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

APPENDIX TO PETITION FOR A WRIT OF PROHIBITION

VOLUME 3

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PETITIONER'S APPENDIX
ALPHABETICAL INDEX

DATED: April 18, 2022

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/s/ Kelly H. Dove
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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 **APPENDIX TO PETITION FOR A WRIT OF PROHIBITION VOLUME 3** upon the following 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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Westland Tropicana Royale LLC;
Vellagio Apts of Westland LLC;
The Alevy Family Protection rust;
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A&D Dynasty Trust

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DISTRICT COURT

CLARK COUNTY, NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff,

vs.

WESTLAND LIBERTY VILLAGE, LLC, and WESTLAND VILLAGE SQUARE, LLC,

Defendants.

AND ALL RELATED ACTIONS.

Case No. A-20-819412-B

Dept No. XIII

PLAINTIFF AND FHFA'S REPLY IN SUPPORT OF MOTION TO DISMISS IN PART DEFENDANTS' FIRST AMENDED ANSWER AND AMENDED COUNTERCLAIM

Hearing Date: December 16, 2021
Hearing Time: 9:00 a.m.

Plaintiff Federal National Mortgage Association ("Fannie Mae") and Intervenor Federal Housing Finance Agency ("FHFA", and collectively, "Movants") file their *Reply In Support of: Motion to Dismiss In Part Defendants' First Amended Answer and Amended Counterclaim* ("the Reply"), responding to the opposition ("Opposition") filed by Defendants/Counterclaimants Westland Liberty Village, LLC ("Liberty Village"), Westland Village Square, LLC's ("Village

Square," collectively with Liberty Village, "Westland" or "Original Defendants"), Amusement Industry, Inc. ("Amusement"), Westland Corona LLC ("Corona"), Westland Amber Ridge LLC ("Amber Ridge"), Westland Hacienda Hills LLC ("Hacienda Hills"), 1097 North State, LLC ("North State"), Westland Tropicana Royale LLC ("Tropicana"), and Vellagio Apts of Westland LLC ("Vellagio", collectively with Amusement, Corona, Amber Ridge, Hacienda Hills, North State, and Tropicana, the "Credit Facility Entities"); The Alevy Family Protection Trust ("Protection Trust"), Westland AMT, LLC ("AMT"), AFT Industry NV, LLC ("AFT"), and A&D Dynasty Trust ("Dynasty Trust," collectively, with Amusement, Protection Trust, AMT, and AFT, the "Securities Entities"). For ease of reference, Westland, the Credit Facility Entities, and the Securities Entities will be referred to collectively as the "Counterclaimants," even though Original Defendants are the only true counterclaimants.

This Reply is based on the following Memorandum of Points and Authorities, all pleadings and papers of record, and any evidence or oral argument the Court entertains at the hearing in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY

A year into this litigation, Counterclaimants filed a First Amended Counterclaim (the "Amended Counterclaim"), adding 21 new parties (11 of which are counterclaim-plaintiffs) and 11 new causes of action. As to Fannie Mae, the Amended Counterclaim adds the 11 new Counterclaimants to Westland's good faith and fair dealing claim and asserts a new breach of contract action based on a Master Credit Facility Agreement ("MCFA") between Fannie Mae and the Credit Facility Entities. The MCFA was not at issue during the first year of this litigation and bears no relation to the litigation originally filed by Fannie Mae or even Westland's original counterclaims. Instead, Counterclaimants now seek hundreds of millions of dollars in purported damages based solely on the Securities Entities'—strangers to all of the relevant contracts—market losses caused by their speculative investments during a global pandemic. Despite these indisputable facts, Counterclaimants ask the Court to deny Movants' targeted request to dismiss those portions of the Amended Counterclaim which attempt to expand this litigation beyond all reasonable

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bounds. As a matter of law, this Court should reject Counterclaimants' invitation and dismiss (1) the contractual claims asserted by strangers to the underlying contracts,[1] (2) the two MCFA claims; and (3) the claims for punitive damages, consequential damages, and attorneys' fees.

More specifically, the contract claims asserted by strangers to the contracts must be dismissed for lack of standing. "Only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract or obtain an appropriate remedy for breach." *GECCMC 2005-C1 Plummer St. Off. Ltd. P'ship v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012)). The Opposition largely concedes that the Counterclaimants (who are strangers to the contracts) cannot assert claims under those contracts. Therefore, counterclaims 1, 2, 3, 5, 9, and 10 should be dismissed as to any Counterclaimant which is not a party to the relevant contract. The Court should also dismiss Counterclaimants' claim for breach of the duty of good faith and fair dealing to the extent it is asserted by strangers to the contracts. Whether Counterclaimants plead breach of the covenant of good faith and fair dealing in contract or tort, they cannot assert this claim, as a matter of law, on behalf of parties who are not parties to the MCFA or the loan documents signed by Liberty Village and Village Square (the "Loan Documents"). *See Bell v. Bimbo*, 2016 WL 3536173, at *4 (D. Nev. June 27, 2016)

Counterclaims 3 and 4, to the extent they assert claims under the MCFA, must also be dismissed. The MCFA contains a mandatory forum selection clause for claims brought by the Credit Facility Entities. The forum selection clause clearly provides that the Credit Facility Entities can only bring those claims in the District of Columbia. Contrary to the Credit Facility Entities' argument, counterclaims 3 and 4 are not compulsory in this litigation—they arise out of a separate contract and purported breach. Even if they were compulsory counterclaims, however, the law is clear that the forum selection clause should be enforced.

Counterclaimants' requests for punitive damages and attorneys' fees should be dismissed pursuant to 12 U.S.C. § 4617(j)(4) (the "Penalty Bar"). Courts have routinely held that 12 U.S.C. § 4617(j)(4), which precludes awards against FHFA and Fannie Mae "in the nature of penalties or

[1] For ease of reference, Movants have attached a list of Counterclaimants who should be dismissed from each counterclaim for lack of standing as **Exhibit A**.

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fines," prohibits punitive damages. *See* Mot. 15-16 (*citing* numerous cases including *Gray v. Seterus, Inc.*, 233 F. Supp. 3d 865, 872 (D. Or. 2017) ("Fannie Mae is indeed immune from punitive damages under 12 U.S.C. § 4617(j).")). Punitive damages are clearly "in the nature of penalties or fines." *See Webb v. Shull*, 128 Nev. 85, 90 (2012). Similarly, the attorneys' fees Counterclaimants seek are precluded penalties. Contrary to Counterclaimants' arguments, there are no exceptions or carve-outs to the Penalty Bar and it precludes recovery of punitive damages and/or attorneys' fees from FHFA and Fannie Mae.

Attorneys' fees are also unavailable under the contracts at issue or as special damages. As established in the Motion, and undisputed in the Opposition, the Loan Documents and MCFA provide no basis for recovery of attorneys' fees by Counterclaimants. Verified Compl. Ex. 1 (Village Square Multifamily Loan and Security Agreement), § 4.02(g)(3) (emphasis added); *see also* Verified Compl. Ex. 6 (Liberty Multifamily Loan and Security Agreement), § 4.02(g)(3); Mot., Ex. 1 § 4.02(g)(3). Counterclaimants cite no statutory basis for the recovery of attorneys' fees because there is none. They assert instead that attorneys' fees may be recovered as special damages. They are wrong. Special damages cannot be recovered for breach of contract as a matter of law. *Pardee Homes of Nevada v. Wolfram*, 135 Nev. 173, 177 (2019). In any event, Counterclaimants have not properly pleaded a claim for special damages.

Finally, the Original Defendants and the Credit Facility Entities have contractually waived their claims for consequential damages. The contractual waiver is clear and conspicuous. The waiver's inclusion in a section of the Loan Documents and MCFA relating to marshaling of assets does not alter the express waiver and the Court should enforce the waiver by dismissing the consequential damages claims.

As is readily apparent, the current Motion does not revisit old territory from Fannie Mae's prior motion to dismiss, contrary to Counterclaimants' assertion, and establishes that dismissal is required by the contracts and applicable law. Accordingly, the Movants respectfully request that the Court grant the Motion and deny Counterclaimants' futile request to amend.

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II. ARGUMENT

A. Various Counterclaimants Concede that They Lack Standing to Assert Counterclaims 1, 2, 3, 5, 9, and 10.

In the Motion, Movants argued that counterclaims 1, 2, 3, 5, 9, and 10 must be dismissed, for lack of standing, as to all Counterclaimants who are not parties or third-party beneficiaries to the relevant contract. Mot. at 7-10. Specifically, Movants argued that counterclaims 1, 2, 5, 9, and 10 must be dismissed as to the Credit Facility Entities and the Securities Entities because they are not parties to, or third-party beneficiaries of, the loan documents entered into by Liberty Village or Village Square (the "Loan Documents").[2] Mot. at 10. Movants also established that counterclaim 3 must be dismissed as to the Original Defendants and the Securities Entities because they are not parties to the MCFA. *Id.* at 8-10.

Counterclaimants concede these points. They do not argue that non-parties to the relevant contracts can assert counterclaims 1, 2, 3, 5, 9, and 10, nor that any of them are parties or third-party beneficiaries. Instead, they argue only that the allegations in counterclaims 1, 2, 3, 5, 9, and 10 are clear about the party or parties asserting each claim, and identify particular Counterclaimants as the relevant party for each such counterclaim.[3] Opp. at 7-8. According to Counterclaimants, counterclaim 1 is only asserted on behalf of Liberty Village, counterclaim 2 is only asserted on behalf of Village Square, counterclaim 3 is only asserted on behalf of the Credit Facility Entities, and counterclaims 5, 9, and 10 are only asserted on behalf of Liberty Village and Village Square,

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[2] Movants established that counterclaim 4, the breach of the duty of good faith and fair dealing counterclaim, should also be dismissed as to the Original Defendants (to the extent the counterclaim is based on the MCFA), the Securities Entities (as non-parties to any relevant contract), and the Credit Facility Entities (to the extent the counterclaim is based on the Loan Documents). The dismissal of counterclaim 4 will be addressed in detail below.

[3] Movants would not have sought dismissal if the Amended Counterclaim was clear. Contrary to Counterclaimants' argument, the Amended Counterclaim does reference parties in counterclaims which are not parties to the contract. Specifically, counterclaims 1 and 2, which Counterclaimants assert were largely unchanged, were amended to add allegations related to unnamed "Westland entities." Amended Counterclaim, ¶¶ 441, 453. Additionally, as discussed more below, counterclaim 4 asserts a breach of the duty of good faith and fair dealing by all of the Counterclaimants without regard to which Counterclaimants are parties to which contracts. Amended Counterclaim, ¶¶ 466-78.

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per their respective Loan Documents.[4]

Based on this clarification, the Court should dismiss counterclaims 1, 2, 3, 5, 9, and 10 as to any Counterclaimant other than those identified in the Opposition as asserting the particular claims. *GECCMC 2005-C1 Plummer*, 671 F.3d at 1033 ("[O]nly a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract or obtain an appropriate remedy for breach."); *see also* EDCR 2.20(e) (stating that a failure to file an opposition is an admission that a motion is meritorious and consenting to granting the same); *Bates v. Chronster*, 100 Nev. 675, 681-82, 683 (1984) (treating a failure to respond to an argument on the appropriate interest rate under the contract as conceded).

B. The Court Should Dismiss the Breach of the Covenant of Good Faith and Fair Dealing Claim as to Every Counterclaimant Except Liberty Village, Village Square, and the Credit Facility Entities, for Lack of Standing.

Movants maintain that, just as with the breach of contract claims, only parties to a contract have standing to bring a claim for the breach of the covenant of good faith and fair dealing. *See GECCMC 2005-C1 Plummer*, 671 F.3d at 1033 (holding that "only a party to a contract or an intended third-party beneficiary" may sue to enforce a contract or obtain an appropriate remedy for breach). In response, and as described above, Counterclaimants conceded that non-parties to contracts lack standing to assert breach of contract claims. However, they maintained that the fourth counterclaim, for breach of the covenant of good faith and fair dealing, "include[s] every counterclaimant," notwithstanding whether they are parties to the contracts. Opp. at 8. They argue that Fannie Mae's alleged acts of "bad faith loan servicing and placing entities other than those involved with the Loan Agreement on a-check" generates a breach of the covenant of good faith and fair dealing claim under contracts as to which Counterclaimants are not a party. Their theory, which does not have any support in the law, is that because a breach of the covenant of good faith and fair dealing can, in some limited circumstances, be a tort, no contractual relationship is necessary to assert it.

That is not the law. "The existence of a contract between the parties" is a required element to establish a claim for breach of the implied covenant of good faith and fair dealing. *Shaw v.*

[4] *See* Exhibit A.

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CitiMortgage, Inc., 201 F. Supp. 3d 1222, 1251 (D. Nev. 2016), amended in part, 2016 WL 11722898 (D. Nev. Nov. 1, 2016). The claim should be dismissed for lack of standing except as to Liberty Village and Village Square as to their respective Loan Documents and as to the Credit Facility Entities as to the MCFA.[5]

1. It Is Black-Letter Law that a Claim for Breach of the Covenant of Good Faith and Fair Dealing Requires that the Claimant Be a Party to that Contract.

"Similar to breach of contract claims, ***non-parties to a contract cannot recover under a breach of the implied covenant of good faith and fair dealing***." *Bell*, 2016 WL 3536173, at *4 (granting defendants' motion to dismiss breach of good faith and fair dealing claims, without leave to amend where plaintiffs were not parties to the contract) (emphasis added). There must be a "contract between the parties" to assert a claim for breach of the implied covenant of good faith and fair dealing. *Shaw*, 201 F. Supp. at 1251; *see also Bertsch v. Discover Fin. Servs.*, 2020 WL 1170212, at *4 (D. Nev. Mar. 11, 2020) (holding that to establish a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must show that "***the plaintiff and defendant*** were parties to a contract," and dismissing the claims where no such contract existed); *Macionski v. Alaska Airlines*, 94 F.3d 652 (9th Cir. 1996) (unpublished) ("The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship."); *Langlois v. Harrah's Tahoe, Inc*., 959 F.2d 240 (9th Cir. 1992) (unpublished) (affirming dismissal of claim for breach of the implied covenant of good faith and fair dealing where no contract existed between the parties); *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 989 (2004) (holding that "every contract imposes ***upon the contracting parties*** the duty of good faith and fair dealing") (emphasis added). The covenant cannot "be endowed with an existence independent of its contractual underpinnings." *Guz v. Bechtel Nat'l Inc*., 8 P.3d 1089, 1110 (Cal. 2000).

Counterclaimants' response to this black-letter law is to "disagree" with it, without citation to any applicable authority in support of their disagreement. Opp. at 8. This is not adequate and,

[5] As addressed below, the claims arising from the MCFA and brought by the Credit Facility Entities should be dismissed based on the forum selection clause.

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as the many cases cited above make clear, it is not the law. Counterclaimants cite only one case in support of their position—*American Federation of Musicians v. Reno's Riverside Hotel, Inc*., 86 Nev. 695, 697 (1970)—which has no application here, and is wholly inapposite. That decision does not address who has standing to sue under a contract, whether for breach of express contractual terms or for the implied covenant of good faith and fair dealing. Indeed, that case does not even involve a claim for the breach of the covenant of good faith and fair dealing. Instead, the Nevada Supreme Court addressed "whether the National Labor Relations Act, as amended, preempts state jurisdiction to enjoin the American Federation of Musicians from placing the Riverside Hotel on the National Defaulters List," analyzing whether certain labor practices were unlawful and who had jurisdiction to adjudicate them. That case is wholly irrelevant to this question. Stated simply, Counterclaimants have no authority for their position that a stranger to a contract may sue to enforce the covenant of good faith and fair dealing. *See, e.g.*, *Bell*, 2016 WL 3536173, at *4 (granting defendants' motion to dismiss breach of good faith and fair dealing claims, without leave to amend where plaintiffs were not parties to the contract).

2. Strangers to a Contract Do Not Have Standing to Bring a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing, Regardless Whether the Claim Sounds in Contract or Tort.

Despite the undeniably contractual nature of Counterclaimants' claim for a breach of the implied covenant of good faith and fair dealing, they argue that if there is no contractual relationship between various Counterclaimants and Fannie Mae, then Fannie Mae's placing (unspecified) entities[6] on A-Check gave rise to an implied covenant claim sounding in tort, regardless whether those entities were parties to a contract with Fannie Mae. Opp. at 8. This is not a correct statement of the law, for two reasons. First, regardless whether the breach of the covenant of good faith and fair dealing is a contract or a tort, strangers to the contract lack standing to sue on that claim. Second, Counterclaimants did not and cannot allege a tortious breach of the covenant of good faith and fair dealing as a matter of law because the pre-requisite for a tortious breach—a special relationship—does not exist here.

[6] The Opposition states only that Fannie Mae "engag[ed] in bad faith loan servicing and placing entities other than those involved with the Loan Agreement on a-check." Opp. at 8.

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a. Non-Parties to a Contract Lack Standing to Bring a Claim for Breach of the Covenant of Good Faith and Fair Dealing, Even When the Claim Sounds in Tort.

The Opposition is silent regarding how the potentially tortious nature of this claim somehow opens it to strangers to the contract. Counterclaimants provide no authority supporting their position, nor did Movants locate any. The law on this issue uniformly holds that a claim for the breach of the covenant of good faith and fair dealing requires the plaintiff to allege and prove the existence of a contract between the parties, regardless whether the breach is contractual or tortious. *Stebbins v. Geico Ins. Agency*, 2019 WL 281281, at *2 (D. Nev. Jan. 22, 2019) (articulating the elements of the claim as applying to both types of breaches); *Innovative Bus. Partnerships, Inc. v. Inland Ctys. Reg'l Ctr., Inc*., 194 Cal. App. 4th 623, 631–32, 123 Cal. Rptr. 3d 525, 533 (2011) (holding that a cause of action for tortious breach of the covenant of good faith and fair dealing requires the existence of an enforceable contract).

Indeed, the standard for a tortious breach of the covenant of good faith and fair dealing requires a special relationship between the parties. Case law makes clear that this claim only arises between parties to a contract. *See, e.g.*, *Hilton Hotels Corp. v. Butch Lewis Prods, Inc.*, 109 Nev. 1043, 1046 (1993) (holding, with respect to tortious breach of the covenant of good faith and fair dealing that "[i]t is well established within Nevada that every contract imposes ***upon the contracting parties*** the duty of good faith and fair dealing." (emphasis added)).

The Opposition's statement that the Supreme Court remanded the matter in *Hilton Hotels* "to determine whether tort liability should be imposed on additional parties, who were not parties to the contract" is incorrect, or at least misleading. Opp. at 9. The breach of the implied covenant claims were *only* between parties to the contract, whereas Hilton had brought other tort claims against separate defendants. *Hilton Hotels Corp.*, 109 Nev. at 1049. To be clear, Hilton was *not* seeking to sue non-parties to the contract for a tortious breach of the duty of good faith and fair dealing, nor was the remand for the purpose of allowing claims by additional *plaintiffs* who were strangers to the contract.

In sum, in addition to limited and special circumstances (none of which are present in this case), a tortious breach of the covenant of good faith and fair dealing requires a contractual

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relationship between the parties, just as an express contractual breach does. Counterclaimants offer absolutely no support for their contention that a contractual stranger can assert a claim for breach of the covenant of good faith and fair dealing—whether it be contractual or tortious. The fourth counterclaim for breach of the implied covenant of good faith and fair dealing should be dismissed for lack of standing except as to Liberty Village and Village Square as to their respective Loan Documents and as to the Credit Facility Entities as to the MCFA. [7]

b. Counterclaimants Did Not Allege, and Cannot Allege, an Implied Covenant Claim Sounding in Tort Because No Special Relationship Between the Parties Exists Here.

The Amended Counterclaim does not, by its terms, allege a tortious breach of the covenant of good faith and fair dealing. Nor could it, as the requisite relationship between the parties does not exist.

"Although every contract contains an implied covenant of good faith and fair dealing, an action in tort for breach of the covenant arises only 'in rare and exceptional cases' when there is a special relationship…." *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 461 (2006). The imposition of liability in tort for breach of the covenant of good faith and fair dealing is "limited … to those cases involving special relationships characterized by elements of public interest, adhesion, and fiduciary responsibility." *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 355 (1997) (discussing an insurer/insured relationship as an example of a special relationship). It requires the special element of reliance or fiduciary duty. *Id.* at 354. Tort liability is not permitted where, as here, "agreements have been heavily negotiated and the aggrieved party was a sophisticated businessman." *Id.* at 355; *see also A.C. Shaw Constr. v. Washoe County*, 105 Nev. 913, 915 (1989); *K Mart v. Ponsock*, 103 Nev. 39 (1987) (abrogated on other grounds).

Indeed, courts consistently recognize that there is no special or fiduciary relationship between a lender and borrower. *Davenport v. Homecomings Fin., LLC*, 130 Nev. 1169 (2014) (unpublished) ("[T]his court has never recognized the existence of a special or fiduciary relationship arising solely from a routine, arm's-length relationship between a borrower and a

[7] The MCFA claims brought by the Credit Facility Entities, though, should be dismissed based on the forum selection clause, as discussed below.

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lender or successor lender."); *Jordan v. Bank of America*, 2013 WL 5308268 at *7 (D. Nev. Sept. 19, 2013) (recognizing that lenders do not typically have a fiduciary duty to a borrower).

Here, the Amended Counterclaim does not allege or attempt to allege any special relationship between the parties, acknowledging that the agreements "specified the terms that would govern the parties' practices for administration of the loans" and the contracts at issue were "two separate sets of loan agreements, related to the Properties." Amended Counterclaim ¶¶ 307-308. Accordingly, even if a tortious breach of the implied covenant claim could be brought by a non-party to a contract, no such claim can be brought here as a matter of law because there are no allegations of the required "special relationship."

3. Current Non-Party Counterclaimants Fail to Identify Any Contract or Breach, Which Is Also Fatal to their Claim.

In an apparent attempt to argue that the Counterclaimants who are not parties to any relevant contract do have contractual claims, the Opposition asserts, in conclusory fashion, that the implied good faith and fair dealing claim "arises from the Loan Agreements, the Master Credit Facility Agreement, the related guarantees, and the applications that required submission of the financial statements/financial records of the Westland Securities Entities."[8] This tactic fails Rule 8, as it does not provide notice as to what contract or conduct gives rise to the claim as to each party.

A complaint for breach of contract should be dismissed where it fails to "identify what provisions … were breached…." *Davenport v. GMAC Mortg.*, 129 Nev. 1109 (2013) (unpublished); *Herold v. One W. Bank*, No. 2:10-CV-02204-KJD, 2011 WL 4543998, at *2 (D. Nev. Sept. 29, 2011) (dismissing complaint where Plaintiff did not identify the provisions of a contract that defendants allegedly breached); *Silvas v. GMAC Mortgage, LLC*, 2009 WL 4573234 *5 (D. Ariz. 2010) (dismissing breach of contract claim where plaintiff failed to provide defendant notice of the contractual provision allegedly breached, or the nature of the breach); *In re Mortg. Elec. Registration Sys., Inc*., 555 F. App'x 661, 665 (9th Cir. 2014) (unpublished) (affirming dismissal of complaint where the complaint failed "to specify what provisions of the agreement ... were breached."). Counterclaimants' laundry list of potential agreements that may be implicated

[8] Counterclaimants do not explain how an application constitutes a contract. It does not.

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by this claim, without identification of any provision that was breached, is insufficient to state a claim for relief. *See* Opp. at 8 (broadly referencing "all Counterclaimants related to the breach of the covenant of good faith and fair dealing and also the Loan Agreements, the Master Credit Facility Agreement, the related guarantees, and the applications that required submission of the financial statements/financial records of the Westland Securities Entities.").

C. The MCFA's Forum Selection Clause Mandates Dismissal of Counterclaim 3 and the MCFA Allegations of Counterclaim 4.

Movants have established that the Credit Facility Entities 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,[9] requiring dismissal of counterclaim 3 and the MCFA-related claims in counterclaim 4. In response, the Credit Facility Entities advance two reasons why the Court may supposedly ignore the parties' forum selection clause. First, they contend that the forum selection clause is merely permissive. This is wrong because, unlike the cases cited by the Credit Facility Entities, the MCFA forum selection clause dictates the jurisdiction and venue where the Credit Facility Entities agreed to litigate. That fact is not changed just because the MCFA permits *Fannie Mae*—not the Credit Facility Entities—to file suit in jurisdictions other than the District of Columbia. Second, the Credit Facility Entities argue that application of the clause here is unreasonable because their counterclaims are compulsory. Their counterclaims are not compulsory, but, even if they were, the MCFA forum selection clause remains enforceable.

1. The MCFA Forum-Selection Clause Is Mandatory, Not Permissive, and Enforceable As Written.

The Credit Facility Entities failed to address the key language from the forum selection clause highlighted in the Motion, including:

> 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. . . . 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.

[9] *See* Mot. at 13 (quoting Mot., Ex. 1, §15.01).

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Compare Mot. at 13 (quoting Mot., Ex. 1, §15.01 (emphasis added)), *with* Opp. at 11–13. There is nothing permissive about language that not only specifies that any actions based on the MCFA "shall be . . . litigated" in a single, exclusive jurisdiction—the District of Columbia—but also declares that the party bound by the clause—the Credit Facility Entities—"irrevocably consents," to "waiv[ing] any other venue to which it may be entitled . . . ." This unequivocal language is undeniably mandatory and requires dismissal of the MCFA counterclaims.

Rather than address this language head on, the Credit Facility Entities contend that three other provisions in Section 15.01 somehow mutate the clause into being permissive. But the first two phrases that they highlight are choice-of-law provisions, which do not affect, let alone negate, the forum selection clause. *See* Opp. at 11 (quoting Mot., Ex. 1, §15.01). Those provisions merely provide that the MCFA is to be governed by the laws of the District of Columbia, except in the enumerated instances where (i) the *laws* of the jurisdiction in which the Mortgaged Property is located apply or (ii) the *choice of law* provisions of the Uniform Commercial Code in effect for the jurisdiction in which any Borrower is organized apply. Mot., Ex. 1, §15.01. Thus, the bulk of the language that Counterclaimants highlight in no way addresses—and certainly does not alter—the language that governs *where* a dispute brought by the Credit Facility Entities must be litigated.

Although the final sentence italicized by Counterclaimants does pertain to forum selection, it does not modify the language limiting the Credit Facility Entities' claims under the MCFA to the District of Columbia. *See* Opp. at 11. Rather, the provision—which immediately follows the Credit Facility Entities' waiver of any other venue—states that "[n]othing contained" in the MCFA "shall prevent [Fannie Mae] from bringing any suit, action, or proceeding or exercising any rights against [the Credit Facility Entities] and against the collateral in any other jurisdiction." *Id*. (quoting Mot., Ex. 1, §15.01). Therefore, unlike the Credit Facility Entities, Fannie Mae is not limited in selecting a forum under the MCFA. That does not render the forum selection clause permissive or expand the forum access rights of any party *other than* Fannie Mae.

Counterclaimants' reliance on that provision is particularly inappropriate here because Fannie Mae never sued the Credit Facility Entities and has not alleged any claims against anyone based on the MCFA. In other words, not only does the provision (permitting *Fannie Mae* to bring

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suit in any jurisdiction) not alter the effect of the forum selection clause on the Credit Facility Entities, the provision was not implicated by Fannie Mae's decision to sue different entities for breach of different contracts in the forum appropriate under those contracts.

Moreover, the cases that the Opposition highlights from the examples discussed in *American First Federal Credit Union v. Soro*, 131 Nev. 737 (2015), do not advance Counterclaimants' argument. As addressed in the Motion, *Soro* distinguished between mandatory clauses, which limit venue to a single jurisdiction, and permissive clauses, in which a party consents to venue in a jurisdiction but no "words of exclusivity" dictate that the specified venue is *only* proper in that jurisdiction. Mot. at 12. The cases that Counterclaimants cite are expressly examples in the permissive category. *See John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs Inc.*, 22 F.3d 51, 52 (2d Cir.1994) (stating that disputes "shall come within the jurisdiction of the competent Greek Courts" but not limiting disputes to such courts); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-78 (9th Cir.1987) (stating that "[t]he courts of California, County of Orange, shall have jurisdiction" but including no words of exclusivity); *Keaty v. Freeport Indon., Inc.*, 503 F.2d 955, 956-57 (5th Cir.1974) (stating that "the parties submit to the jurisdiction of the courts of New York" but not restricting jurisdiction to New York). Unlike the parties to the permissive forum selection clauses in these cases, the Credit Facility Entities not only consented to venue in the District of Columbia, but they "waive[d] any other venue . . . ." This phrase—which Counterclaimants again fail to address—unquestionably constitutes "words of exclusivity" that, under *Soro*, render the MCFA's forum selection clause mandatory. *Soro*, 131 Nev. at 740 (agreeing with the Nebraska Supreme court that the phrase "shall be brought only in" a specific jurisdiction, renders a forum selection clause mandatory).

2. Even If the MCFA Counterclaims Are Compulsory, They Are Still Subject to the Mandatory Forum Selection Clause.

Counterclaimants next contend that enforcement of the clause is not "reasonable" in this instance because counterclaims 3 and 4 are "compulsory." Opp. at 12–13. This argument fails for two independent reasons. First, those counterclaims are not compulsory. Under NRCP 13(a), a counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject matter

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of the opposing party's claim . . . ." "The relevant consideration is whether the pertinent facts of the different claims are so logically related that issues of judicial economy and fairness mandate that all issues be tried in one suit." *Mendenhall v. Tassinari*, 133 Nev. 614, 621 (2017). Counterclaimants only summarily assert that the MCFA counterclaims arise out of the "same transaction or occurrence" but they do not provide any reasons why this is the same transaction or occurrence and therefore fail to meet their burden under Rule 13.

That specific allegations as to the "same transaction or occurrence" are absent is not surprising given that Fannie Mae's claims and the MCFA-based counterclaims address two distinct disputes. Fannie Mae initiated this action against Liberty Village and Village Square for a receivership based on breaches of the underlying Loan Documents. Conversely, the Credit Facility Entities—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. These are demonstrably not the same transaction or occurrence. Because Counterclaimants fail to even address this critical distinction, the Court should disregard their argument that counterclaims 3 and 4 are compulsory.

Second, even if the MCFA counterclaims were compulsory, those claims still must be filed in the District of Columbia, as the contract expressly requires. Courts routinely dismiss compulsory counterclaims pursuant to mandatory forum selection clauses just like this one. *See, e.g.*, *Publicis Commc'n v. True N. Commc'ns Inc.*, 132 F.3d 363, 366 (7th Cir. 1997) ("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*, 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

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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.

Counterclaimants cite to *Pal v. Hafterlaw, LLC*, 132 Nev. 1015, 2016 WL 1190352 (Nev. App. 2016) in an attempt to avoid this outcome. Opp. at 12. *Pal*, an unpublished Court of Appeals decision, nowhere determined that the existence of a compulsory counterclaim precludes application of a forum selection clause.[10] Instead, the Court of Appeals found that the court below "had jurisdiction over the matter" because the agreement's forum selection clause was enforceable and the clause selected "Nevada courts [as] having exclusive jurisdiction over any contract disputes . . . ." *Pal*, 2016 WL 1190352, *1. The court then *separately* addressed whether the appellant's counterclaims were compulsory, but it did not address, much less hold, as Counterclaimants assert, that the existence of a compulsory counterclaim precludes application of a forum selection clause. *Id*. at *2.

Finally, Counterclaimants' assertion of unfairness and their insinuation that they will have no relief if the Court enforces the forum selection clause are wrong. Once the MCFA "counterclaims" are dismissed here, the Credit Facility Entities may file those claims, if they choose to do so, in the District of Columbia.[11] The Credit Facility Entities' argument that they would be

[10] Any "unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose." NRAP 36(c)(3).

[11] Movants reserve their defenses to any potential claims.

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forced to incur additional expense by filing a separate action in a separate jurisdiction does not render the forum selection clause unreasonable or unjust. *See* Opp. at 12. If it did, forum selection clauses would be rendered categorically unenforceable—which is clearly not the law. And though Counterclaimants complain that it would be "unreasonable" to bifurcate "claims into repetitive suits in multiple jurisdictions," they again ignore the fact that Fannie Mae's dispute with Liberty Village and Village Square is separate and distinct and involves different parties and different contracts. At bottom, the forum selection clause here is clear and conspicuous, the Counterclaimants are sophisticated borrowers, and the mandatory forum selection clause must be enforced.

Accordingly, Counterclaim 3 and the MCFA claims in counterclaim 4 must be dismissed based on the forum selection clause, even if they are compulsory "counterclaims."

D. The Penalty Bar Precludes Plaintiffs' Claims for Punitive Damages and Attorneys' Fees.

Counterclaimants' argument that their claims for punitive damages and attorneys' fees withstand 12 U.S.C. § 4617(j)(4), which bars awards "in the nature of penalties or fines," fails.

1. The Penalty Bar Applies to Punitive Damages.

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

The central tenet of Counterclaimants' argument for punitive damages is that they are not "'amounts in the nature of penalties' within the meaning of [the Penalty Bar]." Opp. at 13. That is not correct. Indeed, as noted in Movants' opening brief, courts uniformly hold that 4617(j)(4) bars punitive damages. Mot. at 15-16. And still more courts have uniformly interpreted the corresponding FDIC provision, 12 U.S.C. § 1825(b)(3), also to prohibit punitive damages. *See, e.g.*, *Poku v. F.D.I.C.*, No. CIV.A. RDB-08-1198, 2011 WL 1599269, at *3-4 (D. Md. Apr. 27, 2011). This is because punitive damages are universally recognized as penal. "Punitive damages are awarded not as compensation to the victim *but to punish the offender*." *Webb*, 128 Nev. at 90 (emphasis added).[12]

Counterclaimants ask the Court to disregard these myriad decisions, claiming that "the law

[12] *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (similar); N.R.S. 42.005 (permitting punitive damages for "the sake of example and by way of *punishing* the defendant" (emphasis added)); Mot. at 15-16 (citing additional authorities).

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frequently distinguishes" punitive damages from other kinds of penalties, citing a case and statute Counterclaimant says show "civil penalties are not equivalent to punitive damages." Opp. at 13 (citing *Nevada Power Co. v. Eighth Jud. Dist. Ct. of Nevada ex rel. Cty. of Clark*, 120 Nev. 948, 961 (2004), and 18 NRS 228.1116(1)(b)). While that may be, Counterclaimants' point is immaterial when juxtaposed against Congress' clear exemption of liability for "any amounts in the nature of penalties or fines" under Section 4617(j)(4). Punitive damages and civil penalties need not be "equivalent" for both to be "in the nature of … penalties," and Congress expressly exempted the conservatorship from liability for *any* such amounts. Counterclaimants neither recognize nor address the inclusiveness of this exemption. In the end, Counterclaimants offer no coherent argument that *punitive* damages are not inherently *penal*. They are, and the expansive phrase "in the nature of … penalties or fines" therefore covers all of Counterclaimants' claims of entitlement to punitive damages and attorney's fees.

Counterclaimants similarly contend that the Penalty Bar applies only to "punishments imposed by the government." Opp. at 13. No court has ever interpreted Section 4617(j)(4) or Section 1825(b) that way, while many have squarely held that these statutes bar punitive damages sought by private litigants.[13] Counterclaimants imply that only "a handful of [such] cases" exist, Opp. at 14, but a simple search on Westlaw reveals more than two dozen. Bereft of on-point authority, Counterclaimants direct the Court to a case that *does not* address punitive damages—*Higgins v. BAC Home Loans Servicing, LP*, No. 12-CV-183-KKC, 2014 WL 1332825 (E.D. Ky. Mar. 31, 2014). Opp. at 14. That case is irrelevant, as it addresses statutory damages, not punitive damages.[14] *Id.* at *1.

[13] *See, e.g.*, *Gray*, 233 F. Supp. 3d at 872–73 (D. Or. 2017) (punitive damages barred against Fannie Mae based on federal and state law claims, including breach of contract claim); *Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Ass'n*, No. C 16-06969 JSW, 2019 WL 3779531, at *6 (N.D. Cal. Aug. 12, 2019) (similar); *Banneck v. Federal Nat'l Mort. Ass'n*, 17-cv-04657-WHO (N.D. Cal. Dec. 13, 2017) (Dkt. No. 37) (similar); *Mwangi v. Fed. Nat'l Mortg. Ass'n*, No. 4:14-CV-0079-HLM, 2015 WL 12434327, at *4-5 (N.D. Ga. Mar. 9, 2015) (similar); *Poku*, 2011 WL 1599269, at *4 (holding that Section 1825(b) bars punitive damages); *Kistler v. F.D.I.C.*, No. CV411-024, 2013 WL 265803, at *8 n.7 (S.D. Ga. Jan. 23, 2013) (similar).

[14] Fannie Mae and FHFA believe that *Higgins* applied the wrong test and therefore erred in concluding that the statutory damages in question were not penal. But even on its own terms,

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Counterclaimants next argue that Section 4617(j)(4)'s *prohibition* on awards "in the nature of … penalties" must be read to *permit* punitive-damages awards, because a separate HERA provision that applies in the narrow context of contract repudiation expressly addresses punitive damages. Opp. at 14. The provision Counterclaimants cite, Section 4617(d)(3), specifies that where the Conservator repudiates a contract, the counterparty recovers "actual direct compensatory damages" only, a category from which Congress expressly excluded "punitive or exemplary damages" as well as "lost profits" and "pain and suffering." That 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 in the very specific scenario of contracts entered into by a regulated entity before appointment of the Conservator and for which the Conservator has determined in its sole discretion that such pre-conservatorship contracts are burdensome and impede the goals of the conservatorship. Specifically, it confirms unmistakably that the idiosyncratic term "actual direct compensatory damages" does not somehow override Section 4617(j)(4)'s general bar on awards "in the nature of penalties." The level of precision in Section 4617(d)(3) is especially important in the context of repudiation of pre-conservatorship contracts, where the Conservator must be able to reliably predict financial consequences in deciding how best to proceed in order to promote the orderly administration of an insolvent entity, 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).

b. The Penalty Bar Has No Carve-Out for Offsets.

Counterclaimants also argue that Section 4617(j)(4)'s phrase "be liable" means only that Fannie Mae and FHFA do not have to affirmatively *pay* punitive damages or attorneys' fees. From there, Counterclaimants argue that the statute permits such amounts to be *assessed and applied as*

Higgins provides no support for Counterclaimants' argument because, as the Nevada Supreme Court has held, punitive damages *are* penal. *Webb*, 128 Nev. at 90.

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an offset against any amount the Original Defendants are ordered to pay on Fannie Mae's claims. Counterclaimants offer no legal support for this novel theory.[15] 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 Counterclaimant 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 Counterclaimants' fanciful non-refundable offset theory.

2. The Penalty Bar Precludes an Award of Attorneys' Fees.

Counterclaimants do not separately address the Penalty Bar's applicability to attorneys' fees apart from punitive damages except to assert, based on *National Fair Housing Alliance*, that attorneys' fees are on a "weaker footing." Opp. at 14 n.2. That is not correct. *National Fair Housing Alliance* relied solely on *Corder v. Gates*, 947 F.2d 374 (9th Cir. 1991), a case discussing

[15] Counterclaimant cites a HERA provision that uses the word "offset" in an entirely different, and irrelevant, context. *See* Opp. at 14-15 (citing 12 U.S.C. § 4617(d)(8)(E)(iii)). That provision cabins the Conservator's ability to repudiate a specific category of agreements known as "qualified financial contracts," which does not include the loan agreements at issue here. *See* 12 U.S.C. § 4617(d)(8)(D)(i) (defining "qualified financial contracts" as "any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Agency determines by regulation, resolution, or order to be a qualified financial contract").

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attorneys' fees in federal civil rights cases. Congress authorized attorneys' fees in such cases to "encourage meritorious civil rights claims …." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). No such statute evinces a public policy to encourage claims like Counterclaimants' by authorizing attorneys' fees. Instead, there is the opposite—the Penalty Bar. In any event, the type of attorneys' fees sought here are punitive under Nevada law and, therefore, fall squarely within Section 4617(j)(4)'s ambit. *See* N.R.S. 7.085, 18.010(2)(b); *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."). And Counterclaimants' response makes no attempt to grapple with the cases finding attorneys' fees as penalties in other circumstances, including under the analogous FDIC statute. Mot. at 16-17.

3. The Penalty Bar Exempts Fannie Mae as Well as FHFA from Liability.

Counterclaimants' final argument is that the Penalty Bar applies only to FHFA, not Fannie Mae, because it protects "the Agency" from liability. *See* Opp. at 15. But under HERA, "the Agency" is Fannie Mae's legal successor, 12 U.S.C. § 4617(b)(2)(A)(i), and any monetary judgment against Fannie Mae would necessarily be paid out of "assets" that have been "take[n] over" by the Conservator, s*ee id.* § 4617(b)(2)(B)(i). It is therefore legally and logically impossible to impose liability on Fannie Mae during conservatorship without imposing liability on "the Agency" as Conservator.

The Nevada Supreme Court has already rejected a similar argument under Section 4617(j)(3), the Federal Foreclosure Bar, holding that, "[a]ccording to the plain language of the statute, Fannie Mae's property interest effectively becomes the FHFA's while the conservatorship exists." *See Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n,* 134 Nev. 270, 272 (2018). That reasoning applies equally here, because Sections 4617(j)(3) and (j)(4) both refer only to "the Agency."

Counterclaimants' argument relies on the flawed reasoning of the sole district court decision—subsequently vacated for lack of jurisdiction—ever to hold that the Penalty Bar does not protect Fannie Mae. Opp. at 15 (citing *Burke v. Fed. Nat'l Mortg. Ass'n*, 221 F. Supp. 3d 707 (E.D.

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Va. 2016), *vacated by* 2016 WL 7451624 (E.D. Va. Dec. 6, 2016) (concluding that "the Court lacks [subject matter] jurisdiction over this matter, [and] was without jurisdiction to issue any prior opinion or order in this case")). *Burke* is a nullity that carries no persuasive effect. *See Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (court cannot validly act without jurisdiction); *Elliott v. Peirsol's Lessee*, 26 U.S. 328, 340 (1828) (orders entered without jurisdiction are "nullities[,] … not voidable, but simply void"). Regardless, *Burke*'s departure from HERA's unambiguous statutory language is incorrect. *See* 12 U.S.C. § 4617(b)(2)(A)(i). And a 2019 District of Nevada decision rejects it as "unpersuasive." *1209 Vill. Walk Tr., LLC v. Broussard*, No. 2:15-CV-01903-MMD-PAL, 2019 WL 452728, at *3 (D. Nev. Feb. 4, 2019).

Counterclaimants also contend that Section 4617(j)(4) is inapplicable because Fannie Mae, not FHFA, took all the relevant actions here. Opp. at 15. Counterclaimants' theory is that FHFA was not "acting as conservator." *Id*. But Section 4617(j) in its entirety applies regardless of whether the Conservator takes any affirmative act. Again, the Nevada Supreme Court has already rejected a similar argument under Section 4617(j)(3), concluding that the Federal Foreclosure Bar applies throughout conservatorship—*i.e.*, regardless of whether FHFA acts in any particular way as Conservator. *See Christine View*, 134 Nev. at 274; *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. 247, 250-52 (2017). In any event, because the Conservator is Fannie Mae's statutory successor and holds all of its rights, titles, powers, privileges and assets, FHFA as Conservator has the ultimate authority over everything relating to Fannie Mae. All of Fannie Mae's actions necessarily embody exercises of the Conservator's statutory powers and functions. *See* 12 U.S.C. §§ 4617(b)(2)(A), (b)(2)(B).

Accordingly, Counterclaimants' claims for punitive damages and attorneys' fees must fail as a matter of law.

E. Counterclaimants Cannot Recover Attorneys' Fees as Special Damages on their Contract Claims.

The Motion established that Counterclaimants have no basis to recover attorneys' fees on their contract-based claims. Mot. at 17-18. Specifically, the Loan Documents and the MCFA expressly provide that only Fannie Mae can recover attorneys' fees arising out of any disputes

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under those agreements. *Id.* The Opposition did not even respond to, let alone refute, this argument. *See* EDCR 2.20(e) (failure to oppose may be construed as an admission that the motion is meritorious and a consent to granting the same). Instead, Counterclaimants assert that they are entitled to and have pled recovery of their attorneys' fees as "special damages." Relying primarily on *Sandy Valley Assocs. v. Sky Ranch Ests. Owners Ass'n*, 117 Nev. 948, 955–57 (2001), which has been substantially overruled, Counterclaimants argue that "attorney's fees can be recovered as an element of consequential damage and may be plead when foreseeably arising out of breach of contract or tortious conduct as special damages." Opp. at 15. They are not, however, entitled to such fees, because they did not and cannot establish that any of the "narrow and limited exceptions" apply, nor did they plead fees as special damages appropriately.

Nevada "adheres to the American Rule of attorney fees," which is that fees may only be awarded when authorized by statute, rule, or contract. *Pardee Homes*, 135 Nev. at 177. "As an exception to the general rule," attorney fees may be awarded "as special damages in limited circumstances." *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151 (2014) (quoting *Horgan v. Felton*, 123 Nev. 577, 583 (2007)). For example, attorney fees may be an element of damage in cases when a plaintiff becomes involved in a "third-party legal dispute as a result of a breach of contract and the fees incurred in *defending* ... the third-party action could be damages in the proceeding between the plaintiff and the defendant [who breached the contract]." *Id.*, 130 Nev. at 152. Likewise, attorney fees may be awarded as damages in limited cases in which a party incurred the fees in clarifying or removing a cloud upon the title to property." *Id.* Neither applies here, nor have Counterclaimants identified any legitimate basis to seek fees as special damages.

Primarily relying on *Sandy Valley*, Counterclaimants broadly assert that they are entitled to fees as special damages because they are the result of Fannie Mae's injurious conduct, that they are related to third-party actions, and that they are incurred to remove a cloud upon title. Counterclaimants' reliance on *Sandy Valley*, which has been substantially overruled and abrogated, is misplaced and cannot support their claim for fees as special damages. First, the Nevada Supreme Court has expressly rejected Counterclaimants' reading of that decision, holding that "to the extent *Sandy Valley* has been read to broadly allow attorney fees as special damages whenever the fees

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were a reasonably foreseeable consequence of injurious conduct, we disavow such a reading." *Pardee Homes*, 135 Nev. at 177 (emphasis added). Further, the Court clarified that *Sandy Valley* does "*not support an award of attorney fees as special damages where a plaintiff merely seeks to recover fees incurred for prosecuting a breach-of-contract action against a breaching defendant*." *Id.* (emphasis added) (citing *Liu*, 130 Nev. at 155 n.2 (observing *Sandy Valley* did not permit a plaintiff to recover attorney fees as special damages in a suit for breach of contract)). Yet, that is exactly what Counterclaimants urge in their Opposition. Moreover, Counterclaimants fail even to acknowledge the Nevada Supreme Court's clear rejection of their position in *Pardee Homes*.[16]

Second, Counterclaimants are not defendants in a third-party action that could support an award of fees as special damages. A party to a contract may recover, as special damages, the attorney fees that arise from another party's breach of the contract when the breach causes the former party to incur attorney fees in a legal dispute brought by a third party. *Liu*, 130 Nev. at 155. But Counterclaimants are defendants in a breach of contract action, and counter-plaintiffs as to other claims—none is a third-party defendant. Indeed, the Opposition does not advance this claim, other than to mention it.

Finally, Counterclaimants cannot seek attorney fees as special damages because they now argue in their opposition that they wish to clear a "cloud on title." Like most of *Sandy Valley*, that exception has been substantially narrowed. Attorney fees incurred in removing spurious clouds from a title may qualify as special damages in an action for slander of title, or similar action. *Horgan*, 123 Nev. at 585. Such fees may be permissible in slander of title actions because "the defendant ... by intentional and calculated action leaves the plaintiff with only one course of action: that is, litigation.... Fairness requires the plaintiff to have some recourse against the intentional malicious acts of the defendant." *Id. Pardee Homes* makes clear that this is not such a case, but is rather a contract dispute, where Nevada law does "*not support an award of attorney fees as special damages where a plaintiff merely seeks to recover fees incurred for prosecuting a breach-of-*

[16] Again, Counterclaimants' focus on the superficial similarity of the "defaulters list" in *Reno's Riverside Hotel* is misplaced, as the cases are vastly different. This case does not involve labor law. Further, that 1970 case was even disapproved of by *Sandy Valley* and is not instructive here.

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contract action against a breaching defendant," and particularly where entitlement to fees is governed by the contract. 135 Nev. at 177.

Counterclaimants cannot recover attorneys' fees as special damages because none of their claims plead special damages as Rule 9(g) requires. Attorneys' fees as special damages must be pled as such in the complaint pursuant to NRCP 9(g). "The mention of attorney fees in a complaint's general prayer for relief is insufficient to meet this requirement." *Sandy Valley*, 117 Nev. at 955–57 (2001). Here, the contract-based counterclaims include only the identical, conclusory allegation that Counterclaimants have had to hire counsel and are entitled to reasonable attorneys' fees. This is insufficient to recover special damages.

The Counterclaimants' claim for attorneys' fees as special damages should be dismissed as a matter of clear Nevada law because Nevada law does "not support an award of attorney fees as special damages" in a breach of contract action. *Pardee Homes*, 135 Nev. at 177.

F. The Waivers of Consequential Damages Agreed to By Westland and the Credit Facility Entities Are Clear, Unambiguous and Enforceable.

In the Motion, Movants established that the Loan Documents and the MCFA all contain clear and unambiguous waivers of consequential damages. Mot. 18-19. In opposition, Counterclaimants argue that this waiver was only intended to apply to damages relating to recovery of collateral or application of foreclosure proceeds, not all conduct related to the Loan Documents and MCFA. Counterclaimants cite no law for their argument and base it solely on the inclusion of the consequential damages' waiver within the "Waiver of Marshaling" section of the Loan Documents and MCFA. That argument fails under applicable law and the terms of the Loan Documents and the MCFA.

In Nevada, "when a contract is clear on its face, it 'will be construed from the written language and enforced as written.' The court has no authority to alter the terms of an unambiguous contract." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776 (2005) (quoting *Ellison v. C.S.A.A.,* 106 Nev. 601, 603 (1990) and citing *Renshaw v. Renshaw,* 96 Nev. 541, 543 (1980)). A contractual limitation on consequential damages is no exception. *See* Restatement (Second) of Contracts § 351 (1981) ("When parties expressly exclude or limit consequential damages, the basic

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principles of freedom of contract counsel that the agreed upon provision should be enforced."); 24 Richard A. Lord, *Williston on Contracts* § 64:21 (4th ed. 2021 update) ("In determining the amount of consequential damages recoverable for breach of a contract, it is often necessary to consider any limitation of liability or liquidated damages provisions set forth in the contract in question, since contracting parties are generally allowed to limit their liability in the event of breach to the performance of certain prescribed acts, such as repairing or replacing any defective performance or parts, or to the payment of a specified sum. The effect of such provisions, if lawful, may be to exclude entirely any liability for consequential damages.") (footnotes omitted). Counterclaimants concede these points of law by not responding. EDCR 2.20(e) (stating that a failure to file opposition is an admission that a motion is meritorious and consenting to granting the same); *Bates*, 100 Nev. at 681-82, 683 (treating a failure to respond to an argument on the appropriate interest rate under the contract as conceded).

As set out in the Motion, the relevant language says:

> NONE OF LENDER OR ITS AFFILIATES, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, OR REPRESENTATIVES SHALL BE RESPONSIBLE TO BORROWER (a) FOR ANY ACT OR FAILURE TO ACT UNDER ANY POWER OF ATTORNEY OR OTHERWISE, EXCEPT IN RESPECT OF DAMAGES ATTRIBUTABLE SOLELY TO THEIR OWN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT AS FINALLY DETERMINED PURSUANT TO A FINAL, NONAPPEALABLE COURT ORDER BY A COURT OF COMPETENT JURISDICTION, OR (b) FOR ANY PUNITIVE, EXEMPLARY, INDIRECT OR CONSEQUENTIAL DAMAGES.

Motion, Ex. 1 at 102 (emphasis added); *accord* Verified Compl. Exs. 1 (Village Square Multifamily Loan and Security Agreement), § 14.04, and 6 (Liberty Multifamily Loan and Security Agreement), § 14.04.

The inclusion of the clear and unambiguous waiver of indirect or consequential damages in the "Waiver of Marshaling" sections of the Loan Documents and the MCFA does not limit the clear language. On the contrary, the Loan Documents and the MCFA provide that: "The captions and headings of the sections of this Master Agreement and the Loan Documents are for convenience only *and shall be disregarded in construing this Master Agreement and the Loan Documents*." Motion, Ex. 1, § 15.09(a) (emphasis added); *see also* Verified Compl. Ex. 1 (Village Square Multifamily Loan and Security Agreement), § 15.08(a) and Ex. 6 (Liberty Multifamily Loan and Security Agreement), § 15.08(a). Accordingly, the Original Defendants and the Credit Facility

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Entities have contractually waived their only argument in the Opposition.

Under the plain language of the conspicuous waiver, Fannie Mae cannot be liable to the Original Defendants or the Credit Facility Entities for indirect or consequential damages. No part of this waiver limits it to the matters discussed elsewhere in Section 14.04. The discussion in clause (a) of "any act or failure to act under any power of attorney or otherwise" is not contrary to clause (b) and, because it is stated in the disjunctive, does not modify clause (b).

Accordingly, the Court should enforce the Original Defendants' and the Credit Facility Entities' clear and unambiguous waiver of indirect and consequential damages and dismiss any claim for the foregoing under the Loan Documents and the MCFA.

G. Plaintiffs' Improper, Pro Forma Request for Amendment Should Be Denied as Futile.

Plaintiffs conclude the Opposition with a perfunctory, undeveloped request for leave to assert unspecified amendments. As set forth above, however, Counterclaimants cannot cure the lack of standing related to the contract-based claims asserted by Counterclaimants that are not parties to any contract with Fannie Mae. Nor are Counterclaimants able to amend the claims so as to avoid the MCFA's forum selection clause—it expressly applies to "any controversy arising under or in relation to the Notes, the Security Documents (other than the Security Instruments), or any other Loan Document." Mot. Ex. 1, § 15.01. Any claim, however it may be articulated, arising out of or relating to the MCFA is subject to that contractual term. Finally, there is no amendment that can alter the statutory and contractual provisions that preclude any claims here for punitive damages, consequential damages, and attorneys' fees as a matter of law. Accordingly, any amendment by Counterclaimants would be futile. *See Allum v. Val. Bank of Nev.*, 109 Nev. 280, 287 (1993) (affirming denial of leave to amend where amendment would be futile); *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 402 (2013), *as corrected* (Aug. 14, 2013) (*reversing* grant of leave to amend misrepresentation claim because such would be futile).[17] Additionally, Counterclaimants' request for leave to amend should be denied where they have not submitted a

[17] In an attempt to avoid dismissal of the non-contracting parties, Counterclaimants request leave to "state appropriate business tort claims." Opp. 9. However, they fail to state what tort claims they would allege or what parties would allege those claims. Further, such claims would almost certainly be dismissed as a matter of law. Accordingly, this request should also be denied as futile.

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copy of any proposed revised pleading. *See* EDCR 2.30 ("A copy of a proposed amended pleading must be attached to any motion to amend the pleading.").

III. CONCLUSION

For the foregoing reasons, Fannie Mae and FHFA respectfully request that the Court grant their motion to dismiss the counterclaims as discussed in the Motion and above.

Dated: December 9, 2021

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EXHIBIT A

Counterclaim Number	Counterclaimants to Dismiss
1	Village Square, the Credit Facility Entities, the Securities Entities
2	Liberty Village, the Credit Facility Entities, the Securities Entities
3*	Liberty Village, Village Square, the Securities Entities
4*†	The Securities Entities
5†	The Credit Facility Entities and the Securities Entities
9†	The Credit Facility Entities and the Securities Entities
10†	The Credit Facility Entities and the Securities Entities

* Counterclaims 3 and 4, as they relate to claims based on the MCFA, must be dismissed in their entirety based on the mandatory forum selection clause.

† Counterclaims 4, 5, 9, and 10 assert claims under the Loan Documents and the MCFA. The court can also dismiss the portions of those counterclaims to the extent they are asserted by parties who are not parties to the specific contract. For example, Liberty Village cannot assert any of the MCFA-related claims in counterclaim 4 because it is not a party to the MCFA.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **PLAINTIFF AND FHFA'S REPLY IN SUPPORT OF MOTION TO DISMISS IN PART DEFENDANTS' FIRST AMENDED ANSWER AND AMENDED COUNTERCLAIM** by the method indicated:

_____ U. S. Mail

_____ U.S. Certified Mail

X Electronic Service

_____ E-mail

and addressed to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff, vs. WESTLAND LIBERTY VILLAGE, LLC, and WESTLAND VILLAGE SQUARE, LLC, Defendants.	Case No. A-20-819412-B Dept No. 13 **NOTICE OF ENTRY OF ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' FIRST AMENDED ANSWER AND AMENDED COUNTERCLAIM**
AND ALL RELATED ACTIONS.	

PLEASE TAKE NOTICE that an Order Denying in Part and Granting in Part Defendants' First Amended Answer and Amended Counterclaim was entered in the above-captioned matter on March 17, 2022, a copy of which is attached hereto.

Dated: March 17, 2022.

SNELL & WILMER L.L.P.

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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 this date, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' FIRST AMENDED ANSWER AND AMENDED COUNTERCLAIM** by method indicated below:

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☐ **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.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by , a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

☒ **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.

DATED March 17, 2022.

/s/ Maricris Williams
An employee of SNELL & WILMER L.L.P.

4875-0386-6902

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DISTRICT COURT

CLARK COUNTY, NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff,

vs.

WESTLAND LIBERTY VILLAGE, LLC, and WESTLAND VILLAGE SQUARE, LLC,

Defendants.

AND ALL RELATED ACTIONS.

Case No. A-20-819412-B

Dept No. 13

ORDER DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS IN PART DEFENDANTS' FIRST AMENDED ANSWER AND AMENDED COUNTERCLAIM

Hearing Date: December 16, 2021

Hearing Time: 10:45 a.m.

This matter came before the Court pursuant to the *Motion to Dismiss In Part Defendants' First Amended Answer and Amended Counterclaim* filed October 29, 2021 (the "Motion") by Plaintiff Federal National Mortgage Association ("Fannie Mae") and Intervenor Federal Housing Finance Agency ("FHFA", and collectively, "Movants"). Counterclaimants filed their opposition on November 23, 2021 (the "Opposition"). Movants filed their reply in support of the Motion on

December 9, 2021.

The Court heard oral argument on the Motion on December 16, 2021. After taking the Motion under advisement, the Court issued its Minute Order on December 22, 2021. This Order will replace the Minute Order as the final order of the Court. Based on the moving papers and the argument of counsel, and for good cause shown:

IT IS HEREBY ORDERED that the Motion is DENIED IN PART as a matter of law relative to Movants' venue contentions;

IT IS FURTHER ORDERED that the Motion is DENIED IN PART as a matter of law relative to Movants' contention that 12 U.S.C. § 4617(j)(4) protects Fannie Mae from liability for the punitive damages Counterclaimants seek;

IT IS FURTHER ORDERED that the Motion is DENIED IN PART regarding Movants' attorneys' fees contentions because the complexities and nuances involved in this case render disposition of these issues under NRCP 12(b)(5) to be inappropriate. This denial is without prejudice to further development of these issues pursuant to NRCP 56;

IT IS FURTHER ORDERED that the Motion is DENIED IN PART regarding Movants' contentions that certain Counterclaimants lack standing because the complexities, party affiliations/interrelationships, and nuances involved in this case render disposition under NRCP 12(b)(5) to be inappropriate. This denial is without prejudice to further development of these issues pursuant to NRCP 56;

IT IS FURTHER ORDERED that the Motion is GRANTED IN PART under NRCP 12(b)(5) regarding Movants' consequential damages contentions because the papers and documents properly before the Court establish that such damages cannot be claimed; and

IT IS FURTHER ORDERED that Movants shall answer Counterclaimants' First Amended Counterclaim on or before 14 days after the filing of a notice of entry of this Order.

IT IS SO ORDERED.

Dated this 17th day of March, 2022

DISTRICT COURT JUDGE

51A BA7 5E06 15C8
Mark R. Denton
District Court Judge

ABG

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Respectfully submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Federal National Mortgage Association, Plaintiff(s) vs. Westland Liberty Village, LLC, Defendant(s)	CASE NO: A-20-819412-B DEPT. NO. Department 13

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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