IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator for the Federal National Mortgage Association,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT, Clark County, Nevada; and THE HONORABLE NADIA KRALL, District Judge,

Respondents,

and

WESTLAND LIBERTY VILLAGE, LLC; WESTLAND VILLAGE SQUARE, LLC; and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Real Parties in Interest.

Electronically Filed
May 27 2021 12:49 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 82666

ANSWER TO PETITION FOR WRIT OF PROHIBITION

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VERIFICATION

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

DATED this 27th day of May, 2021.

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

RULE 26.1 DISCLOSURE

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

DATED this 27th day of May, 2021.

CAMPBELL & WILLIAMS

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I. INTRODUCTION

On November 20, 2020, the district court enjoined Federal National Mortgage Association ("Fannie Mae") from pursuing foreclosure proceedings and related adverse actions arising out of an utterly defective default notice that would have created dire and irreversible consequences for Westland Real Estate Group and its unblemished business record. Since that date, Fannie Mae has engaged in relentless attempts to avoid compliance with the injunction.[1] Having failed at every turn, Fannie Mae has now called for the cavalry in the form of its government conservator, Federal Housing Finance Agency ("FHFA"), to mount a last-ditch effort to unwind the district court's order. This writ proceeding and a flurry of motion practice in the Related Action followed FHFA's belated appearance on the scene.

FHFA's primary contention is that 12 U.S.C. § 4617(f) of the Housing and Economic Recovery Act ("HERA")—which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator"—prohibits the district court's grant of injunctive relief against Fannie Mae in the Related Action. But even if FHFA were correct on the merits, HERA's

[1] The injunction was entered in District Court Case No. A-20-819412-B, which Fannie Mae appealed to this Court in Case No. 82174 (the "Related Action"). Since that time, Fannie unsuccessfully moved to stay enforcement of the injunction pending appeal on two separate occasions in the district court, and also moved this Court to stay compliance therewith. The Court entered an order denying the bulk of Fannie Mae's requested relief on February 11, 2021. Fannie Mae thereafter moved for reconsideration of the Court's order, which the Court denied on May 25, 2021.

Anti-Injunction Clause[2] does not limit the district court's *jurisdiction*, thus making writ relief improper. The Anti-Injunction Clause, moreover, only applies when FHFA acts within the scope of its conservatorship powers, but the federal statute under which FHFA operates "does not authorize the breach of contracts." *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997). FHFA's reliance on the Anti-Injunction Clause also misses the mark because the agency has made no showing that it took any affirmative action or gave Fannie Mae any directive that would be affected by the preliminary injunction. Indeed, FHFA had absolutely nothing to do with this dispute until it filed the instant Petition, and only sought to intervene in the Related Action several months after the injunction was entered.

FHFA's secondary arguments are even further afield, and likewise premised on misleading depictions of the district court's order. FHFA is in privity with Fannie Mae and therefore may be bound by the preliminary injunction in this case. Similarly, FHFA argues that Section 5(o) of the order is void for vagueness, but then conveniently ignores both the correct legal standard governing vagueness challenges as well as the highly specific language in the subject provision. FHFA's Petition should be denied for all these reasons.

[2] Westland will refer to 12 U.S.C. § 4617(f) as the "Anti-Injunction Clause."

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether HERA's Anti-Injunction Clause deprives the district court of jurisdiction to enjoin Fannie Mae from violating Westland's contractual rights?

2. Whether the district court's preliminary injunction impermissibly enjoined FHFA from violating Westland's contractual rights even though FHFA stands in the shoes of Fannie Mae and is now a party to proceedings in the district court?

3. Whether Section 5(o) of the district court's injunction order is void for vagueness to the extent it prohibits "any adverse action against any Westland entity" where that same provision expressly provides specific examples of such "adverse actions"?

III. COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

Because FHFA's "Relevant Factual Background" begins with Fannie Mae's commencement of the Related Action—likely because FHFA had no involvement whatsoever in the events preceding the litigation—we provide the Court with the rest of the story before turning to the relevant procedural history.

A. Westland Purchases The Properties.

On August 29, 2018, Westland Liberty Village, LLC and Westland Village Square, LLC (collectively "Westland") purchased adjoining multi-family communities located at 4870 Nellis Oasis Lane and 5025 Nellis Oasis Lane, Las

Vegas, Nevada (the "Properties") for $60.3 million. SA01635.[3] The Westland entities are affiliated with the decades-old Westland Real Estate Group, which employs approximately 500 people, and owns and operates over 38 communities in the Las Vegas valley. *Id*. In more than 50 years of operation, the Westland Real Estate Group and its affiliates have never defaulted on a loan. *Id.*

As a condition of the purchase, Westland assumed loans of $29,000,000 and $9,366,000 (the "Loans") that were issued to the prior owner by Grandbridge Real Estate Capital, LLC ("Grandbridge"), the successor to SunTrust Bank, and assigned to Fannie Mae (other than for loan servicing) before Westland's purchase. *Id.*; SA00003-SA00145; SA00207-SA00407; SA01965. Westland paid the remainder of the purchase price in cash such that Westland has well over $20 million of equity in the Properties. *Id*. At the time of purchase, Fannie Mae reaffirmed the sufficiency of the combined total Repair Reserve and Replacement Reserve balances of $143,319.30 based on a property condition assessment ("PCA") performed by CBRE. SA01920-SA01926; SA01932; SA1942; SA1966. There is no dispute that Westland satisfied this reserve funding.

B. Westland Rehabilitates The Properties At Great Expense.

Notably, Fannie Mae agreed to the reserve amounts at the time of purchase with knowledge that the Properties had been in a distressed condition for years due

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

to poor management, high levels of crime, and physical disrepair. SA01638-SA01639; SA01642-SA01649; SA01966-SA01967; SA01970. The Properties, in fact, received a nuisance abatement complaint from Las Vegas Metropolitan Police Department due to high crime levels while the Properties were in escrow. *Id.* For that reason, Westland advised Grandbridge prior to closing that a decline in occupancy would inevitably occur as evictions were necessary to address the high crime rate and the prior owner's poor management. *Id.*

From the date of purchase in August 2018 through September 2019, Westland invested $1.8 million solely on capital improvements, spent another $1.57 million on private security, took measures to clean up crime, added a dedicated 32-employee staff, and began improving integration with local community services. SA01638-SA01639. Westland's efforts in this regard received plaudits from multiple leaders and government bodies in the community, including a Clark County Commissioner, the Nevada State Apartment Association, and the Las Vegas Metropolitan Police Department. *Id.*

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

In mid-2019, Grandbridge, acting on behalf of Fannie Mae, demanded a PCA to which it was not entitled under the loan agreements. Fannie Mae acknowledged in the district court that this request was based on a reduced occupancy rate—which, again, only resulted from Westland's attempts to improve the Properties—when the

loan agreements only allowed a PCA due to physical deterioration of the Properties. SA00036; SA00041; APP0209. The contract language notwithstanding, Grandbridge retained an out-of-state vendor, f3, Inc. ("f3"), to perform a new PCA in September 2019 even though CBRE, a local vendor, had performed a PCA at the time of purchase just a year earlier. APP0054-APP0055.

On October 18, 2019, Fannie Mae (through Grandbridge) served a Notice of Demand (the "Demand") based on alleged maintenance deficiencies identified in f3's PCA reports. The Demand required Westland to deposit $2.85 million in the Replacement Reserve Account. SA01242-SA01255. Because Fannie Mae's "assessment" effectively meant the condition of the Properties deteriorated by $2.85 million in one year despite Westland's capital expenditures of $1.8 million during the same period, it was readily apparent that f3 artificially inflated the PCA by using different standards than those used by CBRE months earlier. Indeed, the PCA at the time of purchase determined that vacant units required routine maintenance without reserves whereas f3 did not categorize the same type of repair as routine maintenance and instead required $1.9 million be held in reserve for vacant units. SA01297-SA01619; *c.f.* APP0049-0063; SA00490; SA00801. By adopting this approach, f3 caused the demanded reserves to skyrocket from $143,319.30 to $2.85 million even though the condition of the Properties had dramatically improved since the initial PCA.

The loan agreements expressly prohibit Fannie Mae from making increased reserve demands in these circumstances. ***First***, "adjustment to deposits" for reserve schedules are permitted under Section 13.02(a)(3), but only at the time a loan is renewed or transferred, *i.e.*, at the time of purchase in August 2018 when Fannie Mae reduced the reserves. SA00071-SA00072.

Second, Section 13.02(a)(4) only permits increases in Required Repairs and Required Replacements that are explicitly listed in the loan schedules when the loan is issued or assumed as well as Additional Lender Repair or Additional Lender Replacements that are "*repairs of the type listed* on the Required Repair Schedule" or "Required Replacement Schedule" but not specifically identified. SA00072; SA00095 (emphasis added). In this case, the scheduled items only identified a handful of minor repairs with a total value of $143,319.30 whereas Fannie Mae's $2.85 million demand requested wholesale changes far beyond that limited scope. SA01920-SA01926; SA01932; SA01942; SA01966.

Third, Section 6.01(d) states the "condition of the Mortgaged Property" only applies to physical onsite conditions, including "the construction or condition of the Mortgaged Property or . . . any structural or other material defect" and "any damage other than damage which has been fully repaired." SA00036. There is no mention of occupancy levels. Similarly, under Section 6.03(c), Fannie Mae can only obtain a PCA when "the *condition* of Mortgaged Property has *deteriorated* (*ordinary wear*

and tear excepted) since the Effective Date" of the loan. SA00041 (emphasis added). Fannie Mae, however, did not—and could not—produce any evidence establishing deterioration since the effective date of the loans as opposed to deterioration that already existed before Westland purchased the Properties. APP0191-APP0192. Put another way, the f3 report on which Fannie Mae's Demand was premised did not account for the baseline condition of the Properties at the time of purchase.

Fourth, assuming *arguendo* the PCA was properly conducted and the Demand was related to a condition listed in a schedule, Fannie Mae improperly failed to provide Westland an opportunity to complete identified repairs as required by Section 6.02(b)(3)(B) & (C) before mandating a multi-million dollar deposit. SA00038-SA00039; *c.f.* SA01242-SA01255. Additionally, the reserve increase for required repairs was duplicative of the reserve increase for monthly replacement deposits attributable to deferred maintenance. SA01620-SA01625.

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

Westland responded to the Demand on November 13, 2019 by objecting on the foregoing bases, reaffirming that it had improved the Properties' condition through more than $1.8 million of renovations, and noting that Grandbridge failed to provide an opportunity to perform the alleged necessary repairs. SA01620-SA01625. Westland then attempted to resolve the dispute with Fannie Mae by providing its Strategic Improvement Plan for the Properties, which discussed

Westland's ongoing plans to renovate the Properties, provided timelines for remaining renovations to be made, and addressed deficiencies identified by f3 that had already been corrected. SA01297-SA01619; SA01626-SA01632.

Westland's efforts to remedy the situation were summarily rebuffed when Fannie Mae's counsel forwarded a boilerplate Notice of Default and Acceleration of Note ("Default") on December 17, 2019 rejecting Westland's good-faith proposal and ignoring Westland's improvements to the Properties. SA01256-SA01264. Nearly seven months later, on July 14, 2020, Fannie Mae filed the Notice of Default and Intent to Sell alleging a default of the Loan Agreements because Westland did not deposit nearly $3 million into the Replacement Reserve Escrow Account upon Fannie Mae's unilateral demand. Incredibly, Fannie Mae took this action without seeking to re-inspect the Properties even though Westland had (i) invested an additional $1.7 million in capital improvements during the ten months since the September 2019 PCA, and (ii) completed a large number of work orders to prepare vacant units for rental. SA01636.[4] The prejudice to Westland is breathtaking.

E. Bad Faith Loan Servicing

Besides pursuing the deficient Default based on an improper PCA, Fannie

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

Mae and Grandbridge routinely engaged in unscrupulous conduct when servicing the Loans. For example, contrary to Fannie Mae's prior assertions that Westland failed to disclose any improvements or repairs prior to f3's PCA or improperly denied access to the Properties, the evidence demonstrates that Westland made numerous reserve reimbursement requests that attached detailed support for work performed before and after Fannie Mae demanded a PCA in mid-2019. SA01967-SA01968. Grandbridge, however, repeatedly failed to respond to Westland's requests, did not process requests in a timely manner, and refused to release Westland's funds. *Id.* Moreover, Fannie Mae did not seek access to the Properties between the time of f3's PCA and the filing of the Related Action. SA01636.

Additionally, in February 2020, Grandbridge (without notice) stopped sending loan statements and auto-debiting Westland's monthly debt service payments, which forced Westland to guess at its floating monthly payments at the risk of a financial default. SA01635-SA01637. To ensure that a miscalculation did not result in a default, Westland began mailing its monthly payments plus an additional ten percent (10%). SA01636; SA01947-SA01963. As a result, Westland had overpaid its mortgage by more than $550,000 since February 2020. *See infra* at III.I.

The most egregious example of Fannie Mae's and Grandbridge's misconduct was their refusal to release $951,407.55 of insurance funds from the Restoration

Reserve earmarked for reconstructing two fire-damaged buildings at the Liberty Property. Westland completed the work at its sole expense and met all conditions for the release of Restoration Reserve funds well before the spurious Default. SA01639. Fannie Mae, though, withheld all of the insurance funds on grounds it had no obligation to release funds after a self-proclaimed event of default has occurred. Setting aside that no default occurred in the first place, Westland had requested reimbursement of insurance funds on October 18, 2019—two months before Fannie Mae noticed the purported default on December 17, 2019. SA01999-SA02019.

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

Fannie Mae filed the Related Action on August 12, 2020, and promptly moved for the appointment of a receiver.[5] In response, Westland filed its counterclaim and moved for a preliminary injunction (supported by a fully-developed record of over 3,200 pages of exhibits and three sworn affidavits) to stop all foreclosure proceedings, to negate the effects of the wrongful Default, and to restore Westland's good name in the industry. On October 13, 2020, the district court held a lengthy hearing, denied Fannie Mae's request for a receiver, and granted Westland's

[5] Fannie Mae sought expansive receivership powers as evidenced by its 17-page proposed order listing 34 different "duties, rights, and powers" as well as eight separate acts that Westland would be enjoined from performing. SA01278-SA01296.

counter-motion for a preliminary injunction.

FHFA implies that Westland somehow duped the district court into signing an order that went beyond the relief sought or ordered at the hearing. *See* Pet. at 4-5.[6] The 52-page transcript, however, establishes otherwise as Judge Earley repeatedly expressed shock at the positions espoused by Fannie Mae, stating on numerous occasions that Fannie Mae's position on holding the insurance reserve funds "makes no sense," that Fannie Mae was acting improperly by assuming a default, that Westland had performed under the contract and had "done a lot," and that the district court was "stopping the Notice of Default" and anything "flowing" therefrom. APP0443-APP0444; APP0452-APP04554; APP0461-APP0467.

The parties submitted competing orders to the district court along with the hearing transcript and voluminous letters setting forth each side's positions as to content. SA02020-SA02026. The district court adopted Westland's proposed order in its entirety notwithstanding FHFA's present contention that the order exceeds the scope of the district court's ruling at the hearing. *See Mortimer v. Pacific States Savings & Loan*, 62 Nev. 142, 153, 145 P.2d 733, 736 (1944) ("[The formal written order] must be taken as the best evidence of the court's decision. The fact that it was prepared by appellant is of no consequence. A court is presumed to read and know

[6] In doing so, FHFA is merely parroting arguments advanced by Fannie Mae that have been uniformly rejected by the district court and this Court.

what it signs.").

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

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

After appealing the injunction order, Fannie Mae moved this Court to stay its enforcement. On February 11, 2021, the Court issued an order granting Fannie Mae limited relief. Specifically, the Court stayed enforcement of the provisions requiring Fannie Mae to remove the notices of default and election to sell from the Properties' titles pending resolution of the appeal in the Related Action. It otherwise denied the motion and left the remainder of the injunction order in place, thereby prompting Fannie Mae to seek reconsideration of the Court's order. The Court denied the reconsideration motion on May 25, 2021.

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

While expansive in its review of the case law interpreting HERA's Anti-Injunction Clause, FHFA's Petition is conspicuously silent regarding its actions that

purportedly contributed to Fannie Mae's mistreatment of Westland—*i.e.* FHFA's supposed exercise of powers as conservator. That is because FHFA had ***no*** role in the underlying dispute between Fannie Mae and Westland until it moved to intervene in the Related Action, and sought writ relief in late March 2021 after the injunction had been in place for months and had, in fact, been preliminarily reviewed by this Court as part of Fannie Mae's stay motion.

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

I. Developments In The District Court Since FHFA Commenced The Instant Writ Proceeding.

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

[7] Westland objects in advance to any attempt by FHFA to submit new evidence regarding a directive, policy or any other alleged involvement by FHFA in the underlying dispute. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671, 262 P.3d 705, 715 n.7 (2011) ("We decline to consider this argument because Francis did not cogently raise the issue in his opening brief; rather, he raised it for the first time in his reply brief, thereby depriving Wynn of a fair opportunity to respond.").

Restoration Reserve, Westland moved to compel Fannie Mae's compliance with the injunction in the district court. SA02404SA02491. On the eve of the May 6, 2021 hearing, Fannie Mae finally disbursed $905,599.68 to Westland representing the amount of insurance proceeds associated with the repairs of the fire-damaged buildings at the Properties. SA02512-SA02528. Additionally, Fannie Mae remitted $550,748.78 to Westland as reimbursement for the amounts it paid in excess of its monthly loan obligations due to Fannie Mae's and Grandbridge's bad faith loan servicing. *Id*.

Westland submits that Fannie Mae's newfound willingness to comply with the injunction and disburse Westland's funds arose from the fact that, in April 2021, Fannie Mae produced two new PCA reports for the Properties that were conducted at Fannie Mae's behest on March 4-5, 2021. SA02128-SA02403. The new PCA reports established that the appropriate amount for Westland's Replacement and Repair Reserve Accounts is, at best, a mere $436,005—which is more than $2.4 million less than the demand that led to Fannie Mae declaring default and commencing foreclosure proceedings against Westland. SA02146; SA02285. Indeed, even after recently releasing nearly $1.5 million, given that the Repair and Replacement Reserve Accounts for the Properties currently contain $1,001,610.30, there is no question that Westland's Repair and Replacement Reserve Accounts are overfunded by hundreds of thousands of dollars. SA02504-SA02511. In short, the

new PCA reports commissioned by Fannie Mae confirm that it lacked any justifiable basis to declare default and commence foreclosure proceedings in the first place, which renders FHFA's belated intervention into this dispute even more inexplicable and improper.

IV. REASONS THE WRIT SHOULD NOT ISSUE

A writ of prohibition is an appropriate remedy only when a district court acts in excess of its jurisdiction. Even if FHFA were correct that the preliminary injunction entered below violates the Anti-Injunction Clause, the district court did not exceed its jurisdiction because the Clause only limits available remedies; it is not a jurisdictional statute under modern U.S. Supreme Court precedent. Further, the preliminary injunction does not violate the Anti-Injunction Clause as the latter cannot be used to defeat injunctive relief in a breach of contract case. Nor does anything in the record indicate that FHFA has exercised any conservatorship power that the preliminary injunction would restrain, which again renders the Anti-Injunction Clause inapplicable. Finally, the scope of the district court's injunction is entirely appropriate under the circumstances presented, and Section 5(o) of the injunction order is not void for vagueness because the language is not so uncertain and indefinite as to make compliance impossible.

V. ARGUMENT

A. Regardless Of The Merits Of FHFA's Arguments, The Writ Should Not Issue Because The District Court Acted Within Its Jurisdiction.

A writ of prohibition is a discretionary remedy that is only available when "a district court acts without or in excess of its jurisdiction." *Nev. State Bd. of Architecture v. Eighth Jud. Dist. Ct.*, 135 Nev. 375, 377, 449 P.3d 1262, 1264 (2019). The Court need not delve deeply into the merits of FHFA's challenge to the district court's preliminary injunction because this prerequisite for issuance of the writ is not satisfied.

Although FHFA insists that the Anti-Injunction Clause is jurisdictional, the better view is that this provision only limits the *remedies* available for certain claims against FHFA. In *Perry Capital v. Mnuchin*, 864 F.3d 591, 604 (D.C. Cir. 2017), the FHFA's Anti-Injunction Clause defense was treated as a "merits" issue. *See also, e.g.*, *Roberts v. FHFA*, 889 F.3d 397, 403 (7th Cir. 2018). That is the correct approach under controlling U.S. Supreme Court precedent, because a federal statutory provision must be "clearly labeled jurisdictional" to be jurisdictional. *Reed v. Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166, 130 S.Ct. 1237, 1247 (2010); *accord Sebelius v. Auburn Regional Medical Ctr.*, 568 U.S. 145, 153–55, 133 S.Ct. 817, 824-25 (2013) (federal statutes are non-jurisdictional absent "a clear statement" to the contrary).

The Anti-Injunction Clause's plain terms address the *remedies* available against FHFA without purporting to limit any court's jurisdiction: "[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver." 12 U.S.C. § 4617(f). The absence of any express jurisdictional label in the Anti-Injunction Clause is particularly significant because, elsewhere in the same statute, Congress used such labels to restrict the claims that courts may hear. *See, e.g.*, 12 U.S.C. § 4617(b)(11)(D) (providing "no court shall have jurisdiction" over certain claims during receivership); *id.* § 4623(d) (providing "no court shall have jurisdiction" to affect FHFA's capital classifications). When Congress uses jurisdictional labels in some provisions of a statute but declines to do so in others, the variation in usage must be given meaning.

To be sure, a handful of courts have characterized the Anti-Injunction Clause or the parallel provision of FIRREA, 12 U.S.C. § 1821(j), as a limitation on the federal courts' jurisdiction. *See Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 622 (11th Cir. 1996); *Telmatics Intl'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 704 (1st Cir. 1992). But none of those cases applied the standard the Supreme Court now uses to determine whether a federal statute limits jurisdiction, and most of them predate a 1998 decision in which the U.S. Supreme Court began using the word "jurisdiction" with far greater precision. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90–93,

118 S.Ct. 1003, 1010-11 (1998). Moreover, nothing turned on the Anti-Injunction Clause's jurisdictional status in any of the cases FHFA cites, and "drive-by jurisdictional rulings" of this sort "have no precedential effect." *Id.* at 91.

The non-jurisdictional nature of the Anti-Injunction Clause alone is a sufficient reason to deny the petition. *See* NRS 34.320 (writ available when district court acts "without or in excess of" its jurisdiction); *First Nat'l Bank of Nev. v. Eighth Judicial Dist. Ct.*, 75 Nev. 77, 81, 335 P.2d 79, 81 (1959) (on petition for writ of prohibition, "decisional considerations are limited to matters of jurisdiction and do not include non-jurisdictional error"). *Sweeping Services of Texas, LP v. Eighth Judicial Dist. Ct.*, 2011 WL 1045105 (Nev. Mar. 21, 2011), an unpublished disposition cited by FHFA in violation of this Court's rules, is not to the contrary. The Court in that case treated *state* workers' compensation statutes as restricting the district court's jurisdiction, and it did not purport to apply the test to determine whether a *federal* statute restricts jurisdiction.

B. FHFA Cannot Use HERA's Anti-Injunction Clause To Avoid Equitable Remedies In Breach Of Contract Cases.

The Anti-Injunction Clause only bars equitable relief that would "restrain or affect the exercise of powers or functions of [FHFA] as conservator." 12 U.S.C. § 4617(f). Consistent with the statute's plain meaning, every federal appellate judge to interpret this provision has agreed that it does not prohibit injunctive relief when FHFA acts "beyond the scope of its conservator power." *Cnty. of Sonoma*, 710 F.3d

at 992; *see also, e.g.*, *Perry Capital*, 864 F.3d at 606; *Roberts*, 889 F.3d at 402; *Jacobs v. FHFA*, 908 F.3d 884, 889 (3d Cir. 2018). Thus, the district court's preliminary injunction prohibiting Fannie and related entities from violating Westland's contract rights does not run afoul of the Anti-Injunction Clause unless FHFA can show that it has the statutory authority as conservator to breach contracts. FHFA enjoys no such power.

Although FHFA cites a litany of cases in which it has successfully invoked the Anti-Injunction Clause, it fails to mention the case most directly on point. In *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997), the Ninth Circuit held that the materially identical anti-injunction provision that applies to the FDIC allows equitable remedies in contract cases because the statute "does not authorize the breach of contracts." This Court favorably cited *Sharpe* in *CML-NV Grand Day, LLC v. Grand Day, LLC*, 134 Nev. 925, 430 P.3d 530, 2018 WL 6016683 (Nov. 15, 2018) (unpub. disp.), and *Sharpe*'s reasoning applies with full force here. Like the statute at issue in *Sharpe*, HERA includes a subsection that specifically delineates the timing and procedure the conservator must follow to repudiate contracts. *Compare* 12 U.S.C. § 4617(d), *with* 12 U.S.C. § 1821(e). "Although the statute clearly contemplates that [FHFA] can escape obligations of contracts, it may do so only through the prescribed mechanism." *CML-NV Grand Day, LLC*, 2018 WL 6016683, at *2 (quoting *Sharpe*, 126, F.3d at 1155). FHFA exceeds its

conservatorship authority when it breaches contracts without following that mechanism, and in such cases the Anti-Injunction Clause does not apply.

Sharpe's reading of the statutory text is buttressed by several additional considerations. Courts apply a presumption against federal preemption of state law, *see Rolf Jensen & Associates v. District Court*, 128 Nev. 441, 446, 282 P.3d 743, 746 (2012), and to hold that FHFA is authorized by statute to breach contracts would preempt out of existence a broad swath of state contract law. Nothing in the statute's text even hints that Congress intended to displace state contract law except when FHFA exercises its limited authority to repudiate contracts, and the Supreme Court has held the materially identical statutory regime that applies to the FDIC leaves state law in place "except where some provision in the extensive [federal statutory] framework . . . provides otherwise." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 2054 (1994). *Sharpe* also finds support in the canon of constitutional avoidance, for "to hold that the federal government could simply vitiate the terms of existing assets, taking rights of value from private owners with no compensation in return, would raise serious constitutional issues" under the Fifth Amendment's Takings Clause. *Waterview Management Co. v. FDIC*, 105 F.3d 696, 700 (D.C. Cir. 1997).

Under FHFA's own regulations, the agency's authority to repudiate contracts expired 18 months after it placed Fannie Mae into conservatorship in September

2008. *See* 12 C.F.R. § 1237.5(b). With FHFA's limited statutory authority to repudiate contracts having long ago expired, the preliminary injunction issued by the district court, which was grounded in Westland's contractual rights, was entirely consistent with the Anti-Injunction Clause.

Anticipating this argument, FHFA cites cases in which federal courts declined to enjoin the FDIC from transferring the assets of failed banks despite claims that the challenged transfers would breach contracts. *See* Pet. at 10–11 (citing *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994) and *RPM Invs.*, 75 F.3d at 620–21). But those cases are distinguishable from both this case and *Sharpe* because they turned on a separate statutory provision that authorizes the FDIC to transfer the assets of a failed bank during receivership "without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G); *see also id.* § 4617(b)(2)(G) (materially identical provision of HERA). Because nothing in the preliminary injunction enjoins FHFA from transferring the assets of Fannie Mae, this case is controlled by *Sharpe* rather than cases such as *Volges* and *RPM Investors*.[8]

[8] Cases cited by FHFA concerning changes to stock purchase agreements such as *Perry Capital* and *Roberts* are even further afield, as they did not seek equitable relief based on alleged breaches of contract. *See Jacobs v. FHFA*, 2017 WL 5664769, at *5 (D. Del. Nov. 27, 2017) (distinguishing *Sharpe* on this basis). Cases about FHFA's directive against purchasing mortgages encumbered by clean energy liens are likewise inapposite because they did not involve alleged contractual breaches. *See, e.g.*, *Cnty. of Sonoma*, 710 F.3d at 987; *Leon Cnty. v. FHFA*, 700 F.3d 1273 (11th Cir. 2012); *Town of Babylon v. FHFA*, 699 F.3d 221 (2d Cir. 2012).

In other litigation, FHFA has attempted to distinguish *Sharpe* by relying on out-of-context snippets from other Ninth Circuit cases to suggest that *Sharpe* "is not controlling outside of its limited context," *Meritage Homes of Nevada, Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014), and has been "limited to its particular facts," *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 744 F.3d 1124, 1136–37 (9th Cir. 2014). But those statements concern *Sharpe*'s discussion of handling administrative claims during receivership—an issue not relevant in this (purported) conservatorship case. Thereafter, the Ninth Circuit reaffirmed "*Sharpe*'s reasoning as to whether FIRREA authorizes the unrestrained breach of contract," *Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136–37 (9th Cir. 2015), and this Court correctly followed *Sharpe* in *CML-NV Grand Day, LLC*.

C. The Preliminary Injunction Does Not Violate HERA's Anti-Injunction Clause Because FHFA Has Never Purported To Exercise Any Of Its Conservatorship Powers In This Matter.

"[F]or section 4617(f) to bar judicial relief, [FHFA] must have ***acted*** . . . pursuant to its 'powers or functions'[.]" *Roberts*, 889 F.3d at 402 (emphasis added); *Suero v. Fed. Home Loan Mortg. Corp.*, 123 F. Supp. 3d 162, 171 (D. Mass. 2015) ("It is undisputed that courts have applied HERA's anti-injunction clause only where FHFA took clear, decisive and affirmative action—including issuing a formal directive to [Fannie Mae or Freddie Mac]."). The Anti-Injunction Clause does not

apply because nothing in the record indicates that FHFA has taken any affirmative action or issued a directive to Fannie Mae in this matter.

In *Suero v. FHFA*, the court ruled the Anti-Injunction Clause "would not apply" to a challenge to Freddie Mac policies under state law unless "FHFA directed [Freddie] to adopt those policies." 123 F. Supp. 2d at 168–69. Although the *Suero* court ultimately concluded after a factual inquiry that FHFA had issued a directive triggering the Anti-Injunction Clause, there is no evidence of any similar FHFA directive or affirmative action here. There is no allegation by FHFA or, more importantly, substantive evidence in the record demonstrating that Fannie Mae demanded increased reserve amounts from Westland, declared default, and commenced foreclosure proceedings pursuant to a directive or policy that was issued or promoted by FHFA. Nor is there any evidence in the voluminous record to support that FHFA had any involvement in the events preceding this lawsuit.

FHFA's lack of involvement in this dispute makes sense given that FHFA delegated responsibility for "normal business activities and day-to-day operations" back to Fannie Mae and Freddie Mac (the "Enterprises") shortly after placing them in conservatorship in 2008. SA02033. Notably, the responsibilities delegated to the Enterprises by FHFA include, among other things, "decisions about individual mortgages, property sales, or foreclosures." *Id.*[9] FHFA likewise "lacks statutory

[9] The FHFA's caselaw addressing FDIC and RTC anti-injunction provisions is

authority to supervise activities by mortgage servicers" such as Grandbridge. SA02074. FHFA cannot credibly claim that it exercised its powers as conservator in connection with the punitive measures Fannie Mae exacted on Westland when FHFA delegated the same responsibilities at issue here to the Enterprises more than a decade ago.

Unlike *Suero* and many of the other cases FHFA cites, this case does not implicate a broader policy enforced by the Enterprises at FHFA's behest. Moreover, FHFA has not reassumed responsibility over "decisions about individual mortgages, property sales, or foreclosures," and certainly cannot do so to punish a single borrower without exceeding the scope of FHFA's conservatorship authority and raising a host of constitutional issues. *Suero*, 123 F. Supp. 3d at 174.

Indeed, while FHFA may claim the preliminary injunction interferes with its ability to conserve the assets of Fannie Mae, this dispute arises out of Fannie's Mae's unilateral demands for increased reserves rather than a monetary default as Westland actually overpaid its mortgage by more than $550,000 since this dispute began.

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inapposite. Those cases uniformly involve individual properties, transactions and assets over which the FDIC and RTC were actively exercising receivership functions as opposed to "acting" through a failed institution that was delegated independent responsibility over such affairs by its own conservator. *See, e.g.*, *Telematics*, 967 F.2d 703; *Volges*, 32 F.3d 50; *Ward v. RTC*, 996 F.2d 99 (5th Cir. 1993); *Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239 (11th Cir. 2010); *RPM Invs.*, 75 F.3d 618; *Furgatch v. RTC*, 1993 WL 149084 (N.D. Cal. Apr. 30, 1994); *Bobick v. Cmty. & S. Bank*, 743 S.E.2d 518 (Ga. Ct. App. 2013).

More importantly, the new PCA reports commissioned by Fannie Mae demonstrate that Westland's Repair and Replacement Reserve Accounts are now overfunded by hundreds of thousands of dollars such that FHFA cannot seriously contend that Fannie Mae's assets are at risk. Thus, this case represents the type of situation discussed by the *Suero* court where FHFA's intervention can be "challenged as failing to promote the Agency's mandate to 'preserve and conserve the assets and property of [Fannie Mae] or as exceeding the scope of FHFA's authority as Conservator, among other grounds." *Suero*, 123 F. Supp. 3d at 174.

Lastly, if the Anti-Injunction Clause was actually a viable defense to equitable relief in the Related Action, Fannie Mae surely would have raised such a knockout argument at the outset when opposing Westland's motion for preliminary injunction or—at least—in the voluminous motion practice that challenged the injunction thereafter. That it took multiple rounds of briefing, a new paternalistic party, and a new writ proceeding to raise this argument demonstrates it is nothing more than an afterthought.

D. The Preliminary Injunction Complies with Nevada Law.

Largely as an aside to its federal arguments, FHFA asserts the preliminary injunction is inconsistent with Nevada law for two faulty reasons.

First, FHFA argues the district court improperly purported to "bind parties not before it" by extending the injunction beyond Fannie Mae to those "exercising or

having control over the affairs of Fannie Mae." *See* Pet. at 12. But as conservator, FHFA "stands in the shoes" of Fannie Mae. *O'Melveny & Meyers*, 512 U.S. at 86–87, 114 S.Ct. at 2054. FHFA and Fannie Mae are plainly in privity with each other, which is sufficient to extend the injunction to FHFA under long-settled precedent. *See Bowler v. Leonard*, 70 Nev. 370, 376, 269 P.2d 833, 836 (1954); *Ahlers v. Thomas*, 24 Nev. 407, 56 P. 93, 94 (1899); NRCP 65(d)(2) (authorizing injunctions against "persons who are in active concert or participation with" the parties). This is not a case like *Levin v. Second Jud. Dist. Ct.*, 133 Nev. 1043, 403 P.3d 685 (2017) where the district court purported to bind a nonparty over which it lacked personal jurisdiction.

Second, FHFA argues that Section 5(o) of the injunction is impermissibly vague. Pet. at 12–14. This Court recently rejected a similar argument by Fannie Mae seeking relief from the same preliminary injunction provision as "overbroad." Order in Related Action (dated May 25, 2021), at 2. As this Court has already explained, Section 5(o) of the preliminary injunction "merely places the parties in the same position as if the alleged default had not occurred." *Id.*

Notably, in attacking Section 5(o) of the injunction order as impermissibly vague, FHFA neither provides the Court with the correct legal standard nor addresses the complete language of the provision at issue. Beginning with the former, "pursuant to NRCP 65(d), an injunction is void where its terms are vague,

ambiguous, and so uncertain as to be impossible of compliance." *Housewright v. Simmons*, 102 Nev. 610, 612, 729 P.2d 499, 501 (1986).

Turning to the plain language of the injunction order, it is apparent that Section 5(o) is not "impossible of compliance." Contrary to FHFA's assertions, Section 5(o) includes a list of specific examples of "adverse actions," including "placing Westland on 'a-check,'[10] adding a fee to any loan quoted or adding an interest rate surcharge on such applications, based on the purported default that arose from failing to deposit the additional $2.85 million into escrow as requested." APP0381. Fannie Mae is certainly capable of complying with the straightforward terms of Section 5(o), which merely require Westland to be treated like any other applicant without a preexisting default.

Finally, FHFA contends that the term "any Westland entity" is impermissibly vague and could be "any given business operating in Nevada or anywhere else." *See* Pet. at 14. This is silly. First, the term "Westland" in the name is strong indicia that the applicant is part of the similarly-named Westland Real Estate Group. Second, Fannie Mae has acknowledged in the district court it knows exactly which active and inactive loans are affiliated with Westland entities. SA02097-SA02101. Moreover, any new or preexisting Westland entity would be required to disclose its affiliation

[10] "A-check" status effectively blacklists a borrower and its affiliates with Fannie Mae, and triggers increased mortgage rates with other lenders.

with Westland Real Estate Group—including the existence of the default at issue—in a loan application to Fannie Mae. To that end, it speaks volumes about the merit of FHFA's vagueness argument that Fannie Mae has never claimed the term "Westland entity" is "impossible of compliance" despite seeking to unwind Section 5(o) on multiple occasions, including in this Court.

VI. CONCLUSION

For the reasons set forth herein, Westland respectfully submits that the Court should deny FHFA's petition for writ of prohibition in its entirety.

DATED this 27th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 28.2, I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, double spaced, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,771 words.

I further certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(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 reply does not conform with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 27th day of May, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 27th day of May 2021, I caused true and correct copies of the foregoing **Answer to Petition for Writ of Prohibition** to be delivered to the following counsel and parties:

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