IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator for the Federal National Mortgage Association, and FEDERAL NATIONAL MORTGAGE ASSOCIATION, Petitioners, vs. EIGHTH JUDICIAL DISTRICT COURT, Clark County, Nevada, and THE HONORABLE MARK DENTON, Judge Respondents, WESTLAND LIBERTY VILLAGE, LLC; WESTLAND VILLAGE SQUARE, LLC; and FEDERAL NATIONAL MORTGAGE ASSOCIATION Real Parties in Interest.	Case No. 84573

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert, Esq. (SBN 11728)
FENNEMORE CRAIG, P.C.
7800 Rancharrah Parkway
Reno, Nevada 89511

Michael A.F. Johnson, Esq.
ARNOLD & PORTER
KAYE SCHOLER, LLP
601 Massachusetts Ave. NW
Washington, DC 20001
Admitted pro hac vice in underlying district court action

Attorneys for Petitioner Federal Housing Finance Agency in its capacity as Conservator for the Federal National Mortgage Association

Kelly H. Dove (#10569)
Nathan G. Kanute (#12413)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway,
Suite 1100
Las Vegas, NV 89169
Attorneys for Federal National Mortgage Association

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INTRODUCTION

The Federal Housing Finance Agency (FHFA), as Conservator for the Federal National Mortgage Association (Fannie Mae), and Fannie Mae respectfully petitioned this Court for a writ of mandamus directing the Eighth Judicial District Court to reverse its ruling that demands for punitive damages and attorneys' fees may proceed against Fannie Mae while in conservatorship. *See* Pet. Br. In its Answer to the writ petition, Westland argues that (1) federal law permits private parties to seek punitive damages and attorney's fees from Fannie Mae while in FHFA's conservatorship, Ans. Br. 12-21; and (2) the Petition fails to satisfy the standard for mandamus, *id.* at 7-12.

Westland is incorrect as a matter of law on both points, and the Court should therefore issue a writ mandating the dismissal of Westland's demands for punitive damages and attorney's fees.

ARGUMENT

I. FEDERAL LAW PRECLUDES WESTLAND'S DEMANDS FOR PUNITIVE DAMAGES AND ATTORNEYS' FEES

Westland insists that "[n]othing in the text of the Housing and Economic Recovery Act ('HERA') prevents a private party from seeking punitive damages or attorney's fees from Fannie Mae." Ans. Br. 12. This argument flies in the face of

the text of the federal statute governing FHFA conservatorships, which unequivocally mandates that FHFA as Conservator "shall not be liable for any amounts in the nature of penalties or fines …." 12 U.S.C. § 4617(j)(4) (the "Penalty Bar"). Because the Conservator is Fannie Mae's legal successor, and exclusively holds all rights, titles, powers, privileges, and assets of Fannie Mae, *id.* at § 4617(b)(2)(A)(i), the statute protects Fannie Mae from such liability as well.

In arguing the opposite, Westland's brief disregards an unbroken string of cases from around the country applying the provision's straightforward language in closely analogous circumstances. Indeed, Westland cites only general statutory-interpretation caselaw—and not one valid case interpreting or applying the Penalty Bar or the closely analogous provision applicable to FDIC receiverships. *See* Ans. Br. 12-20.

Westland offers no persuasive arguments against the relief FHFA and Fannie Mae request, which is in the interests of justice, coherent development of the law, and judicial economy. The Court should grant the petition.

A. The Text of Section 4617(j)(4) Applies to Penalties by Private Parties and Government Entities Alike.

Westland first argues that "the text of Section 4617(j)(4) applies only to financial punishment by *government entities*." Ans. Br. 13 (emphasis in original).

In so doing, Westland seeks to undermine the commonsense proposition that *punitive* damages are a form of *penalty* by suggesting that the definition of "penalty" changes "depending on the context." *Id*. But in interpreting the definition of "penalty" in the Penalty Bar, Courts have *never* distinguished between punitive damages sought by government entities and those sought by private parties.

Instead, courts routinely hold that "Fannie Mae is immune from punitive damages under 12 U.S.C. § 4617(j)" regardless of whether a governmental or private party seeks them. *Gray v. Seterus, Inc.*, 233 F. Supp. 3d 865, 872 (D. Or. 2017). Such cases include: *National Fair Housing Alliance v. Federal National Mortgage Association*, No. C 16-06969 JSW, 2019 WL 3779531, at *6 (N.D. Cal. Aug. 12, 2019), *Mwangi v. Federal National Mortgage Association*, No. 4:14-CV-0079-HLM, 2015 WL 12434327, at *3 (N.D. Ga. Mar. 9, 2015), and *Higgins v. BAC Home Loans Servicing, LP*, No. 12-CV-183-KKC, 2014 WL 1332825, at *3 (E.D. Ky. Mar. 31, 2014).

Westland's reliance on canons of statutory interpretation to suggest otherwise is unavailing. That is, Westland points to the fact that the Penalty Bar explicitly "includ[es] those [penalties or fines] arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." Ans. Br. 14. But this Court has emphasized that "when a

statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403 (2007).

Regardless, that Section 4617(j)(4) includes a list of examples does not suggest that the Penalty Bar applies *only* to government-imposed fines. As the U.S. Supreme Court has repeatedly recognized, lists introduced by terms such as "including"—like the plainly non-exhaustive list of examples of penalties barred by Section 4617(j)(4)—are "illustrative and not limitative." *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quotation marks and citation omitted); *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) (similar); *Bloate v. United States*, 559 U.S. 196, 207 (2010) ("including" is "an expansive or illustrative term"). Indeed, just last year that Court noted that where a list begins with the word "including," the "examples it sets forth *do not exclude other[s]* …." *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183, 1197 (2021) (emphasis added).

Westland's argument to the contrary lacks support and contravenes extensive case law—not only the squarely on-point cases enumerated above, but also the many cases applying the materially identical statute applicable to FDIC receiverships, 12 U.S.C. § 1825(b)(3). *See, e.g., Commercial Law Corp. v. FDIC*, No. 10-13275, 2016 WL 4035508, at *4 (E.D. Mich. July 28, 2016), *aff'd,* 716 F. App'x 383 (6th Cir. 2017) (Section 1825(b)(3) prohibits imposition of attorney's fees by private party);

Poku v. F.D.I.C., No. CIV.A. RDB-08-1198, 2011 WL 1599269, at *4 (D. Md. Apr. 27, 2011) ("As punitive damages represent penalties, the plain language of Section 1825(b) precludes the imposition of punitive damages on the FDIC as Receiver.").

Unable to point to *any* decision adopting its position in the context of *any* analogous statute, Westland resorts to language in the Administrative Procedure Act, 5 U.S.C. § 551(10)(C), a public housing statute, 42 U.S.C. § 1437f(o)(10)(e), and a statute regulating the shipping of liquid bulk dangerous cargoes, 46 U.S.C. § 3718(e)(1). These unrelated statutes lend Westland no support. Of course Congress refers to "'penalties or fines' . . . in the context of *government* penalties or fines" (Ans. Br. 14-15) in statutes that *establish* government penalties and fines, as these do. But the Penalty Bar is clearly unlike these other statutory provisions: It does not *establish* penalties owed to the government, it *precludes* the imposition of not just "penalties or fines," but anything "*in the nature* of penalties or fines," on FHFA conservatorships. 12 U.S.C. § 4617(j)(4) (emphasis added).

Nothing in the Penalty Bar's text—or in the relevant caselaw—suggests that the statutory reference to "penalties" covers only *governmentally imposed* liabilities, and no court has ever read such a limitation into it or any comparable statute. Westland's unfounded argument lacks merit, and this Court should reject it.

B. The Statutory Phrase "In the Nature of Penalties or Fines" Includes Punitive Damages and Attorneys' Fees.

Westland also asserts that, "even if Section 4617(j)(4) did encompass 'penalties' sought by private parties, the statutory phrase 'penalties or fines' does not include punitive damages or attorneys' fees." Ans. Br. 15.[1]

1. Punitive Damages Are "In the Nature of Penalties."

Westland's argument that punitive damages are not "in the nature of penalties" is implausible on its face and unsupported in the law. As an initial matter, courts across the country have confirmed that punitive damages are "in the nature of penalties or fines" within the meaning of the Penalty Bar. *See Gray*, 233 F. Supp. 3d at 872 ("Fannie Mae is indeed *immune from punitive damages* under 12 U.S.C. § 4617(j)" (emphasis added)); *Nat'l Fair Hous. All.*, 2019 WL 3779531, at *6 (similar); *Mwangi*, 2015 WL 12434327, at *3 (similar). Following its sister courts, a different Nevada district court, in *Fannie Mae v. Sellers*, recently (and correctly) ruled that punitive damages and attorneys' fees are barred by 12 U.S.C. § 4617(j)(4) because, "[a]s a fundamental tenet of our federal system, this Court is 'bound' to apply 'the laws of the United States,' which the federal Constitution makes the

[1] Westland conspicuously omits the broadening clause "in the nature of" from its quotation of the statute.

'supreme law of the land.'" No. A-19-805418-C (quoting U.S. Const. art. VI, cl. 2) (attached as Exhibit A).

Westland's suggestion that such a definition is too "broad" (*id.*) also flies in the face of other decisions definitively holding that punitive damages—which by definition are not compensatory—are penalties. *E.g., Gabelli v. S.E.C.*, 568 U.S. 442, 451–52 (2013) (stating that "penalties" are amounts that "go beyond compensation, are intended to punish, and label defendants wrongdoers"); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (punitive damages "serve the same purposes as criminal penalties"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996) (punitive damages are among the "economic penalties that a State … inflicts"). This Court agrees, repeatedly explaining that punitive damages exist "not as compensation to the victim but to punish the offender for severe wrongdoing." *Webb v. Shull*, 128 Nev. 85, 90 (2012); *Banngiovi v. Sullivan*, 122 Nev. 556, 580 (2006) (similar).

Westland fares no better in arguing that because "Section 4617(d)(3)(B) limits FHFA's liability for 'punitive or exemplary damages' when FHFA repudiates contracts," the Penalty Bar purportedly does not cover punitive damages. *See* Ans. Br. 15. Even if courts across the country had not already adopted FHFA's definition of "penalties," Sections 4617(d)(3)(B) and 4617(j)(4) are perfectly consistent with

each other. Section 4617(d) authorizes the Conservator to repudiate pre-conservatorship contracts; subparagraph 4617(d)(3) specifies that when the Conservator does so, the counterparty recovers "actual direct compensatory damages" only, a category from which Congress expressly excluded "punitive damages" as well as "lost profits" and "pain and suffering." This reflects Congress's intent to precisely demarcate the limits of FHFA's liability when it repudiates contracts as conservator or receiver, and it harmonizes readily with Section 4617(j)(4)'s general bar on awards "in the nature of ... penalties." Section 4617(d)(3) provides belt-and-suspenders clarity that the idiosyncratic term "actual direct compensatory damages" does not override Section 4617(j)(4)'s general bar on awards "in the nature of penalties." That level of clarity is especially important in the repudiation context, where FHFA as Conservator must be able to reliably predict the financial consequences in deciding how to proceed during insolvency, because opposing parties might otherwise contest the meaning of "actual direct compensatory damages," as they often do for items Congress did *not* specifically exclude from the definition. *See, e.g.*, *ALLTEL Information Services, Inc. v. F.D.I.C.*, 194 F.3d 1036, 1043 (9th Cir. 1999) (liquidated damages); *McMillian v. F.D.I.C.*, 81 F.3d 1041 (11th Cir. 1996) (severance pay award); *Resolution Trust Corp. v. Management, Inc.*, 25 F.3d 627, 631-32 (8th Cir. 1994) (contractual non-

renewal fee). Section 4617(j)(4) is consistent but broader. It applies in all contexts, and it precludes all awards "in the nature of penalties or fines," not just "punitive or exemplary damages." Congress rationally used different words to convey that different, broader meaning.

The cases Westland relies on for its statutory-interpretation argument are inapplicable. In *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022), the Court declined to equate the term "prohibit" with the term "regulate" because doing so "risks rendering the [relevant statute] a *jumble*" and "an *indeterminate mess*." 142 S. Ct. at 1939 (emphasis added). Here, by contrast, the statute makes perfect sense when its terms are given their ordinary plain meaning, as explained above. Similarly, in *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), the Court declined to read in a limitation on liability where Congress was silent. *Id.* at 492. Because HERA was clearly *not* silent on the issue of liability for amounts "in the nature of penalties or fines," 12 U.S.C. § 4617(j), *Tanzin* is inapplicable here.

Buckwalter v. Eighth Judicial Dist. Ct., 126 Nev. 200 (2010), is also irrelevant; in that case, this Court sought to avoid a conflict between two different statutes. *Id.* at 202. But here, there is no conflict to avoid—as explained above, the HERA provisions Westland cites are harmonious and consistent.

Westland's reliance on *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012) is similarly unavailing. There, a party argued that a more general statutory provision should control over a more specific one where they would operate differently—the party claimed the general clause "permit[ted] precisely what [the more specific] clause proscribe[d] …." *Id.* at 645. The Supreme Court described the party's argument as "contrary to common sense," and held that "the terms of the more specific [provision] must be complied with." *Id*. Here, Westland departs even farther from common sense. There is no plausible argument that the two HERA provisions operate differently, and therefore no reason to choose between them: Each places punitive damages off limits. But even if there were some daylight between the two, the Penalty Bar is the only relevant provision here—the repudiation provision has no conceivable application, as there is no pre-conservatorship contract, and no repudiation, at issue in this case.

Westland's other efforts to distinguish between "punitive damages" and "penalties" (Ans. Br. 18) are no more persuasive. For example, Westland points to *Nevada Power Co. v. Eighth Judicial Dist.*, 120 Nev. 948 (2004). Ans. Br. 18. But, in that case, this Court merely stated the obvious: that the "civil penalties" provided for in NRS 703.380, which specifically authorized companies to seek $1,000 per day when a public utility company violates an applicable regulation, were "not

equivalent" to the amount of "punitive damages" sought by plaintiffs. *Nevada Power Co.*, 120 Nev. at 961 & n. 41. This "distinction" merely recognizes that the phrase "civil penalty" is a term of art that refers to a specific "fine assessed for a violation of a statute or regulation." *Penalty*, Black's Law Dictionary (11th ed. 2019) (recognizing that "civil penalty" as a term of art with a more specific definition). Westland's reliance on NRS 228.1116(2)(b)—which also uses "civil penalties" as a term of art—for the same proposition, Ans. Br. 18, is irrelevant for the same reason. Therefore, it should come as no surprise that other courts agree that "Fannie Mae is indeed immune from punitive damages under 12 U.S.C. § 4617(j)." *Gray*, 233 F. Supp. 3d at 872.

2. Under Nevada Law, the Attorneys' Fees Westland Seeks Here Are "In the Nature of Penalties"

In this State, attorneys' fee awards such as those sought here are unequivocally penal. NRS 18.010(2)(b), NRS 7.085; *see also Capanna v. Orth*, 134 Nev. 888, 895 (2018) (interpreting these statutes); *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90 (2006) ("Nevada follows the American rule that attorney[s'] fees may not be awarded absent a statute, rule, or contract authorizing such award."). Westland's accusation that this summary is a "misstate[ment] of what Nevada law provides" is incorrect. Ans. Br. 19. Specifically, Westland contends that, because

attorney's fees can be awarded as "*bonus* payments," they "may, in no sense of the word, be considered a 'penalty.'" *Id.* (emphasis in original). Westland offers no legal argument for this proposition. *Id.* Indeed, it is wrong as a matter of law: penalties, by their definition, "go beyond compensation." *Gabelli*, 568 U.S. at 451–52. In other words, a "bonus payment" (Ans. Br. 19) is merely liability in the nature of a penalty by another name.

Westland's reliance on *National Fair Housing Alliance* to argue that attorney's fees are not in the nature of penalties or fines, Ans. Br. 20, is also irrelevant. In that non-Nevada case, the "parties [had] not provided and the Court [had] not been able to find pertinent authority [regarding attorney's fees] in this context." 2019 WL 3779531 at *6. But here, FHFA has provided this Court with ample authority that, under Nevada law, attorney's fees are in the nature of penalties. *See* Pet. Br. 7-8.

The punitive damages and attorney's fees Westland seeks are penal, i.e., in the nature of penalties. As such, they fall squarely within HERA's Penalty Bar.

C. The Penalty Bar Immunizes Fannie Mae—as well as FHFA—from Liability for Penalties and Fines.

Westland argues that the Penalty Bar "immunizes only FHFA—not Fannie Mae—from liability for penalties and fines." Ans. Br. 16. Of course, Westland is

correct that HERA defines "the Agency" to mean FHFA. Ans. Br. 16. But Section 4617(j)(4) "applies equally" to Fannie Mae because "FHFA, as conservator, stepped into the shoes of Fannie Mae . . . ." *Fed. Hous. Fin. Agency v. City of Chicago*, 962 F. Supp. 2d 1044, 1064 (N.D. Ill. 2013). In other words, because the Conservator holds the assets, any award for attorney's fees would come solely from conservatorship estate assets. But Congress specifically prohibited this result, mandating that the conservatorship "shall not be liable for any amounts in the nature of … penalties or fines." 12 U.S.C. § 4617(j)(4). This is why, in the years since Congress passed HERA, courts across the country have seen and rejected the arguments Westland offers here. The District of Oregon, for example, has decisively held that "Fannie Mae is indeed immune from punitive damages under 12 U.S.C. § 4617(j)." *Gray*, 233 F. Supp. 3d at 872. Likewise, the Northern District of Illinois rejected as "meritless" the contention "that any fines and penalties are actually assessed against 'Fannie and Freddie,' . . . and, thus, are not barred by § 4617(j)(4)." *Fed. Hous. Fin. Agency*, 962 F. Supp. 2d at 1064. The Northern District of Georgia agrees, holding "that while under conservatorship with the FHFA, [Defendant] Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is." *Mwangi*, 2015 WL 12434327, at *4 (internal quotation marks and citation omitted). Critically, the District of Nevada has likewise explicitly

determined that, "under conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is." *Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP*, 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011).

Indeed, the Eastern District of Kentucky provided a clear explanation of why this conclusion—adopted by district courts across the country—makes intuitive sense:

> "[W]hen the Agency acts as conservator, it acts with complete control over Fannie Mae's assets. By prohibiting the imposition of fines and penalties on the Agency 'in any case in which the Agency is acting as a conservator or a receiver,' HERA necessarily prohibits the imposition of fines and penalties on Fannie Mae also."

Higgins, 2014 WL 1332825, at *3.

Westland has no persuasive answer to these cases, and offers no plausible reason for this Court to part ways with every other court that has validly considered Section 4617(j)(4)'s application to Fannie Mae. Westland's argument that "the precedents do not uniformly favor FHFA's interpretation" is flatly incorrect. Ans. Br. 20 (arguing that *Higgins*, 2014 WL 1332825 and *Nat'l Fair Hous. Alliance*, 2019 WL 3779531 do not support the proposition that the Penalty Bar applies to Fannie Mae). *Higgins* and *National Fair Housing Alliance* in no way undermine FHFA's position.

First, *Higgins* confirmed that "HERA necessarily prohibits the imposition of fines and penalties on Fannie Mae also," 2014 WL 1332825 at *3; it merely recognized that the damages at issue were "properly viewed as 'liquidated damages'" rather than a "penalty" to the extent that they only intended to make plaintiffs "whole," *id.* at *4-6. In this way, the damages granted in *Higgins* were easily distinguishable from the punitive damages and attorneys' fees that Westland seeks here, which seek to punish Fannie Mae.

Second, *National Fair Housing Alliance* similarly held that "demands for penalties, including requests for punitive . . . damages, are barred by HERA." 2019 WL 3779531 at *6. As discussed above, Westland's attempt to distinguish *National Fair Housing* on the basis of a difference in state law regarding attorney's fees in no way undermines this clear holding regarding the scope of the Penalty Bar.

Westland also relies heavily on *Burke v. Fannie Mae*, 221 F. Supp. 3d 707, 710 (E.D. Va. 2016), *vacated*, 2016 WL 7451624 (E.D. Va. Dec. 6, 2016). Ans. Br. 17, 20. But that decision was *vacated* for lack of jurisdiction. *Burke*, 2016 WL 7451624 at *1. ("[T]he Court … was without jurisdiction to issue any prior opinion or order in this case."). Thus, *Burke* is a nullity that carries no persuasive effect. *See Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005); *Elliott v. Peirsol's Lessee*, 26 U.S. 328, 340 (1828). But even if *Burke* were a valid decision, it would best be

understood as an unpersuasive outlier. The decision placed dispositive weight on § 4617(j)'s use of the term "the Agency," 221 F. Supp. 3d at 709-12, but ignored the fact that the statute vests "the Agency" with sole ownership of Fannie Mae's assets. In other words, subjecting Fannie Mae to punitive damages necessarily punishes its Conservator FHFA—which is Fannie Mae's absolute legal successor, 12 U.S.C. § 4617(b)(2)(A)—as well. For this reason, a 2019 District of Nevada decision rejected *Burke* as "unpersuasive." *1209 Vill. Walk Trust., LLC v. Broussard*, No. 2:15-CV-01903-MMD-PAL, 2019 WL 452728, at *3 (D. Nev. Feb. 4, 2019). Therefore, there is no reason for this Court to depart from every court to have validly considered the Penalty Bar, all of which concluded that it applies to Fannie Mae while it is in FHFA's conservatorship.

Westland further argues that the Penalty Bar is not applicable here because FHFA intervened in the case at a later stage of the litigation, and that "Section 4617(j) applies only to cases 'in which the Agency *is acting* as a conservator or receiver.'" Ans. Br. 17 (quoting 12 U.S.C. § 4617(j)(1) (emphasis added by Westland)). This argument is incorrect for two reasons. First, this Court has confirmed that HERA can be raised "by a regulated entity . . . even though the FHFA was not a party to the case." *Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n*, 134 Nev. 270, 272 (2018). Therefore, Fannie Mae can always

raise Section 4617(j), regardless of the extent of FHFA's participation in the case. Second, Section 4617(j)(1) distinguishes between FHFA's role as a *regulator* from its role as a *conservator or receiver* in order to define the applicability of the Penalty Bar. In this case, FHFA is clearly acting in its role as conservator to "preserve and conserve the assets and property of [Fannie Mae]," *see* 12 U.S.C. § 4617(b)(2), so Section 4617(j)(4) applies.

D. The Penalty Bar Applies Regardless of Whether Westland Seeks Punitive Damages and Attorneys' Fees As an "Offset."

Finally, Westland argues that the Penalty Bar "does not apply to punitive damages or attorneys' fees sought to *offset* Westland's liability to Fannie Mae under the relevant loan agreements." Ans. Br. 17 (emphasis in original). Westland offers no legal support for the argument that, "[t]o the extent that Westland's prayer for punitive damages and attorneys' fees is used as a basis for reducing Westland's contractual liability to Petitioners, these remedies would not make FHFA 'liable' for anything." *Id.* at 18.

As a logical matter, the argument is untenable. For punitive damages to affect an ultimate award at all—whether as a collectable award or, as Westland argues, as a non-refundable "offset" only—FHFA or Fannie Mae would have to be liable for them first. The common law of set-off confirms the point: A party can only apply a

set-off for amounts the opposing party would otherwise be obligated to pay. *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995) (an offset "allows entities that *owe each other money* to apply their mutual debts against each other" to avoid "absurdity" (emphasis added) (citation omitted)); *Westgate Planet Hollywood Las Vegas, LLC v. Tutor-Saliba Corp.*, 133 Nev. 1092 (2017) (unpublished disposition) (applying an offset *after* awarding damages to both plaintiff and defendant on their claims against one another).

But the Penalty Bar precludes the possibility that Fannie Mae could, while in conservatorship, ever owe Westland any amount of punitive damages: Congress mandated that the conservatorship "shall not be liable for any amounts in the nature of … penalties or fines." 12 U.S.C. § 4617(j)(4). And, as a practical matter, there is no functional difference for Fannie Mae or FHFA between a required disbursement and an offset against a receipt otherwise due, as each carries the same financial effect—reducing net income. Therefore, this Court should decline to recognize Westland's fanciful non-refundable offset theory.

II. FHFA AND FANNIE MAE SATISFY THE STANDARD FOR MANDAMUS

Of course, "a writ of mandamus is an extraordinary remedy." *Gonzalez v. Dist. Ct.*, 129 Nev. 215, 217 (2013). But whether to grant one is nonetheless a

"decision [that] lies within [the Court's] discretion." *Id.* Indeed, the Court may grant "writ petitions that challenge orders of the district court denying motions to dismiss[,]" though disfavored, "where considerations of sound judicial economy and administration" warrant. *Smith v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 113 Nev. 1343, 1344 (1997).

In its Answer, Westland asserts that FHFA and Fannie Mae do not satisfy the standard for mandamus because they retain the right to appeal an adverse decision. Ans. Br. 7-8. But, contrary to Westland's assertions, *id.* at 7, this Court certainly has granted mandamus—instructing the district court to grant petitioner's motion to dismiss, no less—where petitioners retained their right to appeal an adverse decision. *See Smith*, 113 Nev. at 1348; *Klingensmith v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, No. 82403, 2021 WL 4261541, at *1 (Nev. 2021) (unpublished disposition) (granting mandamus petition challenging a district court order denying a motion to dismiss). In no way does the case that Westland cites in support of its argument, Ans. Br. 8, impose a *requirement* that petitioners show unavailability of appeal. *See Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev. 783, 79 (2015).

What's more, the arguments that Westland dismisses as "rare exceptions" (Ans. Br. 8) are well-established avenues to mandamus. This Court will entertain a writ petition when: "(1) no factual dispute exists and the district court is obligated to

dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *State v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 118 Nev. 140, 147 (2002); *Advanced Countertop Design, Inc. v. Second Jud. Dist. Ct. of State ex rel. Cnty. of Washoe*, 115 Nev. 268, 269-70 (1999). Either prong would suffice here because the Petition satisfies both: The district court disregarded the clear federal authority of the Penalty Bar when it refused to dismiss the counterclaimants' demand for punitive damages and attorneys' fees, and prompt review will serve judicial economy by resolving a conflict that invites needless and burdensome litigation in this State's courts. *See* Pet. Br. 5-6.

First, a writ of mandamus is the appropriate remedy when there is no factual dispute and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule. *E.g.*, *Anse, Inc. v. Eighth Jud. Dist. Ct. of State ex rel. Cnty. of Clark*, 124 Nev. 862, 867 (2008) (deciding writ on merits); *Klingensmith,* 2021 WL 4261541, at *1 (granting writ where clear and unambiguous statute required dismissal). That standard fits this case like a glove: the clear language of the Penalty Bar plainly precludes any award "in the nature of [a] penalt[y]." 12 U.S.C. § 4617(j)(4); *see also* Pet. at 5-6.

Westland insists that this rule only applies when dismissal is required under the Nevada Rules of Civil Procedure or "a Nevada statute [that] overlays the civil rules with additional mandatory procedures." Ans. Br. 9. In so doing, Westland merely cherry picks examples of when mandamus *was* granted and argues that these must be the *only* examples of when mandamus *can* be granted. *Id.* (citing *Smith*, 113 Nev. at 1345 n.1; *Klingensmith,* 2021 WL 4261541, at *1). But there is nothing in this Court's caselaw to suggest such a narrow requirement. Instead, this Court has considered a mandamus petition brought under a substantive statute that had nothing to do with Nevada's procedural rules. *See Neville v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 133 Nev. 777, 779 (2017) (granting a mandamus petition brought under the Nevada Constitution's Minimum Wage Amendment). Therefore, there is no reason for this Court to look at the Nevada Rules of Civil Procedure as its sole source of "clear authority under a statute or rule" for the purposes of granting mandamus. *Contra* Ans. Br. 9.

Westland is also incorrect to suggest that "whether Respondents are entitled to punitive damages and attorneys' fees *will* turn on numerous contested questions of fact." Ans. Br. 9 (emphasis in original). That Westland does not provide a single example of such a "contested question[] of fact" is telling: *No* facts can provide the answer to the purely legal question of whether the clear language of the Penalty Bar

precludes any award "in the nature of [a] penalt[y]." 12 U.S.C. § 4617(j)(4). Indeed, this Court essentially concluded as much last week when it determined that "the district court clearly erred when it found a [factual] dispute as to Westland's default." Opinion, *Fed. Nat'l Mortg. Ass. v. Westland*, No. 82174 (Nev. Aug. 11, 2022) at 8.

Second, a writ of mandamus is an appropriate remedy when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *State*, 118 Nev. at 147. Westland asserts that this scenario refers only to "petitioners [with] an important entitlement to be free from litigating in court altogether," or where "the resolution of these issues . . . could *dramatically* alter the scale and substance of the proceedings." Ans. Br. 10 (citations omitted) (emphasis in original). But this Court demands no such requirement. For example, the Court has repeatedly exercised its discretion to grant a mandamus petition where, as here, a district court commits a clear and unambiguous error of law that affects only part of an action. *See, e.g.*, *Neville*, 133 Nev. at 778-81 (granting a writ of mandamus to correct a district court's dismissal of some but not all of petitioner's claims); *Anse, Inc.*, 124 Nev. at 864-65, 867.

Here, the demand for punitive damages constitutes a far more substantial part of the action than does any other single cause of action set forth in Westland's

counterclaim pleading before the district court; the demands for punitive damages and attorneys' fees relate to more than half of the thirty counterclaims asserted (and all but one of the counterclaims asserted against Fannie Mae). *See* App. Volumes I-II, 0138-0276 (First Am. Ans. & First Am. Counterclaim). Moreover, this Court's prompt clarification of whether the Penalty Bar protects Fannie Mae and FHFA against punitive damages and attorney's fees while in conservatorship would benefit Nevada courts greatly and limit unnecessary litigation, as other district courts in both state and federal courts in Nevada have squarely held that the Penalty Bar *does* preclude demands for punitive damages and attorneys' fees. Pet. Br. 11-13. *Contra* Ans. Br. 12.

As noted above, *supra* at 6, a different Nevada district court, in *Fannie Mae v. Sellers*, recently (and correctly) ruled that punitive damages and attorneys' fees are barred by 12 U.S.C. § 4617(j)(4) because, "[a]s a fundamental tenet of our federal system, this Court is 'bound' to apply 'the laws of the United States,' which the federal Constitution makes the 'supreme law of the land.'" Exhibit A. And the federal district court in this State has concluded that "while under conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is." *Nevada ex rel. Hager*, 812 F. Supp. 2d at 1218. Other federal district courts in the Ninth Circuit agree. *See, e.g.*, *Gray*, 233 F. Supp.

3d at 872 ("Fannie Mae is indeed immune from punitive damages under 12 U.S.C. § 4617(j)."); *Nat'l Fair Hous. All.*, 2019 WL 3779531, at *6 (finding that plaintiffs' demand for "punitive damages is barred by the Penalty Bar"). This Court has granted mandamus where, as here, clarifying a purely legal issue serves judicial economy outside the four corners of a case. *Smith*, 113 Nev. at 1345. It should do so again here.

The Court should therefore grant FHFA and Fannie Mae's petition for a writ of mandamus because the district court's refusal to dismiss Westland's demands for punitive damages and attorneys' fees was a clear violation of the Penalty Bar and a manifest abuse of discretion.

CONCLUSION

While Fannie Mae is in conservatorship, a federal statute protects it and FHFA, as Fannie Mae's Conservator, from liability from punitive damages and attorneys' fees. Under the U.S. Constitution's Supremacy Clause, this Court's duty is to apply that statute.

In the circumstances of this case, doing so by writ of mandamus would advance the interests of substantive justice and judicial economy. The Court should exercise its discretion to grant a writ mandating that the district court dismiss all claims for punitive damages or attorneys' fees against Fannie Mae.

Dated this 16th day of August, 2022.

Respectfully submitted,
FENNEMORE CRAIG, P.C.

/s/ Leslie Bryan Hart

Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert, Esq. (SBN 11728)
7800 Rancharrah Parkway
Reno, NV 89511
Tel: 775-788-2228
Fax: 775-788-2229
lhart@fennemorelaw.com;
jtennert@fennemorelaw.com

ARNOLD & PORTER
KAYE SCHOLER, LLP

/s/ Michael A.F. Johnson

Michael A.F. Johnson, Esq.*
601 Massachusetts Ave. NW
Washington, DC 20001
Tel: 202-942-5000
Fax: 202-942-5999
michael.johnson@arnoldporter.com
**Admitted pro hac vice in underlying district court action*

Attorneys for Petitioner
Federal Housing Finance Agency
in its capacity as Conservator for the
Federal National Mortgage Association

VERIFICATION

I, Leslie Bryan Hart, declare as follows:

I am a licensed attorney with Fennemore Craig, P.C., counsel for Petitioner Federal Housing Finance Agency (FHFA), and I attest to the following verification in my role as FHFA's attorney, as permitted by NRAP 21(a)(5). I know the contents of this petition and verify that all matters contained herein are true and correct to the best of my knowledge, except as to those matters stated on information and belief, and as to such matters I believe them to be true. I have also reviewed the documents included in the attached appendix and verify that all such documents are true and correct copies of the original documents.

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

Executed 16th day of August, 2022.

FENNEMORE CRAIG, P.C.

/s/ Leslie Bryan Hart

Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert, Esq. (SBN 11728)
7800 Rancharrah Parkway
Reno, NV 89511
Tel: 775-788-2228
Fax: 775-788-2229
lhart@fclaw.com
jtennert@fclaw.com

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on August 16, 2022, a true and correct copy of PETITIONER'S WRIT OF MANDAMUS REPLY BRIEF, was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

Kelly H. Dove, Esq. Nathan G. Kanute, Esq. - Reno Bob L. Olson, Esq. David L. Edelblute, Esq. Snell & Wilmer L.L.P. 3883 Howard Hughes Parkway, Suite 110 Las Vegas, NV 89169 *Attorneys for Real Party in Interest Federal National Mortgage Association* Joseph G. Went, Esq. Lars K. Evensen, Esq. Sydney R. Gambee, Esq. Holland & Hart L.L.P. 9555 Hillwood Dr., 2nd Floor Las Vegas, NV 89134 *Attorneys for Appellant Grandbridge Real Estate Capital, LLC*	J. Colby Williams, Esq. Philip R. Erwin, Esq. Campbell & Williams 700 S. Seventh St. Las Vegas, NV 89101 702-382-5222 John Benedict, Esq. The Law Offices of John Benedict 2190 E. Pebble Road, Suite 260 Las Vegas, NV 89123 John W. Hofsaess, Esq. (Pro Hac Vice) Westland Real Estate Group 520 W. Willow St. Long Beach, CA 90806 Brian W. Barnes, Esq. Cooper Kirk PLLC 1523 New Hampshire Ave., N.W. Washington, D.C. 20036 *Attorneys for Real Parties in Interest and Westland Village Square*

AND VIA U.S. MAIL TO:

The Honorable Mark Denton
District Court Judge, Dept. XIII
200 Lewis Avenue
Las Vegas, NV 89155

/s/ *Debbie Sorensen*
An Employee of Fennemore Craig, P.C.

ATTORNEY'S CERTIFICATE PURSUANT TO NEVADA RULE OF APPELLATE PROCEDURE 28.2

1. I hereby certify that this 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. 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 either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 5470 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate 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.

Dated: August 16th, 2022.

FENNEMORE CRAIG, P.C.

By: */s/ Leslie Bryan Hart*

Leslie Bryan Hart, Esq. (SBN 4932)

EXHIBIT A

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FFCO
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, NV 89134
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: melanie.morgan@akerman.com
Email: scott.lachman@akerman.com

Kristin A. Schuler-Hintz, Esq., SBN 7171
McCarthy & Holthus, LLP
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5961
Email: dcnv@mccarthyholthus.com

Attorneys for Federal National Mortgage Association

MCCARTHY & HOLTHUS, LLP
ATTORNEYS AT LAW

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION Plaintiff, v. CLARINDA R. SELLERS, an individual; RICHARD E. SELLERS, an individual; DOES 1-50; and ROE CORPORATIONS 1-50 inclusive; Defendants.	Case No.: A-19-805418-C Dept. No.: V **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING FEDERAL NATIONAL MORTGAGE ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT**
CLARINDA R. SELLERS, an individual; RICHARD E. SELLERS, an individual; DOES 1-50; and ROE CORPORATIONS 1-50 inclusive; Counterclaimants, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Counterdefendant.	

Case Number: A-19-805418-C

This matter came before Department V of the Eighth Judicial District Court, in and for Clark County, Nevada, on the 1st day of February 2022 for a hearing, with the Honorable Veronica Barisich presiding, upon the motion for summary judgment filed by plaintiff/counterdefendant Federal National Mortgage Association (**Fannie Mae**). Melanie D. Morgan, Esq. and Kristin Schuler-Hintz, Esq. appeared on behalf of Fannie Mae, and Corey B. Beck, Esq. appeared on behalf of defendants/counterclaimants Clarinda R. Sellers and Richard E. Sellers (**defendants**).

The Court, having reviewed the motion, the response in opposition, the reply in support, and the arguments of counsel, and good cause appearing, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On or about February 23, 2007, defendants obtained a loan in the original amount of $232,500.00 from First Horizon Home Loan Corporation as the lender, secured by a deed of trust recorded on March 6, 2007 against the property at 578 Cervantes Drive, Henderson, Nevada 89014. The deed of trust listed Mortgage Electronic Registration Systems, Inc. (**MERS**) as nominee beneficiary for lender and lender's successors and assigns. The deed of trust and the promissory note it secures are referred to together as the "loan."

2. Defendants defaulted on their loan obligations by failing to make monthly payments beginning in January 2011. Defendants admit in verified interrogatory responses that, "[t]he last payment made on our mortgage was December 2010." The default has continued to the present.

3. On May 3, 2011, an assignment of deed of trust from MERS to Fannie Mae was recorded with the Office of the Clark County Recorder as Instrument 201105030001873. No additional assignments have been recorded, and Fannie Mae continues to be the record beneficiary of the deed of trust.

4. Fannie Mae's business records reflect that it acquired ownership of the loan in March 2007.

5. Fannie Mae is now, and at all times relevant to this action, owner of the loan, as further reflected in Fannie Mae's business records.

///

6. Since September 2008, Fannie Mae has been under the conservatorship of the Federal Housing Finance Agency ("FHFA").

7. Fannie Mae, through its counsel at McCarthy & Holthus, LLP, is in physical possession of the original wet-ink note, which is endorsed in blank.

8. Fannie Mae through its counsel at McCarthy & Holthus, LLP, is also in physical possession of the original deed of trust.

9. Nationstar Mortgage LLC began servicing the loan for Fannie Mae on February 29, 2019.

10. Nationstar Mortgage LLC, as the servicer of the loan for Fannie Mae, sent defendants a demand letter on March 21, 2019, which set forth the amount of the deficiency on the loan.

CONCLUSIONS OF LAW

Legal Standard

1. Summary judgment is appropriate and is authorized by NRCP 56 when no genuine issue remains for trial. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

2. To survive summary judgment, the nonmoving party must do more than simply show there is some metaphysical doubt as to the operative facts, relying upon more than general allegations and conclusions set forth in the pleadings, and must present specific facts demonstrating the existence of a genuine issue. *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 194, 444 P.3d 436, 439 (2019).

3. The nonmoving party is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Collins v. Union Fed. Sav. & Loan Ass'n,* 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Fannie Mae's Standing to Foreclose

4. In order to foreclose, a party must be entitled to enforce both the deed of trust and the promissory note. *Edelstein v. Bank of N.Y. Mellon,* 128 Nev. 505, 520, 286 P.3d 249, 259 (2012).

///

5. When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed. NRS 104.3205 (2). Fannie Mae is entitled to enforce the note, which is endorsed in blank, because it is in possession of the original note.[1]

6. Defendants' conjecture and speculation about "when, where and how" Fannie Mae became the holder of the note do not create a genuine issue of material fact. Because the note is endorsed in blank, Fannie Mae need only possess the note to be entitled to enforce it. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 286 P.3d 249 (2012) (finding that to be entitled to enforce the note, BNY Mellon would merely have to possess the note).

7. Fannie Mae is entitled to enforce the deed of trust because it is the record beneficiary of the deed of trust. *Id.* (finding that the party seeking to foreclose must demonstrate that it is both the beneficiary of the deed of trust and the current holder of the promissory note).

8. Fannie Mae need not possess the original assignment of the deed of trust from MERS to Fannie Mae in order to establish standing to foreclose. The copy of the assignment certified to be "a true and correct copy of the recorded document" by the Clark County Recorder sufficiently evidences Fannie Mae's status as the record beneficiary of the deed of trust. *Einhorn v. BAC Home Loans Servicing*, 128 Nev. 689, 290 P.3d 249 (2012).

9. The assignment from MERS to Fannie Mae contains a certificate of acknowledgement signed before a notary public, which carries a presumption of authenticity under NRS 52.165.

10. Also, the certified assignment from MERS to Fannie Mae was obtained from the county recorder's office, which "is sufficient to authenticate the writing." NRS 52.085.

11. Fannie Mae's possession of the original note and deed of trust, combined with the certified recorded assignment constitutes prima facie evidence of Fannie Mae's entitlement to enforce the note and to judicially foreclose on the property. *See Einhorn*, 128 Nev. at 694, citing

[1] Principles of agency apply in determining actual possession of the note. Where an agent of a secured party, here McCarthy & Holthus as agent for Fannie Mae, has physical possession of a note, the secured party has taken actual possession. *Edelstein*, 128 Nev. at 524 *citing* NRS 104.9313 and UCC § 9-313, cmt. 3).

Edelstein, 128 Nev. at 261. Fannie Mae's status as owner of the loan further supports the court's conclusion that Fannie Mae is the party entitled to enforce the note and deed of trust.

12. The prior foreclosure mediations and the prior judicial foreclosure action dismissed by Fannie Mae without prejudice have no relevance to this action, and particularly, Fannie Mae's ability to establish its status as the party entitled to enforce the note and deed of trust in this action.

Defendants' Counterclaim

13. Pursuant to NRCP 8(c), "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

14. Defendants' allegations in their counterclaim are simply mirror images of the arguments supporting judicial foreclosure; *i.e.* Fannie Mae is not the "real party in interest" and failed to produce "required documentation." As such, that the counterclaim will be designated and treated by the court as an affirmative defense. In addition, defendants' failure to respond to Fannie Mae's NRCP 8(c) argument is deemed an admission that the argument is meritorious and a consent to the granting of the same. *See* ECDR 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.")

15. The court has considered the arguments presented in defendants' counterclaim as affirmative defenses, and finds that they have no merit. As holder of the note and record beneficiary of the deed of trust, Fannie Mae has standing to judicially foreclose. *See Edelstein*, 128 Nev. at 262.

Defendants' Claims for Punitive Damages and Attorneys' Fees

16. Fannie Mae also seeks summary judgment on Counterclaimants' requests for punitive damages and attorneys' fees, relying on a federal statute mandating that "in any case in which the [Federal Housing Finance] Agency is acting as a conservator," it "shall not be liable for any amounts in the nature of penalties or fines." 12 U.S.C. § 4617(j)(1), (4) (the "Penalty Bar"). As a fundamental tenet of our federal system, this Court is "bound" to apply "the laws of the

United States," which the federal Constitution makes the "supreme law of the land." U.S. Const. art. VI, cl. 2.

17. The Court holds that the Penalty Bar precludes Counterclaimants' requests for punitive damages and attorneys' fees. While Fannie Mae is in conservatorship, as it has been at all relevant times, the Penalty Bar protects it to the same extent as FHFA. *See Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP*, 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011).

18. Under Nevada law and common sense, punitive damages are in the nature of penalties because they "are designed not to compensate the plaintiff … but, instead, to punish and deter the defendant's culpable conduct." *Bongiovi v. Sullivan*, 122 Nev. 556, 580 (2006). Attorneys' fees in civil cases are also in the nature of penalties because, by statute, Nevada awards them to "punish for and deter frivolous or vexatious claims and defenses." NRS 18.010(2)(b), NRS 7.085.

19. As a matter of law, therefore, Counterclaimants' requests for punitive damages and attorneys' fees must fail under the Penalty Bar, and accordingly this Court grants Fannie Mae's motion as to these requests for relief.

20. In addition, defendants' failure to respond to Fannie Mae's arguments in relation to punitive damages and attorneys' fees is deemed an admission that the arguments are meritorious and a consent to the granting of the same. *See* ECDR 2.20(e).

21. There are no genuine issues of fact in dispute as (1) Fannie Mae is the owner of the loan, (2) Fannie Mae is the holder of the original promissory note, (3) there is a recorded assignment of the deed of trust to Fannie Mae, and (4) defendants are in default. Accordingly, Fannie Mae's motion for summary judgment is **GRANTED** in its entirety.

22. Prior to entry of the final judgment for judicial foreclosure, Fannie Mae shall file a separate motion to establish the amount of its damages sought against the property, including attorneys' fees.

Dated this 1st day of March, 2022

31A 535 DCCC 1327
Veronica M. Barisich
District Court Judge

Respectfully submitted by:

Dated this 15th day of February, 2022.

AKERMAN LLP

/s/ Melanie D. Morgan
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
1635 Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Federal National Mortgage Association

MCCARTHY & HOLTHUS, LLP

/s/ Kristin A. Schuler-Hintz
Kristin A. Schuler-Hintz, Esq., SBN 7171
McCarthy & Holthus, LLP
9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 685-0329
Facsimile: (866) 339-5961
Email: dcnv@mccarthyholthus.com

Approved as to form and content by:

Dated this _____ day of February, 2022.

THE LAW OFFICE OF COREY B. BECK, P.C.

Refused to Sign
COREY BECK, ESQ.
Nevada Bar No. 5870
425 South Sixth Street
Las Vegas, NV 89101

Attorney for Richard and Clarinda Sellers