September 2019, f3 PCA was unwarranted under the Loan Documents because a PCA may be initiated only due to the Properties' deterioration. Ans. Br. 23. Westland contends that Fannie Mae did not satisfy this criterion because Fannie Mae was concerned at the time about the plummeting occupancy rates. This argument misses the mark. First and foremost, Westland is well aware that the July 2019 inspection and subsequent September PCA were also prompted by Westland's failure to abate the extensive fire damage to one of the Properties for nearly a year after Westland had assumed the loans and purchased the Properties. *See, e.g.*, APP352 (setting a May 2018 completion date for this abatement that Westland failed to meet). So, by definition, there was ongoing physical deterioration. But even setting that fact aside, Fannie Mae made clear that the occupancy levels, which

fell from about 80% to a staggering 45%, raised concerns that "the Properties were deteriorating into unleasable condition." APP1447. And, even if Westland could show that that the PCA was somehow unwarranted, which it has not, it has not explained how that conclusion would excuse its breach.

Westland further contends the f3 PCA was flawed because it did not account for any repairs and deterioration that existed at the time that Westland assumed the loans in 2018. Ans. Br. 24. This assertion is part of its argument that the reserve and escrow amounts may have been too low when Westland bought the Properties. But even if true, Westland has failed to establish the relevance of that point. The conclusion that the Properties needed more extensive repairs upon purchase than Westland first anticipated speaks only to Westland's due diligence; Westland has not identified a single provision of the Loan Documents or principle of contract law that would excuse its breach based on these allegations – because none exists. Regardless of when the deterioration began, Westland became responsible for the Properties' maintenance the moment it assumed the loans.

Finally, Westland argues that "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." Ans. Br. 25. It similarly contends that "Fannie Mae fails to account for the fact that the f3 report was stale when Fannie Mae brought this receivership action in August 2020." Ans. Br. 26. In support, Westland points to an April 2021 PCA – conducted over a year and a half after the f3 PCA – showing that the Properties require approximately $400,000 in repairs.

But these assertions misconstrue the Loan Documents' terms and the nature of Fannie Mae's contract claim. As addressed extensively above, the repair and escrow accounts serve as security to ensure that repairs will be completed. The Loan Documents thus expressly require Westland, upon Fannie Mae's demand, to increase the deposits in the reserve and escrow accounts, pay for the repairs out of pocket, and then seek reimbursement from Fannie Mae through disbursements from those accounts. APP082 (Section 13.01(c)); APP085 (Section 13.02(a)(4)–(5)); APP089 (Section 13.02(a)(9)(B)). *It was Westland's failure to fund the reserve and escrow accounts as a precursor to making any repairs that*

constituted its breach. And because Westland has admitted it never complied with Fannie Mae's demand to increase the reserve and escrow deposit amount, it remains in default of the Loan Documents, regardless of whether it eventually makes every repair identified in the f3 PCA.

For that reason, the district court erred in failing to find that Westland breached the Loan Documents.

D. Post-appeal Events Are Not Relevant to the Issues on Appeal and Not Properly Before the Court.

Under the guise of judicial notice, Westland also improperly includes events that followed the district court's entering the challenged injunction and Fannie Mae's taking this appeal, as none of those developments informs the injunction's validity.

This Court is generally reluctant to take judicial notice of other court proceedings and will only do so when "a valid reason exists." *Mack v. Est. of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). For example, post-appeal events that would render a preliminary injunction moot are relevant on appeal to determine whether the appeal should be dismissed. *All. for Am.'s Future v. State ex rel. Miller*, 128 Nev. 878, 381 P.3d 588, 2012 WL 642540 (2012) (unpublished). In contrast, no "valid reason" to take judicial notice of post-appeal events exists here, where the events

Westland describes do not inform the validity of the injunction or whether the appeal is now moot.

Here, Westland's one-sided and incomplete description of certain events that occurred since Fannie Mae filed this appeal are irrelevant to the issues before this Court. Specifically, Westland discusses Fannie Mae's disbursement of the insurance proceeds and overpayment amounts in compliance with the injunction and the fact that the newly-obtained PCAs show that, between the last PCAs and those done in March 2021, Westland has completed much of the work on the Properties. Neither development is relevant to this appeal because they have nothing to do with whether Westland was in default after September 2019.

That Fannie Mae complied with the injunction it challenges on appeal says nothing about whether the injunction should have issued in the first instance. And, to the extent Westland simply aims to portray Fannie Mae as a bad actor because of when it disbursed the insurance proceeds and overpayment, Westland's account of the circumstances of

those payments is at least incomplete, even if it were not irrelevant on appeal.[8]

And as addressed throughout this brief, whether Westland significantly repaired the Properties sometime *after* the default does not inform whether there was in fact a default. Similarly, the fact that *now* there is an estimated $436,005 of necessary repairs does not inform whether *at the time of the default* an estimated $2.8 million of repairs were needed. The Court can infer nothing from the condition of the Properties in April 2021 other than that Westland performed many necessary repairs between the two sets of PCAs, and that fact does not negate Westland's breach.

[8] Westland notably fails to inform this Court that Fannie Mae had already initiated a wire transfer of the funds before Westland filed its motion to compel, that Westland's counsel was informed of this fact upon the filing of the motion and refused to withdraw the motion, that Fannie Mae's counsel delivered the funds only days after the filing of the motion, and that the only reason that the delivery was close in time to the hearing was because the motion was heard a week after filing on an order shortening time. SA1062–63. The district court correctly denied Westland's motion as moot and did not find any improper conduct by Fannie Mae. Order Denying Defs.' Mot. (filed 6/3/2021).

II. Westland Has Failed to Rebut the Fact That HERA Renders the Injunction Void Ab Initio.

A. No Exception to Section 4617(f) Applies Here.

Westland's arguments concerning Section 4617(f) are not grounded in any controlling or persuasive authority. Rather, their arguments are contradicted by the United States Supreme Court's decision in *Collins v. Yellen*, which held that Section 4617(f) broadly bars injunctive relief that could restrain or affect FHFA's statutory powers as Conservator. 141 S. Ct. 1761, 1775–78 (2021). The Supreme Court held that "Congress sharply circumscribed judicial review of any action that the FHFA takes as a conservator" in enacting Section 4617(f). *Id.* at 1775. The Supreme Court also agreed with the judicial "consensus" that Section 4617(f) "prohibits relief where the FHFA action at issue [falls] within the scope of the Agency's authority as a conservator." *Id.* at 1776. And because "FHFA did not exceed its authority as a conservator" in taking the action at issue, Section 4617(f) "bar[red]" injunctive relief. *Id.* at 1778. The Court held that in determining whether to apply Section 4617(f), "[i]t is not necessary for us to decide –and we do not decide – whether the FHFA made the best, or even a particularly good, business decision." *Id.*

Collins controls this case. The preliminary injunction purports to

preclude the Conservator (whether acting in its own name or through its conservatee Fannie Mae) from, among other things, (1) initiating a foreclosure or taking certain other default mitigation steps, and (2) taking any adverse action against any Westland entity in or outside Nevada. Because such actions lie at the heart of the Conservator's core statutory powers – the powers to "operate" Fannie Mae, to "preserve and conserve" Fannie Mae's assets and property, and to "collect … obligations and moneys due" Fannie Mae, *see* 12 U.S.C. § 4617(b)(2)(B)(i), (ii), (iv) – Section 4617(f) precluded the district court from enjoining them. As *Collins* and other relevant decisions confirm, no exception to Section 4617(f) permitted the district court to order injunctive relief affecting FHFA's conservatorship powers.

1. Section 4617(f)'s Express Exception Does Not Apply Because Neither FHFA Nor Fannie Mae Requested the Injunction.

Section 4617(f) has one express exception to the prohibition on judicial actions that "restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver" – such relief may be granted if it is made "at the request of the Director." 12 U.S.C. § 4617(f). Westland argues that this exception applies because "a substantial

portion of the Order is simply the denial of Fannie Mae's own request for … appointment of a receiver." *See* Ans. to Amicus Br. at 5. But that is beside the point; neither FHFA nor Fannie Mae asked for any of the injunctive relief the district court ordered. Furthermore, Fannie Mae has not contended that Section 4617(f) requires the Court to revisit the portion of the Order denying appointment of a receiver. Instead, Fannie Mae asks the Court to apply Section 4617(f) to void the preliminary injunction.

Westland nevertheless contends that the preliminary injunction was made "at the request of the Director," supposedly because it is "related to [Fannie Mae's] request for appointment of a receiver." *Id.* That argument fails. The record is crystal clear that Fannie Mae did not request the relief granted in the preliminary injunction, Westland did. And not only did Westland request the injunction, it drafted it – after the October 13, 2020 hearing – to include terms Westland never raised in briefing or at oral argument and that it submitted to the district court over Fannie Mae's objection.[9] Section 4617(f)'s exemption for injunctive

[9] Opp. to Pls.' Appl. for Appointment of Receiver on Order Shortening Time; Countermot. for TRO and/or Prelim. Inj.; Mem. of Points & Auth. at 18–29 (filed Aug. 31, 2020).

relief requested by an FHFA Director therefore does not apply to the injunction.

Westland also suggests that, in filing this action, Fannie Mae "submitted to the district court's jurisdiction" and "voluntarily invoked the district court's powers," apparently including injunctive relief against Fannie Mae unrelated to that requested in its claims. Ans. to Amicus Br. at 5-6. In Westland's view, once Fannie Mae files an action or petitions a court for relief, Fannie Mae has *requested* whatever injunctive relief the court might impose, including any relief that it actively *opposed*. There is no authority supporting that Orwellian position. The phrase "at the request of the Director" means that "any action to restrain or affect the exercise of powers or functions of [FHFA]," must be something the Director asks for. *See Request*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/request (last visited October 12, 2021) (a request is "the act or an instance of asking for something"). And this Court's duty is to apply the statute as enacted; it cannot adopt a meaning that diverges so dramatically from the text.

Westland's interpretation is also senseless from a policy perspective. If FHFA or an Enterprise could waive Section 4617(f) by

seeking any type of judicial relief, the exception would swallow the rule. Neither Fannie Mae nor FHFA as Conservator could assert a claim in court without forfeiting Section 4617(f)'s protection as to counterclaims, which would then be pled as a matter of course. That absurd result would thwart Congress's intent to "sharply circumscribe[] judicial review" of FHFA's conservatorship activities, *Collins*, 141 S. Ct. at 1775, and "bar[] judicial interference with [FHFA's] statutorily authorized role as conservator," *Roberts v. FHFA*, 889 F.3d 397, 402 (7th Cir. 2018).

2. Section 4617(f) Bars Injunctive Relief in Contract Actions.

Section 4617(f) does have an implied limitation: It does not bar judicial restraint where FHFA exceeds the scope of its statutory authority. *See Collins*, 141 S. Ct. at 1776 (citing cases). Westland contends that the implied limitation applies here because the preliminary injunction "prohibit[ed] Fannie Mae and related entities from violating [Westland's] contract rights," and FHFA supposedly has no "statutory authority as conservator to breach contracts" outside of the limited repudiation provision in 12 U.S.C. § 4617(d). Ans. to Amicus Br. at 6; *see* Ans. Br. at 5. That is wrong.

Westland's focus on contractual rights is misplaced. The preliminary injunction prohibits routine loan management actions at the core of FHFA's conservatorship powers and functions, such as the Conservator's ability to "preserve and conserve [Fannie Mae's] assets and property," 12 U.S.C. § 4617(b)(2)(B)(iv); "collect all obligations and money due" Fannie Mae, *id.* at § 4617(b)(2)(B)(ii); "take over the assets of and operate [Fannie Mae] with all the powers of the shareholders, the directors, and the officers," *id.* at § 4617(b)(2)(B)(i); "conduct all business of [Fannie Mae]," *id.*; and "perform all functions of [Fannie Mae] in the name of [Fannie Mae]," *id.* at § 4617(b)(2)(B)(iii). As discussed above, the Loan Documents expressly authorize these actions with regard to the loans at issue here. There can be no question that Section 4617(f) precludes courts from restraining FHFA's exercise of these powers.

(a) Fannie Mae, and Thus FHFA, Has the Right to Choose to Incur Damages Rather Than Perform on a Contract.

Fannie Mae did not breach any contract in this case, but it could have done so without exceeding FHFA's authority as Conservator. Like any other party to a contract, Fannie Mae retains the right and power to

breach contracts and potentially incur liability for compensatory damages.

As a matter of hornbook law, "[v]irtually *every* contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *United States v. Winstar Corp.*, 518 U.S. 839, 919 (1996) (Scalia, J., concurring); *see Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995) (quoting Justice Holmes: the "duty to keep a contract at common law means a predication that you must pay damages if you do not keep it – and nothing else"). When FHFA became Conservator, it succeeded to all of Fannie Mae's "rights, titles, powers, and privileges," 12 U.S.C. § 4617(b)(2)(A), and nothing in HERA suggests that Congress intended to disempower the Conservator from exercising all of Fannie Mae's pre-existing powers.

(b) Sharpe *Is Inapposite Because Fannie Mae Does Not Propose to Force Defendants into an Administrative Claims Process or to Bar Compensatory Damages.*

Westland posits that *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 2014) precludes Section 4617(f)'s application in contract cases because under *Sharpe*, "FHFA exceeds its conservatorship authority when it breaches contracts" without following HERA's procedure for repudiating them.

Ans. to Amicus Br. at 7 (citing 12 U.S.C. § 4617(d)). But *Sharpe* holds only that a receiver cannot force a contract counterparty into an administrative claims process and thereby deprive the counterparty of a fully compensatory monetary award. *See id.* at 1154–57. The Ninth Circuit has since explained that *Sharpe* "is not controlling outside of its limited context" and stands for the limited proposition that "the FDIC may not breach a contract *and then compel the other party . . . to accept a receiver's certificate, as the result of the FDIC's claims process*, rather than the 'benefit of the bargain' provided for in the contract itself." *Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) (emphasis added) (citations omitted).

Here – unlike in *Sharpe* – neither FHFA nor Fannie Mae is seeking to force Westland to present its counterclaim administratively rather than to the district court, nor to limit the availability of full expectancy damages. Nor could FHFA or Fannie Mae make such an attempt: Because there is no receivership in place, the FHFA administrative claims process analogous to the process described in *Sharpe* is not at issue here. *See* 12 U.S.C. §§ 1821(d)(3)–(5), 4617(b)(3)–(5) (conferring power on FDIC and FHFA receivers, but not conservators, to "determine

claims"). Nor is Fannie Mae attempting to deprive Westland of compensatory damages if it can prove a breach of contract.

And while FHFA as Conservator does have limited authority to repudiate certain contracts in a way that could eliminate otherwise-available contract damages such as lost profits, *see* Ans. to Amicus Br. at 7 (citing 12 U.S.C. § 4617(d)), FHFA did not and could not exercise that power here. That power applies only to *pre-conservatorship* contracts, *see* 12 U.S.C. § 4617(d), and the contracts at issue in this case all *post-date* the inception of conservatorship. And even if they did not, the time in which FHFA could exercise the repudiation power has passed. Thus, even if Westland could establish contract liability, the Conservator could not "force[]" it "into [any] administrative claims process through which [it could] receive[] what might be construed as a partial damages award," *Sharpe*, 126 F.3d at 1154–57, and Section 4617(f) would not bar a fully compensatory monetary judgment against Fannie Mae. As a result, *Sharpe* does not apply.

Westland argues that *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133 (9th Cir. 2015), supports their broad reading of *Sharpe*, under which receivers (and, Westland assumes, conservators) lack authority to breach

contracts generally. Ans. to Amicus Br. at 9. Not so. In *Bank of Manhattan*, the Ninth Circuit noted that *Sharpe* "does not permit the FDIC to breach pre-receivership contracts *without consequence*," does not "authorize[] the *unrestrained* breach of contract," and "does not permit the FDIC to *avoid liability* for the breach of pre-receivership contracts." 778 F.3d at 1137 (emphases added). Thus, *Bank of Manhattan* recognizes that *Sharpe* applies only where a receiver seeks to avoid liability for a full expectancy remedy in relation to a contract predating receivership.

Nor has this Court endorsed Westland's reading of *Sharpe*. Westland observes that the Court "favorably cited" *Sharpe*, Ans. to Amicus at 6–7, but fails to note that the Court relied on *Sharpe* for a different proposition: that FDIC "steps into the shoes" of a failed financial institution unless it elects to repudiate the bank's *pre-receivership* contracts under FIRREA's special mechanism. *CML-NV Grand Day, LLC v. Grand Day, LLC*, 134 Nev. 925, 430 P.3d 530, 2018 WL 6016683 (Nov. 15, 2018) (unpublished disposition) (discussing 12 U.S.C. § 1821(e)). No party disputes that FHFA as Conservator stepped into Fannie Mae's shoes here and continues to hold Fannie Mae's power relating to contracts entered into following the start of the

conservatorship. In so doing, FHFA as Conservator acquired Fannie Mae's power relating to contracts. Section 4617(f) prevents courts from enjoining that power, despite Westland's request that this Court do so.

Westland's other *Sharpe*-related arguments exaggerate the conclusions this Court must reach to dissolve the injunction. A ruling in FHFA's favor will not require the Court to find that HERA preempts Nevada contract law, as Westland incorrectly contends, *see* Ans. to Amicus at 7–8, because damages remain available. But to whatever extent the preclusion of injunctive relief might be deemed to preempt any state-law doctrine, that is the intended purpose and effect of Section 4617(f).[10] Nor is there danger that interpreting HERA to prohibit the preliminary injunction will run afoul of the Takings Clause. *See id.*

[10] Westland notes that Nevada law allows for a party to pursue an injunction in breach-of-contract cases concerning "the possession of real property," citing *Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029 (1987). While Section 4617(f) would preempt injunctive relief even if available under Nevada law here, *Dixon* is distinguishable because it involved a homeowners' residence. 103 Nev. at 416, 742 P.2d at 1030. Here, the property at issue is a commercial enterprise. Westland owns and operates dozens of for-profit multi-family apartment communities. *See Westland Apartments*, www.westlandapartments.com (last accessed October 7, 2021).

Westland can receive compensatory damages should it establish breach and the other elements of contract liability.

(c) Other Courts' Interpretation of Sections 4617(f) and 1821(j) Supports Section 4617(f)'s Application Here.

Westland's attempts to distinguish cases FHFA cited in support of its arguments that any alleged breach of contract here would be within FHFA's conservatorship authority are unpersuasive. *See* Ans. to Amicus at 8–10. Westland notes that several of these cases, including *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017) and *Roberts,* 889 F.3d 397, did not involve alleged breaches of contract does not undermine their holdings that courts cannot restrain or affect the Conservator from exercising its powers. Westland also claims that *Jacobs v. FHFA*, Civ. No. 15-708-GMS, 2017 WL 5664769 (D. Del. Nov. 27, 2017), *aff'd*, 908 F.3d 884, 889 (3d Cir. 2018) , supports distinguishing *Sharpe* from cases that involve statutory claims rather than breach-of-contract claims. Ans. to Amicus Br. at 10. But *Jacobs* actually supports FHFA's argument; the court there rejected the argument that Section 4617(f) incorporates state-law restrictions, holding that it was "contrary to well-established case law that equitable relief will be denied even where the conservator acts

in violation of other statutory schemes." 2017 WL 5664769 at *4 (alteration and internal quotation marks omitted).

Federal appellate decisions applying the substantively identical provision in Section 1821(j) confirm that Section 4617(f) applies to state-law contract claims. For example, in *Volges v. RTC*, the court rejected the notion of an "implicit limitation" in Section 1821(j) "that would give courts equitable jurisdiction to compel the RTC to honor a third party's rights as against RTC under state contract law." 32 F.3d 50, 52 (2d Cir. 1994) ("The fact that the sale might violate [plaintiff's] state law contract rights does not alter the calculus . . . [and] render [Section 1821(j)] inapplicable."). Similarly, in *RPM Investments Inc. v. RTC*, the court held that ordering specific performance of a contract would impermissibly "restrain or affect" the RTC in exercise of its statutory powers, notwithstanding "allegations that the RTC breached a contract." 75 F.3d 618, 621 (11th Cir. 1996). And in *Gross v. Bell Savings Bank PA SA*, the court held that "RTC was acting within its legitimate authority in withholding [plaintiffs'] deposits" and therefore injunctive relief would be "inappropriate" under Section 1821(j). 974 F.2d 403, 408 (3d Cir. 1992).

Westland attempts to distinguish three of the many cases so holding – *Volges*, *RPM*, and *Mile High Banks v. FDIC*, No. 11-cv-01417-WJM-MJW, 2011 WL 2174004, at *4 (D. Colo., June 2, 2011) – because they "turn[] on a separate statutory provision that authorizes the FDIC to transfer the assets of a failed bank during receivership." *See* Ans. to Amicus Br. at 8–9 (citing 12 U.S.C. § 1821(d)(2)(G)). In none of those cases did the outcome "turn" on that statutory provision; rather, it was cited in discussion of whether the RTC or FDIC acted within the bounds of its authority. *See Volges*, 32 F.3d at 52; *RPM*, 75 F.3d at 621; *Mile High Banks*, 2011 WL 2174004, at *4. Those cases thus reinforce the point that Section 4617(f) applies unless FHFA acts outside its authority. *See Collins,* 141 S. Ct. at 1776. If, as Westland contends, conservators and receivers lacked statutory power over contracts, these cases would have come out differently.

3. Collins *Does Not Impose a Necessity Requirement on FHFA's Powers and Functions.*

Westland argues that *Collins v. Yellen* "mark[s] a significant change in the law" because it holds that Section 4617(f) applies only if the Conservator's actions are "necessary to put the regulated entity in a sound and solvent condition." Ans. to Amicus Br. at 12 (quoting 141 S.

Ct. at 1776). Westland then contends that because the loans at issue here will not make or break Fannie Mae, the loan-collection activity the district court enjoined is not "necessary" to Fannie Mae's solvency. *Id.* at 13–14.

Westland misreads *Collins* in a desperate attempt to avoid Section 4617(f). Nowhere does *Collins* indicate any intent to upend a settled point of law: that Section 4617(f) applies without limitation "where FHFA exercise[s] its 'powers or functions' 'as a conservator or a receiver.'" *Id.* To the contrary, the Court "agree[d] with th[e] consensus" reflected in the many appellate decisions – *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018), *Robinson v. FHFA*, 875 F.3d 220 (6th Cir. 2017), and *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). *Compare* Ans. to Amicus Br. at 12, *with Collins* at 1776 (both citing *Robinson*, *Roberts*, and *Perry Capital*). Section 4617(f) bars all courts from restraining or affecting FHFA's exercise of its powers or functions as Conservator, including carrying on the business of its conservatee Fannie Mae.

Nothing in any of those cases, or in *Collins*, conditions Section 4617(f)'s application on the "necessity" of the challenged action.

To the contrary, *Collins* held that in assessing whether Section 4617(f) applies, "*[i]t is not necessary for [the Court] to decide* … whether FHFA made the best, or even a particularly good, business decision when it [took the challenged action.]" 141 S. Ct. at 1778 (emphasis added). Instead of assessing the business case for the challenged action – as Westland's position would require – the Court "conclude[d] only that under the terms of [HERA], the FHFA did not exceed its authority as a conservator, and therefore [Section 4617(f)] bars the … claim." *Id.* Thus, the Supreme Court applied Section 4617(f) to bar a claim, regardless of whether the challenged action was "necessary" to rehabilitate the Enterprises, and confirmed that no court may take any action to restrain or affect the exercise of any of the powers or functions of the Conservator.

If, as Westland contends, the Supreme Court meant to impose a "significant change" by adding a necessity requirement to the Section 4617(f) analysis, Ans. to Amicus Br. at 12, it would have evaluated whether FHFA's action in *Collins* met that requirement. Indeed, it could not have held that Section 4617(f) applies without analyzing whether the FHFA action at issue was "necessary" to put the Enterprises in a sound and solvent condition, as neither the district court

nor the Court of Appeals decisions addressed the question.[11] But the Supreme Court *did* hold that Section 4617(f) applies – *without* that analysis. In consecutive sentences, the Court first held that it need not "decide … whether the FHFA made the best, or even a particularly good, business decision," and then concluded that "FHFA did not exceed its authority as a conservator, and therefore [Section 4617(f)] bars the … claim." 141 S. Ct. at 1778. Thus, *Collins* directly refutes Westland's strained interpretation.

Under Westland's reading, each act and decision by the Conservator that is not "necessary" to returning Fannie Mae to a "sound and solvent condition" would be subject to judicial abrogation, even though the Conservator's authority to operate Fannie Mae encompasses everything from strategic policy decisions to actions concerning individual loans. This would yield absurd consequences, allowing courts

[11] None of the lower court decisions analyze whether an act or decision must be "necessary" to safety and soundness for Section 4617(f) to apply. The Fifth Circuit's en banc decision – which the Supreme Court reversed – held that the challenged act did not fall within any of the Conservator's powers without analyzing whether an act that would otherwise fall within the Conservator's other enumerated powers must also be "necessary" to be valid. *Collins v. Mnuchin*, 938 F.3d 553, 582–83 (5th Cir. 2019).

to enjoin the Conservator's power to take individual actions that, collectively, could be crucial to Fannie Mae's solvency by continuing its business operations and protecting its estate.[12]

Nor is there any textual basis to suggest that HERA's "necessary" clause limits the Conservator's powers or disqualifies them from Section 4617(f)'s protection. To the contrary, Section 4617(b)(2)(D)(i) states that the Conservator "may" – not "must" or "shall" – "take such action as may be … necessary to put [Fannie Mae] in a sound and solvent condition." And in the next sentence, the statute makes clear that the Conservator's powers are in fact far broader. Using the conjunctive "and," Section 4617(b)(2)(D)(ii) empowers the conservator to "take such action as may be … appropriate to carry on the business of [Fannie Mae] and preserve and conserve [its] assets and property." Together, Section 4617(b)(2)(D)(i) and (ii) permit the Conservator to take "necessary" and "appropriate" actions to maintain Fannie Mae's soundness and solvency.

---

[12] Westland's position would be equally absurd in circumstances where any of several alternative strategies would preserve soundness and solvency. In such circumstances, the Conservator would need to do *something*, but *no particular act* would be "necessary" in and of itself, as the alternatives would also be effective. Indeed, *Collins* holds that "[c]hoosing to forgo [one] option in favor of [another] … [is] not in excess of FHFA's statutory authority as conservator." 141 S. Ct. at 1778.

As cases applying the U.S. Constitution's "necessary and proper" clause confirm, such language authorizes acts that are convenient or useful to the objective, rather than only permitting those acts that are indispensable. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 419–20 (1819); *Maynard v. Newman*, 1 Nev. 271, 288 (1865). The same is true here: The "necessary" and "appropriate" clauses of Section 4617(b)(2)(D) augment rather than restrict the Conservator's express powers, including the powers to "operate" Fannie Mae and to "collect all obligations and money due" to it.

There is no legal or historical basis for Westland's contention that Congress intended for the judiciary to interfere with the Conservator's exercise of its powers and functions with respect to actions that, taken alone, are not specifically required or "necessary" to maintain the sound and solvent condition of the entities in conservatorship.

4. Section 4617(f) Applies Prospectively As Well As Retrospectively.

Westland contends that Section 4617(f) only applies if FHFA has already taken "affirmative action" as Conservator – i.e., only retrospectively. Ans. to Amicus Br. at 15–17. That is incorrect.

That position conflicts with decisions holding that Section 4617(f) and Section 1821(j) bar declaratory relief that interferes with anticipated future acts of a conservator or receiver. *See, e.g.*, *Nat'l Tr. for Historic Pres. v. FDIC*, 21 F.3d 469 (D.C. Cir. 1994) (Section 1821(j) barred injunction prohibiting FDIC's impending sale of property).

Section 4617(f)'s prohibitive language – "no court may take any action" – does not require any prior affirmative act. It is unqualified and absolute. And where "the statutory language is 'facially clear,' this court must give that language its plain meaning." *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 402, 399 P.3d 352, 356 (2017); *accord Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002) (a court's "role is to interpret the language of the statute enacted by Congress"). The Court should not read a requirement of a prior affirmative act into the statute where none exists.

Westland cites to language from *Roberts* indicating that FHFA "must have ***acted*** … pursuant to its 'powers or functions'" for Section 4617(f) "to bar judicial relief." Ans. to Amicus Br. at 15 (emphasis original to Answer) (quoting *Roberts*, 889 F.3d at 402). But the *Roberts* Court analyzed whether FHFA had "*acted*" with respect to its

conservatorship powers and functions because the court was deciding whether to award declaratory and injunctive relief with respect to a *past* action that FHFA *had already taken*. It was a given that the action in question was in the past, as the case concerned action that already occurred. The analysis instead turned on whether the challenged action was taken *pursuant to FHFA's conservatorship powers*, not whether FHFA had taken any action *at all*.

Westland's citation to *Suero v. Freddie Mac*, 123 F. Supp. 3d 162, 171 (D. Mass. 2015), *see* Ans. to Amicus Br. at 15–16, fails for the same reason. The court in that case analyzed Freddie Mac's refusal to sell plaintiffs' foreclosed home to a particular lender, an action Freddie Mac had *already* taken. *Suero* rejected the notion that Section 4617(f)'s prohibition turns on FHFA taking "affirmative action," holding instead that the statute's application "is not confined to situations in which FHFA engages in affirmative acts by issuing specific directives or statements …." 123 F. Supp. 3d at 171. The court applied Section 4617(f) even though FHFA "may not have 'acted' by issuing a formal statement or directive relative to the sales of the foreclosed homes." *Id.*

Westland points to FHFA's delegation of functions to Fannie Mae as evidence that FHFA has not exercised its conservatorship powers here. Ans. to Amicus Br. at 16. But the Conservator's delegation of routine business functions in day-to-day operations is not a delegation of its statutory power to Fannie Mae and cannot negate Section 4617(f)'s absolute protections. So long as FHFA's "powers or functions of the Agency as a conservator" are implicated, a court cannot constrain them. And the Conservator always has the ultimate control of Fannie Mae's operations, *see Suero*, 123 F. Supp. 3d at 173; it has not and cannot relinquish its responsibilities by delegating them. Finally, Fannie Mae's exercise of the function or task of preserving assets and collecting obligations it is due promotes "[FHFA's] statutory mission as a protective conservator," and "[t]hat is enough to preclude judicial intervention." *Id.* at 174.[13]

Westland attempts to distinguish cases holding that, under Section 4617(f) and Section 1821(j), courts cannot grant injunctive relief

[13] Even if Section 4617(f) contained an implied affirmative action requirement, FHFA exercised its conservatorship powers and functions by intervening in the action to defend Fannie Mae's ability to preserve and conserve its assets in this case.

against *any* party if doing so would interfere with conservatorship or receivership powers or functions. *See* Ans to Amicus Br. at 16 n.3. Westland notes that "the conservator or receiver itself was an active participant" in the relevant transactions. *Id.* But FHFA's involvement here is similar to FDIC's in other cases: FHFA intervened after the court entered an injunction intending to constrain Fannie Mae and the Conservator here, just as FDIC substituted in as a defendant following the issuance of a restraining order against the institution under its receivership in *Bank of America National Association v. Colonial Bank*, 604 F.3d 1239 (11th Cir. 2010).

B. Any Purported Delay in Raising Section 4617(f) Is Irrelevant Because Jurisdictional Issues May Be Presented at Any Time.

Westland claims that this Court cannot consider Section 4617(f) because it was not raised "until months after" the preliminary injunction was entered. Ans. to Amicus Br. at 2–4. But as explained in the Opening Brief, Section 4617(f) imposes jurisdictional limitations, and parties can

raise jurisdictional defects at any time.[14] *See* Op. Br. at 43–47; *Clark Cty. Deputy Marshals Ass'n v. Clark County*, 134 Nev. 924, 425 P.3d 381, 2018 WL 4297855, *1 n.1 (2018) (unpublished); *Att'ys Tr. v. Videotape Comput. Prod., Inc.*, 93 F.3d 593, 595 (9th Cir. 1996); *see also* Amicus Br. at 7–8.

It is beyond cavil that Section 4617(f) "sharply circumscribe[s] judicial review of any action that the FHFA takes as a conservator." *Collins*, 141 S. Ct. at 1776. And limitations on judicial review are jurisdictional. *See Kucana v. Holder*, 558 U.S. 233, 245 (2010) (describing statute enumerating "'[m]atters not subject to judicial review'" as identifying matters "the federal courts lack jurisdiction to review"); *Barbosa v. U.S. Dep't of Homeland Security*, 916 F.3d 1068, 1074 (D.C. Cir. 2019) (a statutory "preclusion of judicial review … is a jurisdictional limitation on judicial power"). "[J]urisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *United States v. Kwai Fun Wong*, 575 U.S. 402, 411 n.4 (2015).

---

[14] Westland suggests that FHFA is "inject[ing] this issue into the appeal through the filing of an amicus brief." Ans. to Amicus Br. at 2. But Fannie Mae properly raised this issue in its Opening Brief. Op. Br. at 43–47. It is therefore not an issue "raised solely by an amicus." *See* Ans. to Amicus Br. at 2 (quoting *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008)).

The cases Westland precariously relies upon do not support an argument that Section 4617(f) is not jurisdictional. *See* Ans. to Amicus Br. at 2–4. The decisions Westland cites as requiring a "clear statement" to limit jurisdiction refer to inapplicable interpretive principles. In *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), and *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), the Court considered whether certain statutory requirements delimited subject-matter jurisdiction over a particular claim. Neither addressed a provision that limited a court's jurisdiction to enter particular relief. *Reed Elsevier*, 559 U.S. at 158 (considering whether statutory requirement "deprives federal courts of subject-matter jurisdiction to adjudicate infringement claims involving unregistered works"); *Auburn Regional*, 559 U.S. at 148–49 (considering whether statutory deadline precluded an administrative appeal). Westland does not point to any authority imposing a "clear statement" requirement on statutes like this one that prohibit certain forms of relief regardless of the underlying claims. And after *Reed Elsevier* and *Auburn Regional* were decided, the U.S. Supreme Court held that the Tax Injunction Act – which does not directly reference jurisdiction, but limits the relief courts may grant – is a "jurisdictional

statute." *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 12, 14 (2015). Accordingly, courts have characterized Sections 4617(f) and 1821(j) as limitations on jurisdiction, *see* Op. Br. at 46, including in cases issued after *Reed Elsevier* and *Auburn Regional*.[15]

Untimeliness is not an issue in any event. Neither Fannie Mae nor FHFA had the opportunity to brief Section 4617(f) before the injunction was entered because most of the ordered injunctive relief was not part of Westland's initial motion, its briefs in support, or the oral argument before the district court. There was nothing in the record to reveal the greatly expanded scope of the injunctive relief until Westland submitted its proposed order, over the objection of Fannie Mae. Accordingly, Fannie

---

[15] *See, e.g.*, *Jacobs v. FHFA*, 2017 WL 5664769 (D. Del. Nov. 27, 2017) (dismissing claims for injunctive relief for lack of jurisdiction under section 4617(f), and describing section 4617(f) and section 1821(j) as "nearly identical jurisdictional bar[s]"), *aff'd*, 908 F.3d 884, 889 (3d Cir. 2018) (describing the district court decision it affirms as addressing "jurisdiction"); *Bulluck v. Newtek Small Bus. Fin., Inc.*, 2017 WL 8186594 (N.D. Ga. Sept. 19, 2017) (under section 1821(j), "the Court does not have jurisdiction to grant the requests for injunctive relief"); *Koppenhoefer v. FDIC*, 2014 WL 4748490 (C.D. Ill. Sept. 24, 2014) (under section 1821(j), "th[e] Court lacked jurisdiction to award the particular type of relief [plaintiff] seeks"); *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1020 (8th Cir. 2013) (discussing "anti-injunction jurisdictional bar of [Section] 1821(j)").

Mae and FHFA could not have anticipated the extensive injunctive relief the Court would order.

C. Dissolution of the Injunction Would Not Irreparably Harm Westland.

Westland warns of the "troubling implications" of holding that Section 4617(f) is "an absolute bar to equitable remedies in breach of contract cases," namely that "no court could stop Fannie Mae" from foreclosing on any mortgage "without regard to whether borrowers are current on their payments." Ans. to Amicus Br. at 17–18. But the Conservator is accountable to Congress and the President and may be judicially held liable for damages if it commits wrongful actions.

In any event, Westland identifies no authority that would allow equitable considerations to override Section 4617(f)'s "broad and all-encompassing language." *Pyramid Constr. Co., Inc. v. Wind River Petroleum, Inc.*, 866 F. Supp 513, 518 (D. Utah 1994) (applying Section 1821(j)). To the contrary, "the statute bar[s] a court" from enjoining the conservator or receiver "in virtually all circumstances." *Nat'l Tr. for Historic Pres.*, 21 F.3d at 472 (Wald, J., concurring) (applying Section 1821(j)).

Even if Section 4617(f) permitted equitable considerations (a strange proposition given that it bars equitable relief), Westland cannot convincingly argue that dissolution of the injunction would irreparably harm it. Westland owns and operates dozens of for-profit multi-family residential apartment communities. Westland touts itself as owner of "over 65 Multi-Family Residential Communities" acquired for their financial attributes as "underperforming buildings" so that Westland can "maximiz[e] the potential value of its property portfolio."[16] There is no evidence that Westland purchased the Properties for any unique, property-specific qualities. The equities here are akin to those described in *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984), where the enactment of the challenged zoning ordinance meant plaintiff's "business would be closed immediately at its present location" but could reopen elsewhere. *Id.* at 1213. The Ninth Circuit vacated an injunction against enforcement of the law, reasoning that the plaintiff's "hardship" was "purely economic in nature," and "[p]urely monetary injuries are not normally considered irreparable." *Id.* Westland has

[16]*Our Apartments*, https://www.westlandrealestategroup.com/apartments.

provided no persuasive reason why monetary damages would be inadequate to compensate for any harm resulting from the dissolution of the preliminary injunction.

III. This Court Should Vacate the Injunction, Which Contains Multiple Mandatory Injunctive Provisions Without Satisfying the Applicable Heightened Standard.

A. The Injunction Provisions Fannie Mae Challenges Are Subject to a Heightened Standard.

Fannie Mae has also argued at length that the injunction the district court entered here is mandatory and thus subject to a more exacting standard, requiring a finding that "*the facts and law clearly favor the moving party*." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis added). No such finding exists or could have been made here.

Regardless of the injunction's label, its effects unequivocally invoke the higher standard because the injunction results in adverse consequences for Fannie Mae without reversal and affords Westland substantially all of the relief sought in the litigation, even though that relief was not sought in the motion for the injunction.

As the Second Circuit Court of Appeals recognized, "many mandatory injunctions can be stated in seemingly prohibitory terms."

Tom Doherty Assocs., Inc. v. Saban Ent., Inc., 60 F.3d 27, 34 (2d Cir. 1995). "Determining whether the status quo is to be maintained or upset has led to distinctions that are more semantic than substantive." *Id.*; *see also Int'l Union v. Bagwell*, 512 U.S. 821, 835 (1994) (noting that "injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms," for example "do not strike" and "continue working").

Semantics aside, the heightened standard applies if the relief, once the injunction is complied with, cannot be fully undone. *Tom Doherty Assocs.*, 60 F.3d at 35. "The bottom line is that, if a preliminary injunction will make it difficult or impossible to render a meaningful remedy to a defendant who prevails on the merits at trial, then the plaintiff should have to meet the higher standard of substantial, or clear showing of, likelihood of success to obtain preliminary relief." *Id.* In other words, courts must apply the higher standard where an injunction will alter, rather than maintain, the status quo,[17] or where an injunction

[17] Under Nevada law, 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).

will provide the movant with substantially all the relief sought and that relief cannot be undone. *Tom Doherty Assocs.*, 60 F.3d at 33–34. This injunction does both.

B. Section 5(o) of the Injunction Effectively Requires Fannie Mae to Enter New Lending Transactions with Westland and Its Affiliates, Which Cannot Be Undone If Fannie Mae Prevails on the Merits.

As set out in the Opening Brief, Section 5(o) of the injunction requires, among other things, that the Enjoined Parties remove Westland and its affiliates from ACheck. Removing Westland and its affiliates from ACheck does not actually put the parties in the "same position" they were in before their dispute. That is because if Westland and its affiliates are not on ACheck, Fannie Mae can be contractually obligated to enter new lending relationships with Westland. The minimum standard loan amount for these loans is $7 million, and many are, like the loans in this case, tens of millions of dollars. The injunction thus prohibits Fannie Mae from employing the only mechanism it has to regulate its lending with respect to specific parties.

Crucially, if Fannie Mae were to ultimately prevail on the merits, and were permitted to put Westland and its affiliates back on ACheck, Fannie Mae would in no way be returned to any status quo because in

the meantime it will have entered new lending relationships against its will and mission with no feasible way to exit those new loans.

Moreover, Westland continues to argue that ACheck functions as a "do not process" label, but this is not so. ACheck is a temporary pause, not a prohibition against future lending, whereas the *lack* of an ACheck notation is akin to automatic approval if other lender requirements are satisfied. By prohibiting Fannie Mae from pausing before approving new loans to Westland affiliates, it is subject to forced contracting against its will. *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 333 (6th Cir. 1997) (recognizing that it is "hornbook law that the freedom of contract entails the freedom not to contract"). Fannie Mae takes seriously the prospect of unwillingly lending millions of dollars to a borrower that has not only defaulted but aggressively fought Fannie Mae's attempts to enforce its contractually mandated right to ensure that properties it finances are safe and well maintained.

C. The Remaining Injunction Provisions Are Unsupported and Improper.

1. Quiet Enjoyment

The district court's order prohibits the Enjoined Parties from "interfer[ing] with Westland's enjoyment of the Properties pending a

final determination." APP1562. The meaning of this provision has been, at best, a moving target. Westland now expansively interprets "enjoyment" to include being free from any clouds on title, including notices of default, with absolutely no legal authority supporting that interpretation. Ans. Br. 13, 37.

Interference with quiet enjoyment or, more simply, enjoyment, has a particular meaning in the law: the constructive eviction of a tenant by a landlord. *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008); *see also Pickett v. McCarran Mansion, LLC*, 133 Nev. 1061 (Nev. App. 2017) (holding that a "tenant will prove a breach-of-covenant-of-quiet-enjoyment claim by proving constructive eviction").

Ignoring that this is a well-established term of art, Westland instead argues that enjoyment of the Properties includes clear title, free of a deed-of-trust holder enforcing its contractual rights. Westland cites no authority for this ad hoc interpretation and may not substitute its own proposed meaning when there is a legally established one.

2. Disbursing Almost $1.5 Million to Westland

Despite the lack of any finding regarding Westland's default status, rather than *freezing* funds where they were held at the time the dispute

began, thus preserving the status quo, the district court instead ordered Fannie Mae to *disburse* both insurance proceeds and voluntary overpayments by Westland, totaling almost $1.5 million. Under Section 14.02(b) of the Loan Documents, "[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)). Yet, rather than order the money maintained where it was or paid into a third-party escrow account, the district court ordered that all the money be released *to Westland*, without requiring a sufficient bond.

3. Rescinding Notices of Default

The injunction also requires Fannie Mae to rescind the Notices of Demand and Notices of Default, undoing and reversing Fannie Mae's foreclosure activity rather than simply halting it. This would force Fannie Mae to start foreclosure proceedings over even if it prevails in this case. Additionally, this relief does not preserve the status quo that existed at the time of the injunction, but instead sends the parties back several steps before that.

In sum, the injunctive relief ordered here cannot be reversed or undone if Fannie Mae prevails. Fannie Mae will have possibly entered into new loans that cannot be unwound; it will have to begin foreclosure proceedings anew at the cost of additional time and money, rather than where they left off; and it will be forced to collect the money it disbursed to Westland. The district court's injunction mandated affirmative action in favor of one party at the outset of litigation rather than preserving the parties' positions at that time and thus must be vacated.

IV. Fannie Mae Is Entitled to a Receiver Because Westland Breached the Loan Documents and, Separately, Because the Properties' Condition Deteriorated.

Complementing the receivership provision in the Loan Documents, APP176 (Section 3(e)), Fannie Mae highlighted three separate sets of Nevada statutes that support the imposition of a receivership based on two common bases: (1) Westland breached the Loan Documents, which provide for the appointment of receiver upon default; and (2) the Properties had physically deteriorated and were in danger of waste. Op. Br. 50–58. Westland has failed to rebut either basis for a receiver.

A. Because the District Court Erred as a Matter of Law in Its Analysis of the Loan Documents, It Inherently Abused Its Discretion in Not Appointing a Receiver.

Nevada's codifications of UCRERA and UARA both establish that a lender "is entitled to appointment of a receiver" if the underlying agreement provides for that result in the event of default. NRS 32.260(2)(b); NRS 107A.260(1)(a)(1). Westland argues that, in the context of the receivership, "the district court did not just find a 'question of fact' [regarding whether Westland breached the Loan Documents] and instead determined that Westland 'submitted substantial evidence that no deterioration of the [Properties] has occurred.'" Ans. Br. 39 (quoting APP1558 (second alteration in original)). But that conclusion by the district court only underscores the fact that it misconstrued the Loan Documents and engaged in the wrong analysis.

As addressed above, it is irrelevant for the purposes of default whether the repairs that Westland allegedly conducted *after* the September 2019 PCA eventually fixed all or most of the issues and deterioration addressed in that report. *See supra* § I.A., D. Rather, funding the reserve and escrow accounts within 30 days of Fannie Mae's notice of demand is a material term of the Loan Documents and *a pre-*

condition to even initiating the repairs. Westland is in automatic default under those contracts by failing to satisfy that funding demand. APP092 (Section 14.01(a)(1)) ("Any failure by [Westland] to pay or deposit when due any amount required by" the Loan Documents "shall constitute an automatic Event of Default ...."). And because of that default, Westland was also contractually obligated to assign the rents from the Properties over to Fannie Mae, which Westland also failed to do. APP175 (Section 3(b)); APP1279–82.

Accordingly, by solely analyzing whether Westland addressed the needed repairs *at the time Fannie Mae filed this case* as opposed to the time it declared Westland in default, the district court erred as a matter of law in declining to find Westland in breach of the Loan Documents. The court thus committed legal error and abused its discretion in *consequently* declining to appoint a receiver. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) ("While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error.").

B. All Evidence Demonstrates That the Properties Had Deteriorated by the Time Fannie Mae Filed This Action.

Separately, both UCRERA and NRS 107.100 provide for the appointment of the receiver when necessary to protect physical property from deterioration and prevent waste. NRS 32.260(2)(a); NRS 107.100(2). To be clear, the Properties' deterioration resulted in Fannie Mae demanding under the Loan Documents that Westland increase the reserve and escrow funding, and it was Westland's failure to satisfy that demand that resulted in its default – the primary basis addressed immediately above for appointing a receiver. However, under UCRERA and NRS 107.100, the underlying deterioration to the Properties is alone sufficient to appoint a receiver.

In response, Westland relies on the district court's conclusion that the Properties had not deteriorated. APP1558 ¶ 6. But that erroneous conclusion was again based a comparison of the repairs identified in the f3 PCA with the work orders placed by Westland over the *subsequent* year, which ignores the status of the Properties when Fannie Mae declared a default.

During the fall of 2019, all evidence revealed that the Properties were deteriorating and thus jeopardizing Fannie Mae's interest and its mission to provide affordable "safe, quality rental housing." Most importantly, the independent assessment conducted by f3 revealed $2.8 million in needed repairs, much of which needed to be conducted on 577 vacant units and involved health and safety issues, such as water leaks and missing smoke detectors. APP503, 814. By that point, the repairs on the fire damage to Liberty Village, which were contractually obligated to have been completed by May 2018, were a year late and not yet begun. APP352. This combined deterioration was also reflected in the plummeting occupancy rates – a red flag regarding Westland's ability to sustain the Properties that was further reflected in Westland's acknowledgement that, by the time Fannie Mae demanded the Assignment of Rents, "any rents collected were not even sufficient to cover the monthly debt service obligation." Opp. to Pl.'s App. for Appt. of Receiver at p.10 (filed 8/31/2020).

Moreover, none of Westland's actions or correspondence with Fannie Mae's servicer during that period or afterwards mitigated any of these concerns. It decided to automatically default under the Loan

Documents by failing to fund the escrow and reserve accounts – choosing instead to provide a Strategic Improvement Plan, which merely confirmed that the vacant units alone needed at least $1.2 million in repairs, *without* addressing the cost of repairing the fire damage or the Properties' common areas. And though Westland claimed it *subsequently* spent $1.7 million on repairs – an allegation that only underscores the Properties' deteriorated condition – it refused to provide Fannie Mae supporting documentation. Likewise, following the f3 PCA and Westland's default, Fannie Mae was able to inspect the Properties only after initiating this action and successfully moving under NRCP 34 to enter the Properties.

Accordingly, by the time Fannie Mae filed suit in August 2020 (due to compliance with COVID-related emergency relief laws), all evidence demonstrated that the Properties had physically deteriorated and were in severe need of repair. That fact alone warranted appointment of a receiver under the Loan Documents and Nevada law.

Even if it had been appropriate for the district court to engage in its misguided attempt to prove that Westland had made all of the repairs identified in the 800 page PCA, APP483–1254, which, as set forth above,

it was not, the court's findings were nevertheless unsupported by the record. Although the court determined that the work orders showed a lack of deterioration, the court made no findings, for instance, regarding how many of the 577 vacant units had been returned to "rent ready" condition or what portion of the work orders actually addressed the abatement of the fire damage – a separate repair issue not addressed in the PCA, but which Westland was contractually obligated to remedy. *See* APP799 (acknowledging that several Liberty Village buildings and individual units were previously damaged by fire and [were in the process of] being renovated" are were thus "excluded from the [PCA's] scope of work . . . ."). Nor did the district court have any of the information needed to make such critical findings. It instead had piles of *internally generated* Westland "work orders" – unsupported by contractor invoices – that provided vague descriptions of the scope of work, such as "the unit needs full maintenance." *See, e.g.*, Defs.' Ex. 2 filed in support of answer to Pl.'s Compl. at p.11 (Westland000846 – filed 9/1/2020).

So, though the district court may have attempted to diligently review these work orders, it had no basis for accurately or adequately comparing those documents to the needed repairs identified in the f3

PCA. It therefore could not have – and did not – address what degree of repairs were left to be conducted. It instead summarily found that the Properties exhibited no deterioration, APP 1558 – a conclusion irreconcilable with the vast amount of repairs the Properties required over a short period. The court thus abused its discretion in finding a receivership was not warranted based on a lack of deterioration.

Accordingly, even without determining that Westland had defaulted on the Loan Documents (which it did), the district court should have granted Fannie Mae's receivership application.

[continued on following page(s)]

Conclusion

Fannie Mae respectfully requests that this Court reverse the district court, direct it to appoint a receiver on remand, and dissolve the injunction.

DATED: October 20, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

Kelly H. Dove
Nevada Bar No. 10569
Nathan G. Kanute, Esq.
Nevada Bar No. 12413
Bob L. Olson, Esq.
Nevada Bar No. 3783
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorneys for Appellant Federal National Mortgage Association

CERTIFICATE OF COMPLIANCE

I hereby certify that the **APPELLANT'S REPLY 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 12,995 words, and Appellant has concurrently moved this Court to extend the word limit for this brief to 13,000 words.

Finally, I hereby certify that I have read the **APPELLANT'S REPLY 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 October 20, 2021, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY 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/ Maricris Williams
An Employee of SNELL & WILMER L.L.P.

4882-1811-4560