IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT, Clark County, Nevada; and THE HONORABLE MARK R. DENTON, District Judge, Respondents, and WESTLAND LIBERTY VILLAGE, LLC *et al.*, Real Parties in Interest.	Case No. 84575

ANSWER TO PETITION FOR WRIT OF PROHIBITION

John W. Hofsaess, Esq. (*Pro Hac Vice*)
WESTLAND REAL ESTATE GROUP
520 W. Willow Street
Long Beach, CA 90806
Telephone: (310) 639-0782

Counsel for Real Parties in Interest[1]

[1] Additional counsel for Real Parties in Interest are identified below.

VERIFICATION

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

DATED this 13th day of July, 2022.

/s/ *John W. Hofsaess*
JOHN W. HOFSAESS

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Westland Liberty Village, LLC and Westland Village Square, LLC are Nevada limited liability companies wholly-owned by Westland QOF #1 LLC and Westland QOF #2 LLC, respectively. The latter two entities are wholly-owned by A&D Trust Holdings, LLC and AFT Industry NV, LLC, which are private entities held by family trusts.

Amusement Industry, Inc. is a private California corporation that is majority-owned by family trusts. No shareholder other than the family trusts owns more than ten percent (10%) of Amusement Industry, Inc. Amusement Industry, Inc., in turn, is the sole owner of Westland Amber Ridge LLC.

Westland Corona LLC is a Nevada limited liability company that is wholly-owned by Corona Holdings LLC. Corona Holdings LLC is owned by Smart Real Estate, which is a private California corporation that is ninety-nine percent (99%) owned by family trusts.

Westland Hacienda Hills is a Nevada limited liability company that is wholly-owned by DNA Properties, Inc., which is a private California corporation owned by family trusts.

1097 North State, LLC is a Delaware limited liability company that is wholly-owned by Hemet MHP LLC, which is a Delaware limited liability company that is wholly-owned by Smart Real Estate.

Westland Tropicana Royale LLC is a Nevada limited liability company that is wholly-owned by a family trust.

Vellagio Apts of Westland LLC is a Nevada limited liability company that is wholly-owned by Westland Vellagio Ensenda LLC. That limited liability company, in turn, is wholly-owned by AF Properties 2015 LLC, which is majority-owned by family trusts. No shareholder other than the family trusts owns more than ten percent (10%) of AF Properties 2015 LLC.

Westland AMT, LLC and AFT Industry NV, LLC are Nevada limited liability companies that are wholly-owned by family trusts. The Alevy Family Protection Trust and A&D Dynasty Trust are Nevada irrevocable trusts.

No Westland entity is publicly-traded or has publicly-traded owners. The following counsel and law firms have appeared for the subject Real Parties in Interest in the action below: John Benedict, The Law Offices of John Benedict; J. Colby

Williams and Philip R. Erwin, Campbell & Williams; and Brian W. Barnes, Cooper & Kirk.

DATED this 13th day of July, 2022.

WESTLAND REAL ESTATE GROUP

By /s/ *John W. Hofsaess*

John W. Hofsaess, Esq. (*Pro Hac Vice*)
520 W. Willow Street
Long Beach, CA 90806
Telephone: (310) 639-0782

Counsel for Real Parties in Interest

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I. INTRODUCTION

This Petition for a Writ of Prohibition is nothing more than a shell game. On November 20, 2020, the district court enjoined Federal National Mortgage Association ("Fannie Mae") from pursuing foreclosure proceedings and related adverse actions arising out of an utterly defective default notice that would have created dire and irreversible consequences for Westland Real Estate Group and its unblemished business record. SA001-10. Since that date, Fannie Mae, and its government conservator, Federal Housing Finance Agency ("FHFA") have engaged in relentless attempts to avoid compliance with the injunction and this writ proceeding is simply the most recent attempt.[1]

Specifically, this writ is an indirect attack on Section 5(o) of the Preliminary Injunction Order (the "Order"). Section 5(o) provides Fannie Mae may not "Take any adverse action against any Westland entity in relation to other loans, discriminate against or blacklist any Westland entity on new loan or loan refinance applications, *including by placing Westland on "a-check," . . . based on the purported default that arose from failing to deposit the additional $2.85 million into*

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

escrow." SA010. If the Order had been in place during March 2020, it would have been violated when the discriminatory conduct alleged in the Counterclaim occurred, because Section 5(o) involves precisely the same prohibited conduct. *Id*. Namely, the Counterclaim alleges that in March 2020, six Westland entities were unable to submit a line of credit advance for consideration solely due to being placed on "a-check" related to the purported default in this matter. APP091

As such, after having received an unfavorable ruling related to Section 5(o), Fannie Mae filed this Motion, which if granted would shift the Credit Facility Entities' claims to a different forum and allow Fannie Mae to sidestep the existing ruling on the same issue in this case, by asserting the Counterclaim addressed "claims arising from . . . an entirely different contract . . ." (Brief, at 2.) Fannie Mae's argument misses the point. No controversy arose from the terms of the "different contract" entitled the Master Credit Facility Agreement ("MCFA"). Instead, the breach occurred when the Credit Facility Entities were listed on ACheck, which meant a servicer could not proceed far enough to reach the contract's terms. As such, the third and fourth counterclaims should be seen as alleging a breach by Fannie Mae arising from discriminatory lending practices related to placing the Credit Facility Entities on ACheck solely based on the purported default at issue in the receivership matter. APP091. Such a claim is squarely within this Court's jurisdiction, and it would not be just or reasonable for this matter to be shifted to

another forum that would force a bifurcation of claims, duplication of proceedings, and substantial possibility of inconsistent judgments.

Moreover, Fannie Mae's Petition for Writ of Prohibition is procedurally improper "extraordinary relief" that may only be granted where the district court has taken acts that exceed its jurisdiction. The district court did not exceed its jurisdiction here by deciding a motion to dismiss, which is an act that Fannie Mae requested the district court to do, or denying the motion as to venue. The district court was presented with an ambiguous, permissive forum selection clause, and its questioning of the parties at the hearing evidenced that it carefully considered the dispute, and seemingly found it to be a controversy arising from the Counterclaimants placement on ACheck not the MCFA. Fannie Mae's Petition should be denied for all these reasons.

II. COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

As this matter relates to a Motion to Dismiss, Counterclaimants have referred to the allegations of the Amended Counterclaim for a statement of the relevant facts (APP014-137 - First Amended Counterclaim), which is supplemented by the procedural history of this matter.

A. Westland Purchases The Properties.

On August 29, 2018, Westland Liberty Village, LLC and Westland Village Square, LLC (collectively "Westland") purchased adjoining multi-family

communities located at 4870 Nellis Oasis Lane and 5025 Nellis Oasis Lane, Las Vegas, Nevada (the "Properties") for $60.3 million. APP029, APP037 (¶¶ 70-71, 73, 120, 121). The Westland entities are affiliated with the decades-old Westland Real Estate Group, which employs approximately 500 people, and owns and operates over 38 communities in the Las Vegas valley. APP028-29 (¶¶ 67-68, 69(e).). In more than 50 years of operation, the Westland Real Estate Group and its affiliates have never defaulted on a loan. APP028 (¶ 69(d)).

As a condition of the purchase, Westland assumed loans of $29,000,000 and $9,366,000 (the "Loans") that were issued to the prior owner by Grandbridge Real Estate Capital, LLC ("Grandbridge"), the successor to SunTrust Bank, and assigned to Fannie Mae (other than for loan servicing) before Westland's purchase. APP033, APP037 (¶¶ 1, 2, 99, 120-121). Westland paid the remainder of the purchase price in cash such that Westland has well over $20 million of equity in the Properties. APP037 (¶¶ 120-121). At the time of purchase, Fannie Mae reaffirmed the sufficiency of the combined total Repair Reserve and Replacement Reserve balances of $143,319.30 based on a property condition assessment ("PCA") performed by CBRE. APP037-38 (¶¶ 124-125). There is no dispute that Westland satisfied this reserve funding.

B. Westland Rehabilitates The Properties At Great Expense.

Notably, Fannie Mae agreed to the reserve amounts at the time of purchase

with knowledge that the Properties had been in a distressed condition for years due to poor management, high levels of crime, and physical disrepair. APP031-32, APP034-35 (¶¶ 84-90, 106, 107, 111). The Properties, in fact, received a nuisance abatement complaint from Las Vegas Metropolitan Police Department due to high crime levels while the Properties were in escrow. APP032 (¶¶ 91-94). For that reason, Westland advised Grandbridge prior to closing that a decline in occupancy would inevitably occur as evictions were necessary to address the high crime rate and the prior owner's poor management. APP041-42, APP046 (¶¶ 144, 147, 175).

From the date of purchase in August 2018 through September 2019, Westland invested $1.8 million solely on capital improvements, spent another $1.57 million on private security, took measures to clean up crime, added a dedicated staff of employees, and began improving integration with local community services. APP042-44, APP051 (¶¶ 147-154, 164-68, 207). Westland's efforts in this regard received plaudits from multiple leaders and government bodies in the community, including a Clark County Commissioner, the Nevada State Apartment Association, and the Las Vegas Metropolitan Police Department. APP043 (¶ 155).

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

In mid-2019, Grandbridge, acting on behalf of Fannie Mae, demanded a PCA to which it was not entitled under the loan agreements. APP048 (¶¶ 191-92). Fannie Mae acknowledged in the district court that this request was based on a reduced

occupancy rate—which, again, only resulted from Westland's attempts to improve the Properties—when the loan agreements only allowed a PCA due to physical deterioration of the Properties. APP019, APP039, APP048 (¶¶ 11, 136, 187-90). The contract language notwithstanding, Grandbridge retained an out-of-state vendor, f3, Inc. ("f3"), to perform a new PCA in September 2019 even though CBRE, a local vendor, had performed a PCA at the time of purchase just a year earlier. APP016, APP034, APP048 (¶¶ 3, 108, 191).

On October 18, 2019, Fannie Mae (through Grandbridge) served a Notice of Demand (the "Demand") based on alleged maintenance deficiencies identified in f3's PCA reports. APP051, APP055-56, APP094 (¶¶ 205, 235-39, 484). The Demand required Westland to deposit $2.85 million in the Replacement Reserve Account. *Id*. Because Fannie Mae's "assessment" effectively meant the condition of the Properties deteriorated by $2.85 million in one year despite Westland's capital expenditures of $1.8 million during the same period, it was readily apparent that f3 artificially inflated the PCA by using different standards than those used by CBRE months earlier. APP016-17, APP052-55 (¶¶ 3-4, 210-30) Indeed, the PCA at the time of purchase determined that vacant units required routine maintenance without reserves whereas f3 did not categorize the same type of repair as routine maintenance and instead required $1.9 million be held in reserve for vacant units. APP053 (¶¶ 218-19). By adopting this approach, f3 caused the demanded reserves to skyrocket

from $143,319.30 to $2.85 million even though the condition of the Properties had dramatically improved since the initial PCA, which increase it used to justify its improper Notice of Demand. APP016-17 (¶¶ 3-4).

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

Westland responded to the Demand on November 13, 2019 by objecting on the foregoing bases, reaffirming that it had improved the Properties' condition through more than $1.8 million of renovations, and noting that Grandbridge failed to provide an opportunity to perform the alleged necessary repairs. APP056 (¶242). Westland also addressed the Demand by sending a Strategic Plan for the Properties. APP044, APP057 (¶¶ 160, 246). Westland's efforts to remedy the situation were summarily rebuffed with a boilerplate Notice of Default and Acceleration of Note ("Default") on December 17, 2019 rejecting Westland's good-faith proposal and ignoring Westland's improvements to the Properties. APP057 (¶ 247). Thereafter, Fannie Mae filed an improper Notice of Default and Intent to Sell, and the underlying Complaint that sought appointment of a receiver in this matter. APP015, APP066-67, APP101 (¶¶ 1, 306-12, 533-541)

E. "Do Not Process" ACheck Status, Credit Facility Entities and the MCFA.

Contemporaneously with the improper Notice of Demand, Fannie Mae placed all Westland-related entities, even those with no relationship to the properties for which the Notice of Demand was issued, on a "blacklist" known as ACheck.

APP059, APP064 (¶ 260, 297). ACheck results in a "Do Not Process" response being provided to loan servicers at the start of their review of a new Fannie Mae loan application or request for an advance on lines of credit. APP061 (¶ 280). As such, when in December 2019 the Credit Facility Entities inquired about a non-discretionary borrow-up advance on the MCFA, which is equivalent to obtaining a draw on a line of credit, their loan servicer informed them that a "Do Not Process" response had been received on ACheck, and the sole stated reason for Fannie Mae's refusal to extend funds was the disputed default in this matter. APP064-65, APP090 (¶¶ 296, 300-01, 461).

Based on those facts, counts three and four of the Counterclaim alleged a breach of the MCFA, but that breach did not focus on any substantive term of the MCFA. APP090-93. Instead, the crux of the claims was Fannie Mae's failure to permit a borrow-up advance based solely on the Credit Facility Entities having been placed on ACheck. APP091 (¶ 463). Specifically, the Counterclaim alleges "Fannie Mae has materially breached its agreement with the Westland Credit Facility Entities by improperly placing the Westland Credit Facility Entities on 'a-check,' discriminating against the Westland Credit Facility Entities," and solely on that basis failing to permit a borrow up advance due to their ACheck status. *Id*.[2] It is

[2] At the Motion hearing, Counterclaimants argued that "[t]he credit facility entity's claims all arose from one simple fact, the fact that Fannie Mae declared a default against the loan agreements. And based on that, and solely based on that, they

undisputed that the Credit Facility Entities were not provided a notice of default or alleged to have engaged in a breach, and thereby the inability to obtain an advance is unrelated to the lack of performance of even the terms arising from the MCFA.

F. The Entire Forum Selection Provision.

The Master Credit Facility Agreement does contain forum-selection language, but Fannie Mae brief only selectively quotes from that clause. (Brief, at 6-7). The full paragraph states:

> **Section 15.01 Choice of Law; Consent to Jurisdiction.**
> Notwithstanding anything in the Notes, the Security Documents, or any of the other Loan Documents to the contrary, each of the terms and provisions, and rights and obligations of Borrower under this Master Agreement and the Notes and the other Loan Documents, shall be governed by, interpreted, construed, and enforced pursuant to and in accordance with the laws of the District of Columbia (excluding the law applicable to conflicts or choice of law) **except to the extent of procedural and substantive matters** relating only to the creation, perfection, and foreclosure of liens and security interests, and enforcement of the rights and remedies, against the Mortgaged Properties, which **matters shall be governed by the laws of the jurisdiction in which a Mortgaged Property is located**, the perfection, the effect of perfection and non-perfection and foreclosure of security interests on personal property, **which matters shall be governed by the laws of the jurisdiction determined by the choice of law provisions of the Uniform Commercial Code in effect for the jurisdiction in which any Borrower is organized**. 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**

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improperly placed the Master Credit Facility Agreement [entities] on A-check and refused to allow for borrow ups." SA033-34.

> **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.

APP181 (emphasis added). As the bolded language shows, the paragraph is wrought with limitations.

G. The Preliminary Injunction Ruling.

On October 13, 2020, the District Court granted a preliminary injunction in favor of Westland and denied Fannie Mae's application for appointment of a receiver. The ruling was meant to halt Fannie Mae's adverse actions arising from the Notice of Demand and Notice of Default because "Fannie Mae [ ] failed to establish that any default ha[d] occurred." SA005 (¶ 5). On November 20, 2020, the District Court entered an Order providing for that relief. SA001-10. The ordered relief stopped Fannie Mae's foreclose on the property, stopped the appointment of a

receiver, and prohibited the loan servicer from failing to issue loan statements or refusing to process reserve disbursement requests. SA007-10.

Additionally, the Order provided Fannie Mae may not "take any adverse action against any Westland entity in relation to other loans, *discriminate against or blacklist any Westland entity on new loan or loan refinancing applications, including by placing Westland on 'a-check*,' adding a fee to any loan quoted or adding an interest rate surcharge to such applications, *based on the purported default* that arose from failing to deposit the additional $2.85 million into escrow as requested." SA010 (emphasis added).

H. The District Court's Motion to Dismiss Ruling.

Several months after entering the Order, and after numerous additional motions and appellate filings, Fannie Mae filed this Motion to Dismiss (the "Motion") seeking relief seemingly contrary to the relief provided in Paragraph 5(o) of the Order. APP149-53; cf. SA010. The portion of the Motion at issue in this writ is the ruling that this venue is appropriate to hear the Credit Facility Entities' claims concerning Fannie Mae's discriminatory lending practices that occurred when it placed the Credit Facility Entities on ACheck, and that status precluded those parties from using a borrow-up advance in breach of the MCFA. APP385; APP091-92 (¶¶ 463 ["placing the Westland Credit Facility Entities on 'a-check"], 473 ["placing Westland and its affiliated entities on a-check, discriminating against . . . the

Westland-affiliated entities on borrow ups, new loans and refinance loans based on Lenders' own unilateral modification of the Loan Agreement"]).

The Counterclaim alleged the Credit Facility Entities were placed on ACheck solely related to the purported default by Westland Liberty Village and Westland Village Square, which is at issue in this case. APP017-18, APP 059, APP 061 (¶ 6, 260, 278-79). As such, in opposing the Motion, the Credit Facility Entities argued that placement on ACheck did not arise from the MCFA, because Fannie Mae placed all Westland-affiliated parties on ACheck "do not process" status, not just those subject to the MCFA, and that granting the Motion would force an unjust and unreasonable bifurcation of those parties' claims. APP171, APP182 (*see e.g.*, "Fannie Mae . . . took action against the MCFA entities by placing them on a-check based on the purported breach of the same Loan Agreement that Fannie Mae sued in Nevada" and forcing bifurcation "when arising from Fannie Mae's same misconduct against parties it does not dispute are proper parties to this case who have raised the same allegations based on the same purported default" of the Liberty Village and Village Square loans is improper).

In fact, no language from the MCFA is referenced in the third and fourth counts of the Amended Complaint that requires interpretation. APP090-93. Instead, Counterclaim Paragraph 463 states "Fannie Mae has materially breached its agreement with the Westland Credit Facility Entities by improperly placing the

Westland Credit Facility Entities on 'a-check,' discriminating against the Westland Credit Facility Entities," and on that basis failed to permit the contracted for borrow up or future advance due to their ACheck status. APP091.

In contrast, Fannie Mae's Motion to Dismiss ignored the salient facts alleged in the Counterclaims, and simply asserts the MCFA is an agreement with a forum selection clause, but ignores that the breach is alleged to have arisen out of the Credit Facility Entities status on ACheck, not any of the MCFA's terms, which places the claim outside the scope of the MCFA clause. APP145

Additionally, while Fannie Mae's brief asserts the District Court's written order was circumspect (Brief, at 8), the District Court did inquire at the Motion hearing about two topics related to "the additional counterclaimants" and its inquiry suggests it contemplated the third and fourth counts of the Counterclaim arose from the Credit Facility Entities being placed on ACheck not out of the MCFA. SA050-53. First, the District Court asked whether the additional counterclaimants' claims were compulsory counterclaims. Both in its written papers and orally, Fannie Mae only contested that the stated counterclaims were compulsory, not whether the claims were counterclaims as it does in its present papers. Second, the District Court asked if Fannie Mae asserted that any counterclaim, including a claim by a party listed in the underlying complaint would be subject to the forum selection clause. *Id*. In respect to the latter inquiry, Fannie Mae admitted at oral arguments that the

forum selection clause would not be "invoked" against a party Plaintiff Fannie Mae had sued itself. SA052.

III. REASONS THE WRIT SHOULD NOT ISSUE

A writ of prohibition is an appropriate remedy only when a district court acts in excess of its jurisdiction. Here, the district court acted in its power to decide a motion to dismiss. Further, a writ of prohibition is not meant to correct errors, but instead is only employed as an extraordinary remedy to prevent a court from exceeding its judicial powers. Here, each of the arguments Fannie Mae raised amounts to, at best, nothing more than common judicial errors, related to a review that Fannie Mae requested the district court to undertake, so issuance of a writ of prohibition would be improper.

When examining enforceability of forum-selection clauses, Nevada state law is applied for review regardless of choice of law provisions. *See e.g., Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 738-40, 359 P.3d 105, 106-08 (2015) (applying Nevada law to a forum-selection clause, but honoring Utah choice-of-law for remaining terms); *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 21-26, 251 P.3d 690, 696-700 (2011) (utilizing Nevada law for forum-selection clause, but laws of Peru for other terms). But here, Fannie Mae improperly cites irrelevant forum selection clause cases from other jurisdictions, and several unpublished Nevada decisions,

both of which should be disregarded based on Nevada's strong interest in selection of the proper forum.

IV. ARGUMENT

A. Regardless of the Merits of Fannie Mae's Arguments, the Writ Should Not Issue Because the District Court Acted Within Its Jurisdiction.

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

A writ of prohibition "does not serve to correct errors; rather, its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial power." *Mineral Cnty. v. State, Dept. of Conservation & Nat. Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001); NRS 34.320. A writ of prohibition is "an extraordinary remedy," and a writ of prohibition petition will be denied when the "[p]etitioners have not met their burden of demonstrating that extraordinary relief is warranted." *Id*. at 243, 246.

Here, no extraordinary relief is warranted. The district court took the entirely appropriate action of denying a portion of a motion to dismiss. Further, unlike in the cases that Fannie Mae cites, Fannie Mae was the filing party that requested relief,

so it should not now be permitted to argue the District Court did not have the judicial power to review the Motion. *Cf. Nev. State Bd. of Architecture*, 135 Nev. at 377, 449 P.3d at 1264 (issuing a writ of prohibition at the board's request, after the board had not issued a final written decision, and such a decision is a statutory prerequisite to court review). In contrast, Fannie Mae has improperly sought extraordinary relief related to a perceived error only after the District Court rendered an adverse decision on Fannie Mae's Motion to Dismiss, so this writ is procedurally improper.

B. Though Procedurally Improper, Fannie Mae's Argument The Claims Are Not Counterclaims Is Erroneous Due To Fannie Mae's Adverse Action Of Placing Each Counterclaimant On ACheck Related To The Same Loan Default.

Fannie Mae's briefs for the underlying Motion never disputed that the claims in counts three and four are counterclaims. A149-53, A365-68. Instead, Fannie Mae only disputed whether the claims are compulsory, but admitted the claims' status as counterclaims, by stating "those counterclaims are not compulsory." (A365), and that the Credit Facility Entities "joined the amended counterclaim as additional counterclaimants." SA051-52.

However, to the extent this Court addressed the issue, Counterclaimants would rely upon NRCP 13, 19, & 20, as well as *Lund v. Eighth Judicial Dist. Court of State*, 127 Nev. 358, 364-65, 255 P.3d 280, 284-85 (2011). In *Lund*, this Court contemplated that "new parties may be added to an action through a counterclaim if there is at least one original party included in the counterclaim and the nonparties

meet the joinder requirements under NRCP 19 or 20." *Id.* This statement is consistent with NRCP 13, which broadly permits counterclaims to be asserted against opposing parties, and NRCP 13(h) that specifically contemplates "the addition of a person as a party to a counterclaim or crossclaim" via NCRP 19 and 20. "NRCP 19 requires joinder of all parties necessary for an action's just adjudication." *Lund*, 127 Nev. at 361, 255 P.3d at 283. Whereas, NRCP 20(a)(2), related to persons who may be joined, permits the addition of "defendants if: (A) any right to relief is asserted against them . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."

While Fannie Mae attempts to distinguish the Credit Facility Entities' role as counterclaimants, such assertion is contrary to the above cited authority, and Fannie Mae's brief. For instance, in *Depner Architects and Planners, Inc. v. Nevada Nat. Bank*, 104 Nev. 560, 563, 763 P.2d 1141, 1143 (1998), the Court commented in favor of the parties being cross-claimants was based on those parties being similarly situated lien claimants that were adverse to the debtor. Here, the counterclaimants are similarly situated, and each is adverse to Fannie, who after declaring a default placed each defendant and counterclaimant on ACheck, based solely on the Liberty Village and Village Square purported defaults. As such, their common roles and opposition to Fannie Mae shows they are counterclaimants.

Likewise, the claims are compulsory. NRCP 13(a) provides compulsory claims "arise[] out of the transaction or occurrence that is the subject matter 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, 403 P.3d 364, 371 (2017) (positively citing a "logical relationship' between the counterclaim and main claim").

Here, Defendants were placed in default in December 2019, and nearly contemporaneously Fannie Mae placed all Westland-related entities on ACheck. APP091. Fannie Mae's act of placing of all Counterclaimants on ACheck meant each Counterclaimant was adversely affected by Fannie Mae, and harmed by its "Do Not Process" status on ACheck. Moreover, at the Motion, Counterclaimants argued "[t]he credit facility entity's claims all arose from one simple fact, the fact that Fannie Mae declared a default against the [Liberty Village and Village Square] loan agreements. And based on that, and solely based on that, they improperly placed the Master Credit Facility Agreement [entities] on A-check and refused to allow for borrow ups to occur on [the MCFA]." SA033-34. As such, when Counterclaim counts three and four allege a breach that is inextricably intertwined with the discriminatory act of placing the Credit Facility Entities on "a-check" based on the purported default in this underlying case, and not any fault of the Credit Facility

Entities or the terms of the MCFA, a compulsory counterclaim is stated.[3] The same facts support a logical relationship for each Counterclaimant to maintain its suit against Fannie Mae, to restore their reputation within the lending community with judicial economy and fairness, which mandates Counterclaimant's claims should be tried in this one suit.

C. Fannie Mae's Attempt To Bifurcate Claims Through A Permissive Forum Selection Clause Is Improper.

The MCFA's forum selection clause drafted by Fannie Mae is permissive based on Nevada State law. The forum selection clause did not limit all suits to Washington, D.C. ("DC") with unequivocal words of exclusivity, as required to dismiss a complaint on the basis of a mandatory clause. *See Soro*, 131 Nev. at 738, 742, 359 P.3d at 106, 108 (2015). Rather, the clause permits suits to be brought not only in DC, but also in "any other jurisdiction," and even the Credit Facility Entities'

[3] The District of Columbia is not a viable forum for the Credit Facility Entities' claims. Fannie Mae sued on the Liberty Village and Village Square loan agreements in Nevada. Arising out of that transaction, Fannie Mae placed related entities with no relationship to those loan agreements on its ACheck "do not process" status, and the Credit Facility Entities' claims are premised on a finding that their placement on ACheck due to another transaction was improper. Thus, if those claims are dismissed, the District of Columbia court would be forced to separately adjudicate whether Fannie Mae properly declared a default under the Village Square and Liberty Village loan agreements, despite Fannie Mae having already placed the same decision at issue in this Nevada case. Such a process would lead to the possibility of inconsistent judgments and force a bifurcation of the Credit Facility Entities' claims. Such a result is unreasonable and unjust.

consent to litigation in DC was ambiguously limited by the clause "except as otherwise provided herein."

Moreover, consistent with Nevada State law, this Court has vigorously asserted its interest in reviewing forum selection clauses with restraint.[4] For instance, a forum selection clause stating the 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. *Soro*, 131 Nev. 738, 742, 359 P.3d 106, 108. This Court made clear that to be mandatory, it is not enough to mention a particular forum or to specify that disputes will be resolved there, but rather the agreement must contain "words of exclusivity" and that "[a]bsent such language, we deem the clause permissive." 131 Nev. at 742. The parenthetical comments this Court cited from other jurisdictions are telling, as even stringent language was deemed permissive unless only one court is stated to have exclusive jurisdiction. *Id*. at 741.

Specifically, this Court's caselaw review in *Soro* recognized the following out of state authority to be permissive:

> *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs Inc.*, 22 F.3d 51, 52–53 (2d Cir.1994) (holding the forum selection

[4] Fannie Mae's citation to caselaw other than Nevada State law regarding forum selection clauses, including *Publicis Commc'n v. True N. Commc'ns Inc.*, 132 F.3d 371 (7th Cir. 1997), is misplaced. Nevada courts have stressed that Nevada state law should be applied to forum selection clauses. *Soro*, 131 Nev. at 738-40, 359 P.3d at 106-08 (applying Nevada law to a forum-selection clause, but otherwise deferring to a choice of law clause); *Rosenberg*, 127 Nev. at 21-26, 251 P.3d at 696-700 (same).

> clause, "[a]ny dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts," **as permissive** (internal quotation marks omitted)); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76–78 (9th Cir.1987) (holding the forum selection clause, "[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract," **as permissive**, and noting that to be considered mandatory, a forum selection clause must clearly require that a particular court is the only one that has jurisdiction (internal quotation marks omitted)); *Keaty v. Freeport Indon., Inc.*, 503 F.2d 955, 956–57 (5th Cir.1974) (holding the forum selection clause, "[t]his agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York," **as permissive** (internal quotation marks omitted)).

Soro, 131 Nev. at 741–42 (emphasis added).

Faced with that stringent requirement, Fannie Mae's brief selectively quotes the MCFA's forum selection clause, but the full clause is available above. (*See* discussion, *supra* at 9-10.) When examining the clause, the language is wrought with six limitations, including: two choice of law limitations; a limitation on the borrower litigating "any controversy arising under" the loan documents in DC due to a clause stating "except as otherwise provided herein;" a scope limitation on DC jurisdiction over "controversies which may arise" from the loan agreements that again states "except as otherwise provided herein;" a limitation on "Borrower['s] irrevocabl[e] consent[] to service, jurisdiction and venue . . . for any litigation arising from" the MCFA; and a carve out for Fannie Mae to be able "bring[ ] any suit, action,

or proceeding or exercising any rights against Borrower and against the collateral *in any other jurisdiction*." APP181 (emphasis added).

As such, the forum selection clause is not mandatory as Fannie Mae suggests, because three different portions in the clause place reservations and limitations on its terms, including: 1) Fannie Mae's reservation of rights to bring suit "or exercis[e] any rights" in other jurisdictions, 2) the general limitations for jurisdiction imposed by stating "except as otherwise provided herein," and 3) the constraints on the scope of the clause to matters "arising from" the MCFA, as opposed to arising from other events, including discriminatory lending practices.

Factually, Fannie Mae actually exercised rights in a jurisdiction other than DC when it chose to file the present action related to the Loan Agreements in Nevada AND took action against the MCFA entities by placing them on a-check. Notably, Fannie Mae's improper ACheck actions were based on the purported breach of the same Loan Agreement that Fannie Mae sued in Nevada consistent with its reservation to sue in "any other jurisdiction."

Second, the forum selection clause is far from unequivocal. "[T]he except as provided herein" language amounts to a limitation of the selection of jurisdiction in DC, and coupled with the "any other jurisdiction" language is nearly unlimited. That clause alone prevents the forum selection clause from unequivocally setting jurisdiction in only one particular court, as it must to be mandatory.

Finally, the Credit Facility Entities' claims are beyond the scope of the "arising from" term, because they arose independent of the MCFA. Instead, those claims arise from the Credit Facility Entities being placed on ACheck related to a purported default asserted against another affiliated party. Fannie Mae admits that default stems from an entirely separate loan agreement to which this clause would not apply. Further, in the event it is found that whether the clause applies is ambiguous, the scope should be strictly enforced against the drafter.

While Fannie Mae attempts to rely on two features of the paragraph to assert that the forum-selection clause is mandatory – unilateral reservations and a waiver – neither provision assists Fannie Mae. First, Fannie argues that aside from suits in DC the terms only make unilateral reservations in favor of Fannie Mae, but that does not alter the large number of limitations, and with those limitations the clause simply cannot be said to contain words of exclusivity as required to be found mandatory in Nevada. Second, Fannie asserts that the Credit Facility Entities "waive[d]' the right to bring 'any controversy arising under or in relation to' the MCFA in 'any other venue' than" DC. (Brief, at 12). But, that term actually states that the lender's filing of suit in another jurisdiction shall not be a waiver of the agreement DC choice of law shall apply, or the borrower's "submission" to "personal jurisdiction within the District of Columbia." APP181. However, the waiver does not apply, since Fannie Mae has not filed suit under the MCFA in any jurisdiction. Under Nevada state law

it is clear, without unequivocal words of exclusivity unambiguously placing litigation in only one venue, the forum selection clause is rendered permissive, not mandatory.

Procedurally, the present request for relief also seems improper. Fannie Mae now seeks dismissal to change venue to DC, but Fannie Mae did not challenge joinder of the Westland Securities Entities or the Westland Credit Facility Entities as Counterclaimants when they joined the suit. Nor did Fannie Mae challenge the new Counterclaimants' right to bring new claims. Fannie Mae thus conceded that all of the parties and claims arise from the "same transaction or occurrence" or "series of transactions and occurrences." This alone, renders the forum where Fannie Mae brought suit proper, and the nonapplicable forum selection clause in the MCFA is not implicated.

However, even if a portion, or all, of the Credit Facility Entities' claims were required to be refiled in DC, Fannie Mae has stated that is of no consequence without citation of any authority in support of its position that a suit may be split into multiple jurisdictions by a motion to dismiss related to a forum selection clause. *See* APP367-68. Thus, in essence, Fannie Mae seeks to improperly bifurcate this matter. Under those circumstances, aside from the fact that the consent to jurisdiction clause is not mandatory, as Counterclaimants have previously argued, it would also not be "reasonable and just" to permit Fannie Mae to apply the forum selection clause to

the Westland Credit Facility Entities and thus force these matters to be parceled out into a different venue – of Fannie Mae's choice of course, with the resultant risk of inconsistent rulings, findings and judgments, and the astronomically higher costs of litigation. APP182-83.

This is especially true where NRCP 13(a) requires that "a party must raise in response to a complaint any claim 'the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." As such, it would not be just or reasonable to force bifurcation of related claims based on a forum selection clause, when Fannie Mae chose to the initial jurisdiction in which to sue, and it chose to sue in Nevada for a purported breach, but then has engaged in discriminatory lending practices against related entities based on the same purported breach while forcing those claims to be heard in multiple courts. It is not just or reasonable to remove related counterclaims and to force the bifurcation of claims into repetitive suits in multiple jurisdictions based simply on Fannie Mae's whims, especially when arising from Fannie Mae's same misconduct against parties that it does not dispute are proper parties to this case who have raised the same allegations based on the same purported default. The District Court understood the impropriety of such a request, as shown by its questioning on whether the claims were compulsory counterclaims

properly and found in favor of Counterclaimants. SA050-53. This Court should do the same and affirm the trial court's determination.

V. CONCLUSION

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

DATED this 13th day of July, 2021.

WESTLAND REAL ESTATE GROUP

By /s/ *John Hofsaess*
JOHN HOFSAESS, ESQ. (*Pro Hac Vice*)

JOHN BENEDICT, ESQ. (5581)
The Law Offices of John Benedict

JOHN W. HOFSAESS, ESQ.
(admitted *pro hac vice*)
Westland Real Estate Group

J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN, ESQ. (11563)
Campbell & Williams

BRIAN W. BARNES (*Pro Hac Vice*)
Cooper & Kirk

Attorneys for Real Parties in Interest

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,471 words.

I further certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying reply does not conform with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 13th day of July, 2021.

WESTLAND REAL ESTATE GROUP

By /s/ *John Hofsaess*
JOHN HOFSAESS, ESQ. (*Pro Hac Vice*)

JOHN BENEDICT, ESQ. (5581)
The Law Offices of John Benedict

JOHN W. HOFSAESS, ESQ.
(admitted *pro hac vice*)
Westland Real Estate Group

J. COLBY WILLIAMS, ESQ. (5549)
PHILIP R. ERWIN, ESQ. (11563)
Campbell & Williams

BRIAN W. BARNES (*Pro Hac Vice*)
Cooper & Kirk

Attorneys for Real Parties in Interest

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 13th day of July 2022, I caused true and correct copies of the foregoing Answer to Petition for Writ of Prohibition to be delivered to the following counsel and parties:

VIA ELECTRONIC AND U.S. MAIL:

Kelly H. Dove, Esq.
Nathan G. Kanute, Esq.
Bob L. Olson, Esq.
Snell & Wilmer L.L.P.
3883 Howard Hughes Parkway, Suite 110
Las Vegas, Nevada 89169

Leslie Bryan Hart, Esq.
John D. Tennert, Esq.
Fennemore Craig, P.C.
7800 Rancharrah Parkway
Reno, Nevada 89511

Joseph G. Went, Esq.
Lars K. Evensen, Esq.
Sydney R. Gambee, Esq.
Holland & Hart L.L.P.
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

/s/ *John Y. Chong*
An Employee of Campbell & Williams