**No. _____**

# IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

*Petitioner*,



*v.*

THE EIGHTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE MARK R. DENTON,

*Respondents,*

*and*

WESTLAND LIBERTY VILLAGE, LLC, A NEVADA LIMITED LIABILITY COMPANY; WESTLAND VILLAGE SQUARE, LLC A NEVADA LIMITED LIABILITY COMPANY; AMUSEMENT INDUSTRY, INC., WESTLAND CORONA LLC, WESTLAND AMBER RIDGE LLC, WESTLAND HACIENDA HILLS LLC, 1097 NORTH STATE, LLC, WESTLAND TROPICANA ROYALE LLC, VELLAGIO APTS OF WESTLAND LLC, ALEVY FAMILY PROTECTION TRUST, WESTLAND AMT, LLC, AFT INDUSTRY NV, LLC, AND A&D DYNASTY TRUST,

*Real parties in interest.*

From the Eighth Judicial District Court, County of Clark, Dept. XI
Dist. Court Case No. A-20-819412-C

## PETITION FOR A WRIT OF PROHIBITION

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## RULE 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies the following:

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

DATED: April 18, 2022

SNELL & WILMER L.L.P.

*/s/ Kelly H. Dove*
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## NRAP 17 & 21(A)(3)(A) ROUTING STATEMENT

The Supreme Court should retain this proceeding under NRAP 17(a)(9) because it originated in Business Court, and because there are currently related proceedings pending before this Court.

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## INTRODUCTION

This writ proceeding arises from a suit Fannie Mae brought to enforce its security interests in two apartment complexes in Las Vegas owned by experienced commercial borrowers: Westland Liberty Village, LLC and Westland Village Square, LLC (together, "Westland" or "Original Defendants"). Previously, now-retired Judge Earley denied Fannie Mae's receiver motion and granted Westland's request for a preliminary injunction that prohibited Fannie Mae from foreclosing on the properties pending resolution of related litigation and limited other actions Fannie Mae could take. That ruling is currently before this Court in other pending appellate proceedings. Appeal Nos. 82174, 82666, 83695.

This original proceeding arises from Westland's later amendment and counterclaim. More than a year into the underlying case, Westland filed a 783-paragraph pleading entitled "First Amended Answer and Counterclaim" (the "Amended Counterclaim"),[1] adding more than twenty

[1]For reasons discussed below, this pleading is not merely or legally a counterclaim. For ease of reference only, Fannie Mae may refer to the pleading as it was titled.

new parties and claims, including, as relevant to this Petition, claims arising from a Master Credit Facility Agreement ("MCFA"), an entirely different contract not at issue in the ongoing litigation, and to which the Original Defendants are not parties. The new parties asserting these claims are eleven Westland-affiliated entities that fall into two groups: the "Credit Facility Entities"[2] and the "Securities Entities"[3] (collectively, the "MCFA Plaintiffs"). The MCFA is a line of credit under which the Credit Facility Entities claim they were entitled to an advance of more than $27,000,000 that Fannie Mae allegedly wrongfully refused to extend. The MCFA Plaintiffs allege that Fannie Mae's declining to extend this "Borrow Up Advance" forced the Securities Entities to satisfy margin calls on their high-risk margin trade business by liquidating other assets to pay these debts.

For the purposes of this Petition, the salient issue is that the MCFA

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[2]The Credit Facility Entities are Amusement Industry, Inc., Westland Corona LLC, Westland Amber Ridge LLC, Westland Hacienda Hills LLC, 1097 North State, LLC, Westland Tropicana Royale LLC, and Vellagio Apts of Westland LLC.

[3]The Securities Entities include the Alevy Family Protection Trust, Westland AMT, LLC, AFT Industry NV, LLC, and A&D Dynasty Trust. The Securities Entities are not parties to the MCFA.

contains a mandatory forum selection clause requiring that the MCFA Plaintiffs bring any claims under the MCFA in the District of Columbia: "Borrower agrees that ***any controversy arising under or in relation to the Notes, the Security Documents*** (other than the Security Instruments), ***or any other Loan Document shall be***, except as otherwise provided herein, ***litigated in the District of Columbia***." IAPP152 (emphasis added).[4]

The district court refused to enforce the forum selection clause by dismissing the two MCFA claims brought by the MCFA Plaintiffs. Fannie Mae therefore respectfully requests that this Court issue a writ of prohibition or mandamus, enforcing the forum selection provision of the MCFA, which involves two sets of represented and sophisticated parties, and directing the district court to dismiss the MCFA Plaintiffs' claims pursuant to that clause.

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[4]Due to an oversight, the MCFA was not attached to the Motion to Dismiss, even though both sides cite to the unattached "Exhibit 1." *Compare* IAPP152*, with* IIAPP181. Because both sides collectively quote the full language of the relevant section of the MCFA, there is no dispute regarding that provision's content. *Id.*

## APPLICABLE LEGAL STANDARDS

Under Nevada law, a "writ of prohibition … arrests the proceedings of any tribunal … exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal …." NRS 34.320. "Prohibition is a proper remedy to restrain a district judge from exercising a judicial function without or in excess of its jurisdiction." *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "A writ of prohibition may issue when a district court acts without or in excess of its jurisdiction and the petitioner lacks a plain, speedy, and adequate remedy at law." *Nev. State Bd. of Architecture v. Eighth Jud. Dist. Ct.*, 135 Nev. 375, 377, 449 P.3d 1262, 1264 (2019) (citations omitted). "Whether a writ of prohibition will issue is within this [C]ourt's sole discretion." *Id.*

Whether a forum selection clause applies is a question this Court reviews de novo. *LV Car Serv., LLC v. AWG Ambassador, LLC*, 134 Nev. 975, 416 P.3d 206 (2018). Additionally, "[c]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Am. First Fed. Credit Union v. Soro*, 131

Nev. 737, 739, 359 P.3d 105, 106 (2015).

## RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

### I. The Original Loans and the Default on the Loans.

The Original Defendants assumed mortgage loans owned by Fannie Mae of $9,366,000 and $29,000,000, for the purchase of and secured by the two apartment complexes. IAPP014–137 (First Amended Counterclaim) ¶ 100. Because later inspections and assessments of the Properties revealed that they required substantial repairs, Westland was required to make the required repairs and deposit funds sufficient to fund those repairs into reserve and escrow accounts used to secure such repairs. *Id*. ¶¶ 4, 205, 217, 235–37. After Westland failed to fund those reserve and escrow accounts, Fannie Mae and Grandbridge, its servicer, issued a demand and eventually initiated the underlying action. *Id*. ¶ 4–5, 235–37, 486. More than a year into the litigation, Westland filed its "Amended Counterclaim," which included the new MCFA claims at issue here. IAPP001.

### II. Facts and Allegations Concerning the MCFA Claims.

On March 15, 2019, six of the Credit Facility Entities (not including Amusement Industry, Inc.) entered the MCFA, as borrowers, with Wells Fargo Bank, N.A., as lender. IAPP014–137 ¶ 282. The MCFA Plaintiffs

allege that Fannie Mae was obligated to fund certain loans and advances under the MCFA but failed to do so. *Id.* ¶¶ 287, 294, 296. Of those Plaintiffs, the Credit Facility Entities claim that they were entitled to the above-described Borrow-Up Advance. *Id.* ¶ 294. The Securities Entities claim to own significant portfolios of financial securities, many of which were held on margin in March 2020. *Id.* ¶ 270. During the market fluctuation in March 2020 resulting from the onset of the COVID-19 pandemic, the Securities Entities allege that they had more than $27,000,000 in margin calls, which they covered by liquidating financial securities. *Id.* ¶¶ 271–72.

The MCFA has a forum selection clause, which provides:

> **Section 15.01 Choice of Law; Consent to Jurisdiction.**
>
> . . . Borrower agrees that any controversy arising under or in relation to the Notes, the Security Documents (other than the Security Instruments), or any other Loan Document ***shall be***, except as otherwise provided herein, ***litigated in the District of Columbia***. The local and federal courts and authorities with jurisdiction in the District of Columbia shall, except as otherwise provided herein, have jurisdiction over all controversies which may arise under or in relation to the Loan Documents, including those controversies relating to the execution, jurisdiction, breach, enforcement, or compliance with the Notes, the Security Documents (other

> than the Security Instruments), or any other issue arising under, relating to, or in connection with any of the Loan Documents. ***Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any litigation arising from the Notes, the Security Documents, or any of the other Loan Documents, and waives any other venue to which it might be entitled by virtue of domicile, habitual residence, or otherwise***. Nothing contained herein, however, ***shall prevent Lender from bringing any suit, action, or proceeding or exercising any rights against Borrower*** and against the collateral in any other jurisdiction. Initiating such suit, action, or proceeding or taking such action in any other jurisdiction shall in no event constitute a waiver of the agreement contained herein that the laws of the District of Columbia shall govern the rights and obligations of Borrower and Lender as provided herein or the submission herein by Borrower to personal jurisdiction within the District of Columbia.

IAPP152 (emphasis added).

## III. The District Court Refuses to Enforce the Forum Selection Clause.

Fannie Mae moved to dismiss the MCFA Plaintiffs' two claims based on the alleged breach of the MCFA because they can only bring those claims in the District of Columbia. IAPP149–53. The district court

denied that aspect of Fannie Mae's motion without analysis,[5] ruling only that the "Motion is DENIED IN PART as a matter of law relative to Movants' venue contentions." IIIAPP385. Though the denial was without prejudice, for the reasons addressed below, without prompt, interlocutory review, Fannie Mae will not enjoy the benefit of the forum selection clause.

## ARGUMENT

### I. The District Court Erred as a Matter of Law by Refusing to Enforce the MCFA's Mandatory Forum Selection Clause, which Requires that the MCFA Plaintiffs Bring their MCFA Claims in the District of Columbia.

#### A. Mandatory Forum Selection Clauses Are Enforceable Under Nevada Law.

The presence of a clear, mandatory forum selection clause, as here, requires dismissal.[6] "Forum selection clauses are prima facie valid, and

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[5]Fannie Mae moved to dismiss certain other claims and remedies asserted in the Amended Counterclaim as well but does not challenge any other holding in the instant Petition. By so limiting its Petition, Fannie Mae does not waive its right to challenge any other aspect of the district court's ruling by appeal from the judgment or any other permissible vehicle.

[6]There are at least three procedural mechanisms for dismissal based on a forum selection clause: (1) dismissal under NRCP 12(b)(5), *Walters v. FSP Stallion 1, LLC*, No. A564089-B, 2010 WL 8034117 (Nev. Dist. Ct.

are enforceable absent a strong showing by the party opposing the clause that enforcement would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud or overreaching." *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). Under Nevada law, a forum selection clause is enforceable as long as the contract is freely negotiated, and the clause is not unreasonable or unjust. *Tandy Comput. v. Terina's Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8 (1989). This Court has recognized repeatedly the "freedom" parties have to enter agreements that contain forum selection clauses when they are entered into freely and voluntarily. *E.g., San Antonio Mgmt., LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 1149, (2013) (unpublished) (citing *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 21, 251 P.3d 690, 697 (2011); *Tandy Comput.*, 105 Nev. at 843, 784 P.2d at 8).

As with any contract, this Court will enforce a forum selection clause when the terms are "clear, unambiguous, and complete." *San*

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Apr. 13, 2010); (2) dismissal under NRCP 12(b)(1), *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 738, 359 P.3d 105, 105 (2015); and (3) dismissal under the doctrine of forum non conveniens, *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 60-61 (2013). Notwithstanding the multiple procedural mechanisms, the analysis is the same under all three, and Fannie Mae moved to dismiss collectively under all three. IAPP149–51.

*Antonio Mgmt., LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 1149 (2013) (citing *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004)); *see also The Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 12 (1972) ("The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.").

Finally, in evaluating whether a forum selection clause requires dismissal of an action, this Court distinguishes between mandatory and permissive clauses, where mandatory clauses require dismissal and permissive clauses do not. *Soro*, 131 Nev. at 740, 359 P.3d at 107; *DeSage v. AW Fin. Grp.*, LLC, 461 P.3d 162 (Nev. 2020) (holding that a district court will dismiss a complaint pursuant to a mandatory forum selection clause if the clause specifies a non-Nevada forum with unequivocal "words of exclusivity"). The Court in *Soro* explained that "a mandatory jurisdiction clause requires a particular forum be the exclusive jurisdiction for litigation, while permissive jurisdiction is merely a consent to jurisdiction in a venue." 131 Nev. at 740, 359 P.3d at 107 (quoting *Garcia Granados Quinones v. Swiss Bank Corp.* (*Overseas*), *S.A.*,

509 So.2d 273, 274 (Fla. 1987) (internal quotation marks omitted)). That decision highlighted numerous examples from other jurisdictions of this mandatory-permissive dichotomy with which this Court expressly agreed. *Id.* at 742, 359 P.3d at 108. For example, the Tenth Circuit held that a clause was mandatory when it stated that "jurisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado . . . ." *Id.* at 741, 359 P.3d at 107–08 (quoting *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997)). And the Supreme Court of Nebraska ruled that a clause was mandatory based on the words "shall be brought only in" the selected jurisdiction. *Id.*, 359 P.3d at 107 (quoting *Polk Cty. Recreational Ass'n v. Susquehanna Patriot Com. Leasing Co.*, 734 N.W.2d 750, 758 (Neb. 2007)).

In contrast, the *Soro* Court determined that the clause at issue there – "[t]he parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement" – was permissive, "as there is no language within the clause containing words of exclusivity." *Soro*, 131 Nev. at 742, 359 P.3d at 108.

### B. The MCFA's Forum Selection Clause Is Mandatory Because It Selects the District of Columbia as the Exclusive Venue for the MCFA Plaintiffs to Assert Claims Related to that Agreement.

The MCFA includes an exclusive forum selection provision that selects the courts of the District of Columbia for any claims brought by the MCFA Plaintiffs:

> Borrower agrees that any controversy arising under or in relation to the Notes, the Security Documents (other than the Security Instruments), or any other Loan Document shall be, except as otherwise provided herein, litigated in the District of Columbia. The local and federal courts and authorities with jurisdiction in the District of Columbia shall, except as otherwise provided herein, have jurisdiction over all controversies which may arise under or in relation to the Loan Documents….

IAPP152. The MCFA Plaintiffs also expressly "waive[d]" the right to bring "any controversy arising under or in relation to" the MCFA in "any other venue" than the District of Columbia. *Id.*

Under *Soro*, this provision is undeniably mandatory as to the MCFA Plaintiffs. It first directs that any action related to the MCFA "shall be . . . litigated" in the District of Columbia – a phrase highly comparable to the "venue shall lie" language that the Tenth Circuit found (and this Court agreed) was mandatory. *Soro*, 131 Nev. at 741, 359 P.3d

at 107–08. Moreover, by entering into the MCFA, the MCFA Plaintiffs "irrevocably . . . waive[d] ***any other venue*** to which [they] might be entitled by virtue of domicile, habitual residence, or otherwise." IAPP152 (emphasis added). These are unequivocally "words of exclusivity," as they are exclusionary of any venue besides the District of Columbia. *See Soro*, 131 Nev. at 741, 359 P.3d at 107 (agreeing that the phrase "shall be brought only in" denotes a mandatory clause). There are no provisions in the MCFA's forum selection clause that permit the MCFA Plaintiffs to pursue the MCFA claims before the State trial court.

Accordingly, the MCFA precludes the MCFA Plaintiffs from asserting claims that "arise under or [are] in relation to" that agreement in Nevada, and this Court should therefore direct dismissal of those claims.[7]

[7]Although Counterclaim 3 asserts a breach-of-contract claim based on the MCFA only, Counterclaim 4 alleges breach of the covenant of good faith and fair dealing based on both the Loan Documents and the MCFA. IAPP091–93. Accordingly, only the portion of Counterclaim 4 addressing the MCFA must be dismissed under the forum selection clause.

### C. The MCFA Plaintiffs Have No Sound Basis to Avoid the Forum Selection Clause.

In response to Fannie Mae's motion before the district court, the MCFA Plaintiffs advanced two arguments. First, they contended that the forum selection clause is merely permissive and thus cannot support dismissal of the MCFA claims. Second, they argued that application of the clause here would be unreasonable because their counterclaims are compulsory. Both of these arguments lack merit.

#### 1. The MCFA Forum Selection Clause Is Not Permissive.

The MCFA provides:

> Borrower agrees that any controversy arising under or in relation to the Notes, the Security Documents (other than the Security Instruments), or any other Loan Document ***shall be***, except as otherwise provided herein, litigated in the District of Columbia.

IAPP152 (emphasis added). And, in turn, "except as otherwise provided herein," provides only for Fannie Mae's right to bring suit elsewhere: "Nothing contained herein, however, shall prevent Lender from bringing any suit, action, or proceeding or exercising any rights against Borrower and against the collateral in any other jurisdiction."

Rather than address this dispositive language, the MCFA Plaintiffs instead argued that a non-reciprocal provision explicitly giving only Fannie Mae the right to bring suit against a Borrower or collateral in another jurisdiction renders it permissive. IIAPP179. It does not. That part of the forum selection clause provides: "Nothing contained herein, however, shall prevent Lender from bringing any suit, action, or proceeding or exercising any rights against Borrower and against the collateral in any other jurisdiction." IIAPP181. This provision, however, does not modify the language requiring ***Borrowers***, like the MCFA Plaintiffs, to bring their claims in the District of Columbia. Rather, the provision – which immediately follows the waiver of any other venue – makes clear that, unlike those entities, Fannie Mae is not limited in selecting a forum if it brings suit under the MCFA. It is clear from the plain reading of the sentence that it applies only to Fannie Mae as "Lender" and thus does not modify the prior provision limiting the MCFA Plaintiffs to filing suit in the District of Columbia or somehow render the forum selection clause permissive. This is a bargained-for, plain-language provision: Fannie Mae may bring suit in Nevada, the MCFA Plaintiffs may not.

Notably, the MCFA Plaintiffs cited no authority for the proposition that an otherwise mandatory forum selection clause that is non-reciprocal is therefore permissive, because that is not the law. Moreover, Fannie Mae never sued the MCFA Plaintiffs and has not alleged any claims against anyone in Nevada arising from the MCFA. In other words, not only does the provision (permitting Fannie Mae to bring suit in any jurisdiction) not alter the effect of the forum selection clause on the MCFA Plaintiffs, but the provision was also not implicated by Fannie Mae's decision to sue different entities for breach of different contracts in the forum appropriate under those contracts. By contrast, the MCFA Plaintiffs' decision to essentially intervene in this litigation and bring claims against Fannie Mae for an alleged breach of the MCFA triggered that agreement's mandate that those claims "shall be . . . litigated" in the District of Columbia.

**2. Because the MCFA Plaintiffs Were Not Defendants to the Original Action, their Claims Are Not Counterclaims, and thus by Definition Cannot Possibly Be Compulsory Counterclaims.**

The MCFA Plaintiffs also argued below that the forum selection clause cannot preclude them from asserting these claims in the current litigation because they are compulsory counterclaims that would be lost

if not asserted. The MCFA Plaintiffs are wrong, both because the claims are not counterclaims, and even if they were compulsory counterclaims, that does not affect the application of the forum selection clause.

a. *The MCFA Plaintiffs' Claims Are Not Compulsory Counterclaims.*

"A counterclaim refers to a claim by a defendant against an opposing party, while a cross-claim is a claim against a co-party." *Lund v. Eight Jud. Dist. Ct.*, 127 Nev. 358, 361 n.3, 255 P.3d 280, 283 n.3 (2011) (citing *Depner Architects v. Nev. Nat'l Bank*, 104 Nev. 560, 563, 763 P.2d 1141, 1143 (1988)); *see also Stahl v. Ohio River Co.*, 424 F.2d 52, 55 (3d Cir. 1970) (making clear that "counterclaims are litigated between opposing parties to the principal action"); *Hann v. Venetian Blind Corp.*, 15 F. Supp. 372, 376 (S.D. Cal. 1936) ("A counterclaim is a cause of action in favor of a defendant upon which he might have sued the plaintiff.…").

As such, only counterclaims can be compulsory counterclaims. *Depner Architects*, 104 Nev. at 563, 763 P.2d at 1143. For example, in *Depner Architects*, this Court roundly rejected a party's argument that a claim was barred because it was a compulsory counterclaim, where the claim at issue was in fact not a counterclaim, calling the argument "meritless," and reiterating the definition of a counterclaim. Here, the

MCFA Plaintiffs' claims – regardless of how they are styled – cannot be counterclaims, as the MCFA Plaintiffs were not defendants to the original, principal action. Simply put, there is nothing compelling the MCFA Plaintiffs to bring a "counterclaim" against Fannie Mae because Fannie Mae never brought claims against them. The MCFA Plaintiffs' imprecise, colloquial use of the term counterclaim thus ignores the very reason that state and federal rules of civil procedure distinguish between compulsory and permissive counterclaims – i.e., determining whether a defendant is precluded from *later* filing a separate suit against the plaintiff based on facts "so logically related [to the original action] that issues of judicial economy and fairness mandate that all issues be tried in one suit." *Mendenhall v. Tassinari*, 133 Nev. 614, 621, 403 P.3d 364, 371 (2017); *see also Publicis Commc'n v. True N. Commc'ns Inc.*, 132 F.3d 363, 366 (7th Cir. 1997) (discussing the doctrine of preclusion regarding compulsory counterclaims).

Moreover, even if the MCFA Plaintiffs' new, independent claims could somehow be considered counterclaims, those counterclaims would *not* be compulsory because they do not involve the "same transaction or occurrence" as the Fannie Mae's claims against Westland. *See*

NRCP 13(a). Fannie Mae initiated this action against Liberty Village and Village Square for a receivership based on breaches of the underlying Loan Documents. Conversely, the MCFA Plaintiffs – which are not parties to the Loan Documents nor otherwise involved in the Liberty Village and Village Square properties – claim that Fannie Mae breached a different contract by not extending them credit – i.e., conduct wholly separate and distinct from Fannie Mae's claims against Liberty Village and Village Square. But Fannie Mae did not bring suit against any of the MCFA Plaintiffs or assert any claims concerning the MCFA, and as such, this dispute is not part of the same transaction or occurrence.

b. *Even Compulsory Counterclaims Are Subject to the Mandatory Forum Selection Clause.*

Even if the MCFA claims were counterclaims and were compulsory, which they are not, the legal result is the same: they *still* must be filed by the MCFA Plaintiffs in the District of Columbia, as the MCFA expressly requires. Courts consistently dismiss even compulsory counterclaims pursuant to mandatory forum selection clauses just like this one. *See, e.g.*, *Publicis Commc'n*, 132 F.3d at 366 ("True North promised not to assert such claims in other forums [besides Delaware] whether or not they would be 'compulsory' counterclaims . . . . By

presenting the claim in Chicago, True North broke its promise. The district court should have enforced the pooling agreement by dismissing the counterclaim.") *Mil-Ray v. EVP Int'l, LLC*, No. 3:19-CV-00944-YY, 2021 WL 2903224, at *10 (D. Or. July 8, 2021) (agreeing with the analysis in *Publicis Communication*, stating that "other courts have similarly dismissed or transferred counterclaims that are subject to a forum selection clause"); *Reading Rock Ne., LLC. v. Russel*, No. CV 20-5728 (RBK/KMW), 2021 WL 870642, at *8 (D.N.J. Mar. 8, 2021) (unpublished) (finding dismissal appropriate "even if Defendants were asserting compulsory counterclaims").

As the Seventh Circuit explained, this is a matter of basic contract principles. On one hand, the party bound by a mandatory forum selection clause has promised not to sue the other party in a different venue – making no distinction between compulsory and non-compulsory counterclaims. *Publicis Commc'n*, 132 F.3d at 366. The only relevance to a counterclaim being deemed "compulsory" is that a party is usually precluded from asserting that claim in a future action if not asserted in the first action. *Mendenhall*, 133 Nev. at 620. But under a forum selection clause, the party that would seek to enforce the clause against

a mandatory counterclaim is implicitly promising not to raise the defense of preclusion if the counterclaimant files suit in the proper venue. *Publicis Commc'n*, 132 F.3d at 366; *accord* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1412 (3d ed.). The clause thus entails a promise for a promise. While the MCFA Plaintiffs' claims are not compulsory counterclaims, they are equally subject to the forum selection clause.

## II. Fannie Mae Lacks a Plain, Speedy, and Adequate Remedy at Law.

There is no adequate way immediately to review a denial of a motion to dismiss based on a forum selection clause. Such a ruling is not reviewable under the collateral-order doctrine. *In re Lloyd's Reg. N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015) (citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988)).

On appeal from a final judgment, the improper failure to transfer venue is effectively unreviewable. The defendant would be in the unenviable position of having to show that "it would have won the case" had it been tried in the proper venue. *Id.* at 318–19 (citation omitted). The same ineffectiveness of review characterizes the denial of an FNC motion: If it is denied and the case proceeds through trial, the denial will

not be considered reversible error "unless the moving party can demonstrate great prejudice arising from trial in the plaintiff's chosen forum." *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 423–24 (5th Cir. 2001). Accordingly, "a defendant's entitlement to FNC [pursuant to a forum selection clause] ordinarily cannot adequately be vindicated through the regular appeals process." *Lloyd's*, 780 F.3d at 289; *see also McLennan*, 245 F.3d at 423–24; *Soro*, 131 Nev. at 741, 359 P.3d at 108.

Because Fannie Mae cannot effectively obtain review of the denial of its motion to dismiss based on the forum selection clause, writ relief is appropriate and warranted.

## CONCLUSION AND PRAYER

This Court should direct the district court to enforce the MCFA's valid and mandatory forum selection clause by dismissing the claims based on the alleged breaches of that agreement.

DATED: April 18, 2022

SNELL & WILMER L.L.P.

*/s/ Kelly H. Dove*
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*Attorneys for Petitioner Federal National Mortgage Association*

## VERIFICATION

On April 15, 2022, the affiant, Nathan G. Kanute, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

"I am counsel for Petitioner, I have read the foregoing petition for writ of mandamus and all factual statements in the petition are within the affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition.

The exhibits in the appendix and attached to the concurrently filed Petition are true and correct copies of the original documents."

Nathan G. Kanute

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 15th day of April, 2022.

Notary Public in and for the State of Nevada

Notary Public - State of Nevada
COUNTY OF WASHOE
ADELA HERNANDEZ
No. 21-9270-02 My Appointment Expires May 25, 2025

## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook, 14 point, and is 4,432 words.

2. I 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: April 18, 2022

SNELL & WILMER L.L.P.

*/s/ Kelly H. Dove*

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*Attorneys for Petitioner Federal National Mortgage Association*

## NOTICE OF RELATED CASES

- *Federal National Mortgage Association v. Westland Liberty Village, LLC, et al.*, Appeal No. 82174;

- *Federal Housing Finance Agency v. Eighth Judicial District Court* (*Westland Liberty Village, LLC et al.*), Appeal No. 82666;

- *Federal National Mortgage Association v. Westland Liberty Village, LLC, et al.*, Appeal No. 83695.

## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 18, 2022, I caused to be served a true and correct copy of the foregoing **PETITION FOR A WRIT OF PROHIBITION** by the method indicated:

☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

Honorable Mark R. Denton
Eighth Judicial District Court
Dept. XIII
Regional Justice Center
200 Lewis Ave.
Las Vegas, Nevada 89101

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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*1097 North State LLC;*
*Westland Tropicana Royale LLC;*
*Vellagio Apts of Westland LLC;*
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*Westland Amt, LLC;*
*Aft Industry NV, LLC; and*
*A&D Dynasty Trust*

*/s/ Maricris Williams*
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