**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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



# REAL PARTIES IN INTERESTS' SUPPLEMENTAL APPENDIX IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF PROHIBITION

VOLUME 1

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| 1 | 1 | Order Granting Defendants' Motion For Preliminary Injunction And Denying Application For Appointment Of Receiver | November 20, 2020 | SA001 – SA013 |
| 2 | 1 | Transcript of Proceedings Regarding Motions Hearing | December 16, 2021 | SA014 – SA055 |

DATED this 13th day of July 2022.

Respectfully submitted,

By: /s/ John W. Hofsaess
JOHN W. HOFSAESS, ESQ. (*Pro Hac Vice*)
Westland Real Estate Group

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*Counsel 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 **REAL PARTIES IN INTERESTS' SUPPLEMENTAL APPENDIX IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF PROHIBITION (VOLUME I)** to be delivered to the following counsel and parties:

VIA ELECTRONIC AND U.S. MAIL:

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VIA U.S. MAIL:

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

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

# 1

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CLERK OF THE COURT

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Attorneys for Defendants/Counterclaimants/ Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| FEDERAL NATIONAL MORTGAGE ASSOCIATION,<br><br>Plaintiff,<br><br>vs.<br><br>WESTLAND LIBERTY VILLAGE, LLC, a Nevada Limited Liability Company; and WESTLAND VILLAGE SQUARE, LLC, a Nevada Limited Liability Company<br><br>Defendants. | CASE NO. A-20-819412-C<br><br>DEPT NO. 4<br><br>**ORDER GRANTING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION AND DENYING APPLICATION FOR APPOINTMENT OF RECEIVER**<br><br>Hearing Date: October 13, 2020<br>Hearing Time: 10:30 a.m. |
| AND ALL RELATED ACTIONS | |

Defendants' Counter-Motion for a Preliminary Injunction having come before the Court on October 13, 2020, and John Benedict, Esq. appearing on behalf of Defendants Westland Liberty Village LLC and Westland Village Square LLC, and Bob Olson, Esq. appearing on behalf of Plaintiff Federal National Mortgage Association.

Pursuant to Westland Liberty Village LLC's and Westland Village Square LLC's (in combination "Westland") Counter-Motion for a Temporary Restraining Order and/or Preliminary Injunction ("Motion"), the Affidavit of Yanki Greenspan, the Affidavit of Shimon Greenspan,





Case Number: A-20-819412-B

Westland's Counterclaim and Third Party Complaint, and the Court having reviewed the pleadings and papers on file herein, including any filed by Plaintiff Federal National Mortgage Association ("Fannie Mae"), as well as Fannie Mae's Application for Appointment of Receiver and supporting papers (the "Application"), and having heard the arguments presented by Counsel, after considering and relying upon only admissible evidence, this Court in part applying its discretion including weighing the credibility of the declarations and other proof submitted in support of and in opposition to the Motions, enters the following findings of fact, conclusions of law, and Orders the following:

***FINDINGS OF FACT***

1. Fannie Mae admits conducting a property condition assessment at the multi-family apartment communities owned by Westland and located at 4870 Nellis Oasis Lane, Las Vegas, NV 89115 [Assessor's Parcel Nos. 140-08-710-161, 140-08-711-273 and 140-08-712-289] (the "Liberty Village Property") and 5025 Nellis Oasis Lane, Las Vegas, NV 89115 [Assessor's Parcel Nos. 140-08-702-002 and 140-08-702-003] (the "Village Square Property," or in combination the "Properties") in September 2018.

2. Westland has submitted evidence that it has spent over $1.7 million in capital improvements since the property condition assessment was conducted, $3.5 million in capital improvements since the Properties were purchased, $1,573,000 in security costs at the Properties, that it employs an on-site staff of 32 employees, all of which support that the condition of the Properties has not deteriorated.

3. Westland submitted 2300 pages of work orders and related documents for renovations it performed on vacant units from September 2019 through June 2020, which further supports that the condition of the Properties has not deteriorated.

4. Statements from unbiased third-parties, including the Office of the Clark County Commissioner and the Nevada State Apartment Association, support that the condition of the Properties has not deteriorated.

5. The Court finds Westland has submitted substantial evidence that no deterioration of the condition of the Liberty Village Property and Village Square Property has occurred.

6. The two loan agreements both contain terms, including in Section 6.03(c), requiring a showing of deterioration in order to perform a property condition assessment or take further action related to the Repair Reserve or Replacement Reserve accounts. Without Fannie Mae showing there was deterioration at the Properties, there can be no default by Westland's not placing additional funds into those two accounts. Fannie Mae has not shown deterioration of the Properties. In fact, Westland has shown the opposite at this early stage, even without any formal discovery. The lack of demonstrated deterioration is enough to warrant a preliminary injunction as set forth herein.

7. Fannie Mae admits that in August 2018 when the loan agreement for the Liberty Village Property was assumed the parties agreed to a combined total of $105,032.03 for the Repair Reserve and Replacement Reserve, which was fully funded on the date of the date the loan was assumed, plus an additional monthly Replacement Reserve payment of $18,600.00.

8. Fannie Mae admits that in August 2018 when the loan agreement for the Village Square Property was assumed the parties agreed to a combined total of $38,287.25 for the Repair Reserve and Replacement Reserve, which was fully funded on the date of the date the loan was assumed, plus additional monthly Replacement Reserve payments of $10,259.08.

9. The undisputed facts establish that Westland paid $18,600.00 each month for the Liberty Village Replacement Reserve and $10,259.08 each month for the Village Square Replacement Reserve consistent with the schedules to the loan agreements as executed in August 2018, as well as the principal and interest payments that were required by the loan agreements.

10. Fannie Mae admits that its servicer, Grandbridge Real Estate Capital, LLC ("Grandbridge") forwarded a Notice of Demand, dated October 18, 2019, on its behalf that sought a combined $2.85 million additional reserve deposit from Westland for the Liberty Village Property and Village Square Property, which necessarily was based on a modification of the reserve amounts listed in the loan agreements.

11. By relying on the Notice of Demand, Fannie Mae admits that Grandbridge transferred all funds it held on Westland's behalf for each Property from the interest bearing Replacement Reserve account to the non-interest bearing Repair Reserve account.

12. Fannie Mae admits forwarding a Notice of Default and Acceleration of Note, dated December 17, 2019, which sought to hold Westland in default under the loan agreements that were assumed with Fannie Mae for not depositing the additional $2.85 million Fannie Mae demanded, sought acceleration of the note for each Property, and sought not only the full principal balance but also default interest and costs. Fannie Mae further admits that, due to the asserted default, it holds $1,000,000.00 in insurance proceeds from work Westland had performed, and paid for, at the Properties. Based solely on that purported default, Fannie Mae has refused to turn those funds over to Westland.

13. Fannie Mae admits forwarding a Demand and Notice Pursuant to NRS 107A.270, dated December 17, 2019, which sought to revoke Westland's license to collect rents at the Properties, which is based solely on the purported default arising from not depositing an additional $2.85 million into reserves.

14. Fannie Mae admits pursuing a foreclose against Westland's Properties by filing a Notice of Default and Election to Sell under Deed of Trust, dated July 8, 2020, and taking actions in furtherance of foreclosure against each of the Properties, which is based solely on the purported default arising from not depositing an additional $2.85 million into reserves.

***CONCLUSIONS OF LAW***

1. NRCP 65(b) provides the Court with the authority to issue a preliminary injunction;

2. NRS 33.010 provides that an injunction may be granted in the following cases:

   a. "When it shall appear by the [pleadings] that the [requesting party] is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of an act complained of, either for a limited period or perpetually."

b. "When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the [requesting party]."

c. "When it shall appear, during the litigation, that the [non-requesting party] is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the [requesting parties'] rights respecting the subject of the action, and tending to render the judgment ineffectual."

3. A preliminary injunction is available upon a showing that the party seeking the injunction enjoys a "reasonable probability of success on the merits" and that the non-moving party's "conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy." *Sobol v. Capital Management Consultants, Inc.*, 102 Nev. 444, 446 (1986); *Clark County School Dist. v. Buchanan*, 112 Nev. 1146, 924 P.2d 716, 719 (1996). The Court "may also weigh the public interest and relative hardships of the parties ..." *Id*. (*citing Pickett v. Commanche Construction Inc.*, 108 Nev. 422, 426, 836 P.2d 42, 44 (1992)).

4. The ultimate purpose of the preliminary injunction is to preserve the status quo so as to prevent irreparable harm. *Dixon v. Thatcher et al.*, 103 Nev. 414, 415, 742 P2d 1029 (1987).

5. Westland has shown a reasonable probability of success on the merits for the relief it seeks via Counterclaim in this case. This element is thus satisfied in Westland's Counter-Motion for a Preliminary Injunction because Fannie Mae has failed to establish that any default has occurred, and even viewing the evidence and arguments Fannie Mae presented in the best light for it, at best for Fannie Mae there are substantial factual disputes related to whether any default occurred. Fannie Mae's papers admit pursuing a foreclose against Westland's Properties by filing a Notice of Default and Intent to Sell, and such actions may amount to a breach of contract, failure to service the loan in good faith, and may support the other claims and damages in Westland's Counterclaim.

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6. Westland would suffer irreparable harm to its interests in real property, to its personnel, and to an ongoing business in the absence of such an order to enjoin Fannie Mae's actions. First, real property is unique. Second, Westland has invested millions of dollars into the Properties, has substantial equity in them, and has significantly improved the living conditions at the Properties. Westland has been recognized by independent third parties for these successes, including lowering the crime rate at the Properties. Specifically, Westland has received various commendations from the Las Vegas Metropolitan Police Department, housing authorities, and the local governments. Third, Westland has invested heavily in personnel for the Properties, including paying in excess of $1.5M for salaries and related expenses for security personnel. All told, Westland has over thirty people working at the Property, and part of the irreparable harm will be those people losing their jobs if Fannie Mae's foreclosure is allowed to proceed or if the Court appoints a receiver.

7. Based upon the above, and all evidence and documentation submitted, and here specifically applying the Court's discretion, the prejudice to Westland is much greater than the prejudice to Fannie Mae if no injunction is issued in this case.

8. Issuance of a preliminary injunction as requested by Westland would preserve the status quo until this matter is fully resolved on the merits.

9. Westland has met their burden of proof to support this Preliminary Injunction through competent evidence.

10. Westland has made a substantial investment in the collateral securing the loan and continue to maintain substantial funds within the Repair Escrow Account and Replacement Escrow Account that render the need for a bond for a preliminary injunction to be de minimus.

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11. Fannie Mae's has not shown good cause for its Application for Appointment of a Receiver because it has not carried its burden to show any default occurred and based on the lack of evidence of irreparable harm or substantial loss to collateral to Fannie Mae.

**THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that Defendant's Countermotion for a Preliminary Injunction is **GRANTED**;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff's Application for Appointment of a Receiver is **DENIED**;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that:

(1) Fannie Mae, including, without limitation, Fannie Mae's servicers, agents, affiliates, representatives, officers, managers, directors, shareholders, members, partners, trustees, and other persons exercising or having control over the affairs of Fannie Mae, (collectively the "Enjoined Parties") are enjoined from taking any and all actions to foreclose or continue the foreclosure process upon Westland's Properties, and may not conduct any foreclosure proceeding or foreclosure sale on Properties until further order of this Court;

(2) The Enjoined Parties may not continue to maintain the Liberty Village Notice of Default and Election to Sell under Deed of Trust, dated July 8, 2020, which shall immediately be removed from the title of the Liberty Village Property;

(3) The Enjoined Parties may not continue to maintain the Village Square Notice of Default and Election to Sell under Deed of Trust, dated July 8, 2020, which shall immediately be removed from the title of the Village Square Property;

(4) The Enjoined Parties may not interfere with Westland's enjoyment of the Properties pending a final determination of the rights and obligations of the parties pursuant to the Multifamily Loan and Security Agreement entered by and between Lenders and Westland on August 29, 2018;

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(5) Fannie Mae's Application to appoint a receiver is denied, and the Enjoined Parties are further enjoined from and may not do the following acts:

a) appoint a receiver;

b) take possession of any real or personal property, which prohibition extends to both tangible or intangible property, including, without limitation, all land, buildings and structures, leases, rents, fixtures, and movable personal property that may be identified as "Leases," "Rents" or "Mortgaged Property" in any "Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing," located at or related to the Village Square Property and Liberty Village Property (hereinafter the "Property") referenced in both parties pleadings;

c) obtain possession of, exercise control over, enforce a judgment, enforce a lien, foreclose, enforce a Deed of Trust, or otherwise take any action against the Property, without specific permission from or a further determination of this Court;

d) interfere with Westland, directly or indirectly, in the management and operation of the Property, the collection of rents derived from the Property, or do any act which will, or which will tend to, impair, defeat, divert, prevent, or prejudice Westland's use or preservation of the Property (including the leases, rents and reserve-escrow accounts related thereto) or the interest of Westland in the Property and in said leases, rents, and reserve-escrow accounts;

e) fail to turn over to Westland the monthly debt service invoices for the Property, which have been withheld between February 2020 and present, and on a going forward basis, Fannie Mae or its servicer will forward the monthly statements Fannie Mae's servicers produce for any borrower who is not in default;

f) fail to process loan payments consistent with the terms of the loan agreement, including that Fannie Mae, or its servicer, will return to the ordinary practice of auto-debiting Westland's account for the amount of the non-default normal monthly debt

service payment each month;

g) retain possession of any funds paid in excess of the non-default monthly debt service payments, which excess funds Westland paid between February 2020 and the present based on the refusal of Fannie Mae's servicer to produce monthly statements to Westland;

h) fail to disburse or turn over to Westland any funds currently held or initially held in the Restoration Reserve Account, which funds were earmarked for the repair of the fire-damaged buildings, Buildings 3426 and 3517, regardless of whether Fannie Mae continues to maintain those funds in the same account or has transferred those funds to another account;

i) continue to improperly maintain the funds designated to be held in the interest bearing Replacement Reserve Account for each of the Properties in the non-interest bearing Repair Reserve Account for each of the Properties, to restore any balance that has already been transferred, and to credit the Replacement Reserve Account for the interest that Westland would have earned;

j) continue to refuse to respond to Reserve Disbursement Requests for more than 10 days, or to fail to disburse funds held in the Repair Reserve and Replacement Reserve escrow accounts in response to requests submitted consistent with the terms of the loan agreements;

k) continue to maintain the Notice of Demand, dated October 18, 2019, which will be held to be retracted and stricken;

l) continue to maintain the Notice of Default and Acceleration of Note, dated December 17, 2019, which will be deemed retracted and stricken;

m) continue to maintain the Demand and Notice Pursuant to NRS 107A.270, dated December 17, 2019, which will be deemed retracted and stricken;

n) otherwise displace Westland from the operation or management of the Property;

o) 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.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bond amount related to this preliminary injunction shall be $1,000.00 for Defendants, which Defendants may also meet by depositing $1000.00 cash with this Court.

Dated: November ___, 2020

Dated this 20th day of November, 2020

**IT IS SO ORDERED**.

The Honorable Kerry Earley
DISTRICT COURT JUDGE

Kerry Earley
District Court Judge

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Agreed as to Form and Content:

SNELL & WILMER L.L.P.

By: ***DOES NOT APPROVE***
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Bob L. Olson, Esq.
David L. Edelblute, Esq.
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LAW OFFICES OF JOHN BENEDICT

By: ***/s/ John Benedict***
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*Attorneys for Defendants/Counterclaimants/Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC*

*Respectfully Submitted:*

Dated: November 16, 2020

LAW OFFICES OF JOHN BENEDICT

By: ***/s/ John Benedict***
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*Attorneys for Defendants/Counterclaimants/Third Party Plaintiffs Westland Liberty Village, LLC & Westland Village Square LLC*

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

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|---|---|
| Federal National Mortgage, Plaintiff(s)<br><br>vs.<br><br>Westland Liberty Village, LLC, Defendant(s) | CASE NO: A-20-819412-B<br><br>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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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 11/23/2020

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# 2

**TRAN**

DISTRICT COURT

CLARK COUNTY, NEVADA

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| Federal National Mortgage Association,<br><br>Plaintiff(s),<br><br>vs.<br><br>Westland Liberty Village, LLC,<br><br>Defendant(s). | ) | CASE NO: A-20-819412-B<br><br>DEPT. XIII |

BEFORE THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

THURSDAY, DECEMBER 16, 2021

**TRANSCRIPT OF PROCEEDINGS**

**RE: MOTIONS HEARING**
(Attorneys Appearing Via BlueJeans Video)

**SEE PAGE 2 FOR APPEARANCES**

**SEE PAGE 4 FOR MOTIONS HEARING**

RECORDED BY: JENNIFER GEROLD, COURT RECORDER
TRANSCRIBED BY: KATHERINE MCNALLY, TRANSCRIBER

**A P P E A R A N C E S**

FOR PLAINTIFF FEDERAL NATIONAL MORTGAGE ASSOCIATION:

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FOR INTERVENOR(S) FEDERAL HOUSING FINANCE AGENCY FHFA:

MICHAEL A.F. JOHNSON, ESQ., *pro hac vice*
LESLIE BRYAN HART, ESQ.

FOR COUNTERCLAIMANT(S):

JOHN W. HOFSAESS, Esq.
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FOR SHAMROCK PARTIES:

MEGAN E. GARRETT, ESQ., *pro hac vice*

FOR GRANDBRIDGE REAL ESTATE CAPITAL LLC:

CHERYL L. HAAS, ESQ., *pro hac vice*

**LAS VEGAS, CLARK COUNTY, NEVADA**

**FRIDAY, DECEMBER 16, 2021 9:04 a.m.**

* * * * *

THE COURT: And on page 5, Federal National Mortgage Association versus Western Liberty Village, that was given a special time by way of minute order yesterday at 10:45. But if everybody's present, I can hear it now.

Some things came off which I thought were not going to be coming off and that I thought were going to be taking more time, and that's why I gave it a special time. So, in any event, the Court will be in recess until --

THE CLERK: I think Mr. Johnson's on.

THE COURT: On which case?

THE CLERK: I think he's for Federal National Mortgage.

MR. JOHNSON: [Indiscernible, audio distortion] versus Westland. But I don't think [indiscernible]. We really appreciate the Court's accommodation of our time. And unfortunately, it didn't work out [indiscernible] this time, but we look forward to arguing in, what, about an hour.

THE CLERK: Okay.

THE COURT: What did he say?

THE CLERK: He said we'll argue in an hour.

THE COURT: Okay. All right. Very well. Court's in recess.

[Matter Trailed and recalled at 10:49 a.m.]

THE COURT: Federal National Mortgage Association versus Westland Liberty Village LLC, on page 5.

Okay. I'm calling the case. State your appearances.

MALE SPEAKER: Good morning, Your Honor.

MR. JOHNSON: Good morning, Your Honor. Michael Johnson for FHFA, admitted *pro hac vice*.

THE COURT: Good morning.

MS. HART: Good morning, Your Honor.

MR. HOFSAESS: Good morning, Your Honor.

MS. HART: Leslie Bryan Hart, also on behalf of FHFA.

THE COURT: Good morning.

MR. HOFSAESS: Good morning, Your Honor. John Hofsaess, on behalf of counterclaimants. And John Benedict is also here today.

MR. BENEDICT: Good morning, Your Honor. John Benedict, local counsel for Westland.

MS. GARRETT: Megan Garrett, *pro hac vice* counsel for the Shamrock defendants.

THE COURT: Is that everybody?

MS. HAAS: Good morning, Your Honor. This is Cheryl Haas of McGuire Woods for third-party defendant Grandbridge Real Estate Capital, *pro hac vice*.

MR. WENT: Good morning, Your Honor. Joseph Went, local counsel for Grandbridge Real Estate Capital LLC.

THE COURT: Good morning.

MR. WILLIS: Good morning, Your Honor. Jeffrey Willis on behalf of Fannie Mae.

THE COURT: Good morning. Is that it? Okay.

I've got plaintiff and FHFA's Motion to Dismiss in Part Defendant's First Amended Answer and Amended Counterclaim.

Okay. Go ahead.

MR. WILLIS: Thank you, Your Honor. This is Jeff Willis on behalf of Fannie Mae, movant.

As Your Honor will probably realize from a review of the motion itself, that this is a multi-issue motion given that there were 10 counterclaims that were asserted.

With the Court's permission, I will address the arguments -- other than the arguments based upon HERA and the penalty bar, which my colleague, Mr. Johnson, who represents the FHFA, will address with the Court's permission.

THE COURT: All right.

MR. WILLIS: Your Honor, this action was commenced by Fannie Mae to enforce certain covenants under loan agreements that were entered into by defendants Village Square and Liberty Village.

There was an initial counterclaim a year ago by those two parties. And now we find ourselves, a year later, facing a counterclaim -- an amended counterclaim, which has added 11

new parties and asserted 11 additional claims for relief.

The gravamen of our motion to dismiss is to remove from the case claims which obviously cannot lead to any relief for the people or the entities that are asserting them. And we provided the Court yesterday, I believe, a shorthand summary of the basis for our motion as it relates to each of the claims, as well as a very short statement of the basis for the motion itself.

And if Your Honor has that, that might prove useful in evaluating the arguments you're about to hear and the claims that you're going to need to review. But basically, counts -- or Claims 1, 2, 3, 5, 9, and 10, we believe are unarguably susceptible to dismissal for failure to state a claim for the simple reason that some of the entities that are apparently asserting such claims founded on contract were not parties to the contracts themselves. It's elementary that a party cannot sue for breach of a contract that that party is not a party to, or not a third-party beneficiary of. And in this instance, those factors do not exist.

For example, Claim 1 is for breach of the Liberty Village Loan Agreement with Fannie Mae, but a fair reading of the allegations indicates that the claim is not brought just by Liberty Village, but by also -- also other counterclaimants who are not parties to that contract.

The same deficiencies exist in Count 2, which is the

Village Square contract. The -- a fair reading of the counterclaim would be that not only is Liberty Square making the claim, but also Liberty Village, what we described as the credit facility entities and the securities entities. And those latter entities lack any standing in which to pursue a claim for breach of contract between Fannie Mae and Village Square.

So as to all of the claims which rely upon, as a fundamental element, the existence of a contract between the claimant and the counter -- and the defendant. Those claims should be dismissed as to all parties, except the contracting parties.

And as I mentioned, we believe that that particular deficiency in the pleading would be resolved by granting Fannie Mae's motion as to Counterclaims 1, 2, 3, 5, 9, and 10.

THE COURT: That's 1, 3, 5, 9, and --

MR. WILLIS: And unless Your Honor has --

THE COURT: That was 1, 3, 5, 9, and 10; right?

MR. WILLIS: And 2.

THE COURT: Oh, okay.

MR. WILLIS: 1, 2, 3, 5, 9, and 10.

THE COURT: Okay. Go ahead.

MR. WILLIS: Thank you.

There is a -- Counterclaim 4 is based upon breach of the implied duty of good faith and fair dealing. And it is

asserted by all counterclaimants against Fannie Mae.

And there are a number of issues with that claim. The first is the issue that we have noncontractual parties asserting the claim. And as our briefing papers made clear, you do not have standing to assert a claim for breach of the implied covenant of good faith and fair dealing unless you are a party from -- to the contract from which the implied covenant arises. So that's essentially the same argument with regard to the Counts 1, 2, 3, 5, 9, and 10.

But in addition to that, the breach of the duty of good -- or the implied covenant of good faith and fair dealing is asserted by the credit facility entities under the Master Credit Facility Agreement, which is a document or agreement unrelated to the two loan agreements that form the basis for Fannie's suit initially, and that define the obligations between Fannie and the borrowers, Village Square and Liberty Village.

The credit facility entities should not be in this action, bringing this claim for breach of the Master Credit Facility Agreement, for the very simple reason that they agreed to exclusive jurisdiction over any claims in the District of Columbia.

Obviously, we are in the district of -- or we are in the state of Nevada. And that is not the entity that contractually agreed upon a forum in which the credit facility

entities agree to pursue any claims against Fannie Mae.

So that's an additional reason that Counterclaim 4 should be dismissed is because they have agreed to a Mandatory Forum Selection Clause, and this is not the mandatory forum.

And unless Your Honor has a question, I'll move to the claims for relief or the forms of relief that have been requested by the counterclaimants.

THE COURT: Yeah. Go ahead.

MR. WILLIS: Among other things, the counterclaimants make a claim for attorney's fees, which they describe in their papers as special damages. The deficiency in that position is that they have not pled special damages pursuant to Rule 9(g), and nor could they, because the special damages -- or the description of attorney's fees as special damages is very, very limited. And in the *Pardee Ranch* case, the Nevada Supreme Court held that it would not apply to a dispute between two contracting parties over a breach of contract.

So the attorney's fees claim, as a matter of law, should be dismissed, because it simply -- those are simply not damages available to the counterclaimants under the claims that they have pled.

There are also some issues regarding the claim for attorney's fees under the HERA penalty bar that I will leave to Mr. Johnson. But in addition to that, just under Nevada law, the attorney's fees claim simply fails to state a claim

upon which relief can be granted and should be dismissed.

THE COURT: Okay.

MR. WILLIS: The counterclaimants also seek consequential damages. And the consequential damages are subject to dismissal because both the loan documents, which are -- which are at the heart of the case, and the Master Credit Facility Agreement, contain clear and unambiguous waivers of consequential damages. And those waivers have been found to be enforceable in Nevada and in other states. And here they would prevent the counterclaimants from recovering on their -- any claim in which they sought consequential damages.

So if I could just summarize, Your Honor, what we seek through this motion is to bring this case down to the issues that deserve to be litigated. If our -- if Fannie's motion is granted, there will still be 10 counterclaims remaining in the case: Liberty Village breach of contract, Village Square breach of contract, the Liberty Village and Village Square claims for breach of the implied covenant, their claims for declaratory relief, their claims for fraud and concealment, their claim for negligent misrepresentation, their claim for conversion, their claim for injunctive relief, and equitable relief as well, rescission and reformation.

But the dispute will be between the parties that belong in the dispute, and that is Fannie Mae on one side and

Liberty Village and Village Square on the other.

And by acknowledging that these claims remain, we don't acknowledge that there is any validity to those claims, just that the litigation would proceed to a resolution of these claims, even after dismissal of those claims which we've identified as deficient as a matter of law.

And unless you have any questions, Your Honor, I would turn the floor over to Mr. Johnson to discuss HERA and the penalty bar.

THE COURT: That's fine. Go ahead.

MR. JOHNSON: Thank you, Your Honor. It's Michael Johnson for FHFA.

I'm pleased to inform the Court that no charts or matrices in my part of the presentation. That's because we are looking to apply a clearly and broadly worded statute. We briefed its application well, I think, so I'll keep my argument short and just reserve the opportunity for rebuttal.

12 U.S.C. § 4617(j)(4) states that in any case where FHFA is acting as conservator, the agency shall not be liable for any amounts in the nature of penalties.

The statute applies to claims brought against Fannie Mae, FHFA's conservatee, in addition to FHFA as conservator, because the conservator is Fannie Mae's legal successor. Any liability imposed on Fannie Mae is a liability imposed on FHFA as conservator.

On its face, the statute bars any liability in the nature of a penalty. This includes punitive damages and the attorney's fees counterclaimants seek here, because by definition punitive damages are penal. Punitive -- a punitive award is a penal award, and it is in the nature of a penalty. And by statute, the attorney's fees Westland seeks here -- counterclaimants seek here are defined as to punish and deter certain conduct. That's NRS 18.010 and NRS 7.085.

Westland asserts three primary arguments, and they sort of go to those elements of the statute. Their primary argument addresses whether the amounts they seek are in the nature of penalties. They contend that punitive damages are not in the nature of penalties. Well, that argument conflicts with the plain language of punitive damages. Punitive equals penal. And a penal award is in the nature of a penalty.

Every court to look at punitive damages has held that they are covered by the penalty bar in the subsequently identical penalty bar applicable to FDIC conservators and receivers. And that's really no surprise because it's hard to conceive of an award that would be more in the nature of a penalty than a punitive damages award.

Now, plaintiffs contend, or I'm sorry, Westland or the counterclaimants contend that in some contexts Nevada law distinguishes between punitive damages and civil penalties. And that may well be true. There may well be important

differences in some contexts, but that doesn't mean that both don't qualify as in the nature of a penalty and would be barred by a broadly worded statute such as 4617(j)(4).

So it's a bit of a red herring that Nevada, for purposes of computing contingent fee awards, for example, draws a distinction between civil penalties and punitive damages. Each would fall within the category of awards in the nature of a penalty for purposes of the penalty bar here.

Now, the counterclaimants also note that another widely separated HERA provision, one dealing with repudiation of preconservatorship contracts expressly disallows punitive damages from the compensation, the counterparty to a repudiated contract is entitled to receive. And they say, well, if (j)(4) bars punitive damages, there would be no reason for Congress to have put that in the repudiation provision, which is § 4617(d)(3)(B).

Well, Congress, of course, is entitled to include consistent provisions for clarity, sort of a belt-and-suspenders approach to statute drafting that the Court is undoubtedly familiar with -- and is very common. And there's a good reason why it would do so here.

The parties that are the subject of repudiated preconservatorship contracts worked very hard to maximize their recovery. And so while Congress authorized them to receive what are called actual direct compensatory damages,

there is often litigation -- and we cite this in our brief -- about what that idiosyncratic term includes and excludes.

It was completely rational for Congress to make it crystal clear that punitive damages are not allowed and do not constitute actual compensatory damages for purposes of repudiation of contracts.

Very important for FHFA to have that clarity as it makes its decisions on which contracts to repudiate, which to affirm, which to perform.

THE COURT: Okay. All right. Thank you, Counsel.

MR. JOHNSON: Yes.

THE COURT: I have to -- I have until noon today. I'm in trial, so I have to recess at noon. I'm going to be taking these under advisement in any event, so I just have to make sure that we allot the time. This has been well briefed.

MR. JOHNSON: Understood, Your Honor.

THE COURT: Okay.

MR. JOHNSON: Yeah. I appreciate that, Your Honor.

So last point on whether punitive damages are penal, the plaintiffs cite a case called *Higgins* from Kentucky. That case involves statutory damages, not punitive damages. And the reason why the District Court in that case found that the statutory damages available there did not fall within the scope of the penalty bar is that the Court concluded they were really, in substance, a form of liquidated damages, a

substitute for actual damages.

Here, counterclaimants seek punitive damages in addition to actual damages. They didn't negotiate for liquidated damages. The punitive damages aren't functionally liquidated damages. And so therefore the *Higgins* case is entirely off point.

Counterclaimant's next point is that if they only treat punitive damages as an offset against any damages that might be awarded Fannie Mae, the penalty bar doesn't apply.

Your Honor, that argument, with respect, borders on frivolous, because an offset can only be taken for an amount the offset-tor or the offset-tee, whichever way you want to look at it, is liable for. The statute bars liability. So you can't take an offset unless there's liability, and the statute bars liability from punitive damages.

So whether they're a direct payment or an offset against some other amount that Westland might owe Fannie Mae, Fannie Mae would still have to be liable for them before they could be taken as that.

Counterclaimant's final argument is that the statute only protects FHFA, and therefore it can't be applied to counter -- to punitive damages sought against Fannie Mae. Well, there's no valid decision that endorses that theory, although it's been asserted many times. The Nevada Supreme Court decisions in federal foreclosure bar cases suggest the

opposite outcome. They recognize that the HERA provisions that protect the conservatorships can be asserted by the conservatees, Fannie Mae, and oftentimes it's the sibilant corporation Freddie Mac, and not just the agency as conservator. The penalty bar and FDIC penalty bar cases that we cite in the brief are consistent with that.

The one published order that the counterclaimants cite, *Burke*, was voided for lack of subject matter jurisdiction. It's, therefore, a nullity. But it's reasoning is incorrect and conflicts with the language and the policy behind the penalty bar.

If we think a little bit more deeply about the penalty bar, it was designed to protect the conservatorships. If parties in the position of a -- of Westland, or the other counterclaimants, could simply evade its searchers by pleading their claims only against Fannie Mae or Freddie Mac and not also against FHFA, no one would ever plead a claim against FHFA. And Congress's intent to protect the conservatorship's assets would easily be thwarted. That would make no sense.

It also is inconsistent with practice. The statute expressly bars penalties relating to nonpayment of things like taxes and recording fees. Those are things that the conservatee pays, not the conservator. So statute -- so Congress would have incorporated a meaningless provision. It's an example. It's not an exhaustive set of everything the

penalty bar bars. But it would have no operation if the penalty bar operated in the limited, cramped way that counterclaimants' strained reading would suggest.

So again, I would refer the Court to the briefing, which I think is pretty good. But I think that the absence of case law on counterclaimant's side of the penalty bar question is dispositive.

And as I mentioned, the attorney fees here are penal under Nevada law, so everything we just talked about applies to them. Counterclaimants don't argue to the contrary in their brief. And so I think that they've conceded the point implicitly.

Thank you, Your Honor.

THE COURT: All right. Thank you.

All right. Counterclaimants' counsel?

MR. HOFSAESS: Well, Your Honor, John Hofsaess.

I think there's five fundamental flaws in this motion to dismiss for lack -- motion to dismiss for failure to state claims.

The first is that no consequential damage or waiver occurred, other than in the context of marshaling of assets. And to hold otherwise would alter the terms of the agreement in FHFA and Fannie Mae's favor.

Second, asserting the forum selection clause into the Master Credit Facility Agreement was not mandatory. And in no

circumstances -- it should not actually apply and is not binding.

Third, the motion to dismiss ignores the allegations in the counterclaims. And it just restates its own version of the facts.

Fourth, the motion to dismiss asserts claims for breach of an implied warranty that may not be pled as security entities, or that those entities may not be amended to state a business tort claim. But that's just simply not correct, Your Honor.

And fifth, they overstate and misapply 12 U.S.C. § 4617(j)(4), the purported penalty bar, as well as *Webb versus Shull*.

On this final point, counterclaimants note that Fannie Mae and FHFA have repeatedly made substantially similar arguments, focused on preemption; and that that portion of the motion, at the very least, will be substantially impacted by the pending appeal before the Nevada Supreme Court.

So at this point the Court should deny that portion of the motion without prejudice subject to the Nevada Supreme Court's pending decision.

Specifically, as related to the consequential damages limitation, it's completely baseless. On the face of that provision, it's clear it only applies to marshaling of assets. It's within a two section -- or two paragraph section of the

loan agreement that all applies to marshaling of assets.

They fail to cite any authority for failing to construe the contractual agreement as a whole, consistent with Nevada law, which is an exercise reserved for the finder of fact. We would cite *Ringle versus Bruton*, 120 Nev. 82, 93 for that proposition.

Here, the consequential damage waiver was limited to preceding -- by the preceding terms, and those -- in the same sentence, which clearly applied only to marshaling of assets. We don't have marshaling of assets at issue in this case, so the consequential damage clause waiver is not in effect.

Second, in relation to the forum selection clause, it's simply not mandatory, Your Honor. There's no words of exclusivity, so it is permissive. For such a clause to be binding, only one jurisdiction can be mentioned consistent with *Soro*, the 131 Nev. 737 at 738.

Here, the Master Credit Facility Agreement refers to multiple jurisdictions, including the state of Nevada where the mortgaged property is located, the location where the borrowers are organized for the security interest and -- which is again Nevada, and third, the District of Columbia. Moreover, the two portions of the forum selection clause rely on the movants in their reply brief, are not unequivocal either. The first specifically provides, Except as otherwise provided herein. It's simply not unequivocal. It's not

exclusive language, as required for a forum selection clause to be enforceable.

The second applies to "Consent to service jurisdiction and venue", which *Soro* also found was permissive, specifically in *Soro*, they quoted *Converting/Biophile Labs versus Ludlow*, a Wisconsin case from 2006, for the proposition that cases where a party agrees to consent to jurisdiction are not mandatory.

Instead, quoting the Ludlow case, it provided, "It means that the party agrees to be subject to that forum's jurisdiction if sued there. It does not prevent the party from bringing suit in another forum." That's *Soro* 131 Nev. at 741.

However, here, Fannie Mae does not serve or sue -- did not serve or sue the credit facility entities in the District of Columbia. We actually sued -- and a counterclaim in response here.

Therefore, it's simply not exclusive and not enforceable under Nevada law.

Finally, the dismissal on that basis would not be reasonable and just. This is all part of the same transaction and occurrence.

The 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 improperly placed the Master Credit

Facility Agreements on A-check and refused to allow for borrow ups to occur on that loan agreement.

So that case -- so these matters are inexplicably intertwined together. And that is solely due to Fannie Mae's own doing. Further, Fannie Mae chose to sue in Nevada on the underlying agreements, so it should not be allowed to force a bifurcation of those issues. And doing so would not be reasonable and just.

Finally, Fannie Mae cites to several cases such as *Publicis Communications*, a 7th Circuit case. But that utilized mandatory forum selection clauses stating that any claim shall be brought only in the court of the State of Delaware. That only goes to highlight the inadequacies of Fannie Mae's own exclusivity provisions, which are not exclusive.

The third point I would like to raise, Your Honor, is in relation to *Webb versus Shull*. On page 4 of the reply brief, it's incorrectly cited. Fannie Mae appears to quote *Webb versus Shull* and states that it holds that punitive damages are in the natures of penalties and fines, and implies that they are prohibited.

However, *Webb versus Shull* does not use the phrase in the nature of penalties and fines. It only provides that punitive damages are not awarded as compensation to the victim, but to punish the offender for severe wrongdoing, in

the unrelated context of treble damages.

Nothing related to *Webb* suggests that punitive damages were meant to be excluded by 12 U.S.C. § 4617(j)(4)'s fines and penalties language. We clearly could have stated punitive damages, just as Congress did in other portions of the statute.

And it's -- so that's a term that Congress certainly knows and could have used. Instead, in relation to the penalties, *Webb versus Shull* positively cited the Idaho case of *Barth versus Canyon County*, and stating a treble -- an award of treble damages was not a penalty, when a particular statute did not refer to "penalty" in its title or body. Based on the same logic, 12 U.S.C. § 4617(j)(4)'s failure to identify punitive damages excludes such damages from its purview.

Finally, the Webb Court also noted that damages, even when based on multiple areas of damages, such as treble damages may still be compensatory, and that's what we assert that the punitive damages are here, Your Honor. They're not for some greater harm to society. They're for harm caused to these parties due to bad conduct.

While Fannie Mae asserts that no Court has ever interpreted Section 4617(j)(4) consistent with the counterclaims reading of the statute, it is simply not true. The *Burke* case was cited. And *Burke*, although it actually was

later a decision that was vacated, it was vacated as a result of a settlement where the parties agreed as part of the settlement that there was no jurisdiction of the Court. It wasn't the Court finding there was no jurisdiction in the matter.

And we believe that *Burke* is the -- the best analysis that actually exists. The *Burke* Court itself, in its reasoning of its opinion, cited that all the other Courts that have reviewed the issues have just dealt with it in a cursory fashion, they've not actually looked at the language of the statute, delved into it in depth, and actually made a decision on the merits.

So the review and analysis is not here to discredit the plain language of the statute, including Congress's clear ability to identify punitive damages in other provisions.

Lastly, in relation to *Higgins*, the -- it's attempted to -- they have attempted to assert during these arguments that here the credit -- the parties did not actually bargain for any particular limitation on the punitive damage provisions, but similarly in *Higgins*, there was no actual bargaining there either. You know, they've taken a contrary position that *Higgins* related to a statutory amount of punitive damages or a statutory provision for damages, so that's clearly something that was not bargained for.

Finally, it remains undisputed in this case that the

FHFA has not taken any action as conservator in this matter which prevents the application of 12 U.S.C. § 4617(j)(4) on its face. And this is not a problem contrary to assertions that FHFA has raised, in relation to the protection of property of Fannie Mae, because the federal foreclosure bar would apply to Fannie Mae's own property, which is a separate provision and given appropriate protection and the full protection measure that it needs.

Likewise, movant's reliance on nationwide -- *Nation Star Mortgage*, 133 Nev. 247, 252 is vastly overstated because, as the Court simply held, that a servicer had standing to assert preemption. Because under some views of the facts, it is possible that the FHFA could have assigned such action. But the Court did not find that the preemption argument had any valid basis in that case, and in fact -- and in fact, the case was remanded for further factfinding.

Finally, while movants assert that the penalty bar applies to attorney's fees at issue in the case, the same isn't plausible based on the prior arguments that provide punitive damages that are penal. Unlike the civil rights matter that movants cite, no case has held that attorney's fees based on special damages, which are alleged to be compensatory in the counterclaims, and which court, such as *Reno Riverside Hotel,* has found to be compensatory are punitive for the nature of penalties. Movants simply have not

addressed such authority.

Moreover, attorney's fees have validly been pled as special damages consistent with *Liu* at -- which is a Nevada Supreme Court matter at 130 Nev. 155, which is a binding case that the movants failed to address.

Instead, movants rely on the authority of *Pardee Homes*, which is misplaced because it was recognized in that case that it was a garden-variety contract claim, related to fee owed by a real estate broker, not one of the three cited exceptions which we've actually detailed extensively in our opposition papers to show why each one of these exceptions would apply.

And if that's not sufficiently dealt with in our -- on our papers related to special damages, then the counterclaimants request leave to amend.

As to Point 4, the general language of the section is simply, Your Honor, the Westland parties have actually fairly identified which claims apply to which parties. There's one leading provision to each of the paragraphs that actually states that the allegations are repeated and realleged, but other than that, it's clearly stated which party applies for which contract provision, and a Motion to Dismiss is completely unnecessary.

While Fannie Mae selectively cites to paragraph 441 and 453 by mentioning wrongful acts against Westland entities,

Fannie Mae fails to mention that paragraph 441 ends by stating, And generally violating the terms of the Multifamily Loan Agreement, so that Liberty LLC had no option but to commence these proceedings.

Similarly, paragraph 453 ends by stating, The same as to Square LLC.

So as the Court can see, from those provisions, it was specifically limited to the contract and the parties who were involved with that contract.

As to the fourth cause of action, that counterclaim did apply to all parties, and that was intentionally done. Your Honor, we believe that based on the fact that we specifically included all of the counterclaimants in that claim, it makes it clear that the other claims, which did not go so far, are validly pled.

For that -- for those claims, Fannie Mae, as a reply, improperly asserts that the counterclaimants concedes that the security entities are not parties or intended beneficiaries of the contract. No such concession was made.

Instead, the opposition actually states that it was determined that the affiliated Westland entities placed -- were placed on A-check was not based on a contractual right, then a business tort occurred. And Westland had requested leave to amend on that basis.

Further, specifically paragraphs 284 and 472 allege

that prior to closing the Master Credit Facility Agreement, Fannie Mae required the parent entities of the Westland credit facility entities, which were the Westland security entities to provide their financial statements. The financial statements and affiliated owners, shareholders, and parent companies were required to act as guarantors and share that financial information based on those loan agreements.

Further, in paragraphs 263 to 266 provided that the lender specifically required the use of a SPE structure by Liberty LLC and Village LLC in an attempt to prevent liability to Westland affiliated entities and their parent companies that supplied the capital.

Those allegations, alone, are sufficient, Your Honor, to show that -- which entities that it applies to and that it's validly stated claims against all the parties in the fourth claim.

As such, those additional parties, the Westland securities entities were not strangers to the case as Fannie Mae asserts related to the fourth cause of action. They should have had nothing to do with it, but respectfully, Your Honor, Fannie Mae brought them into this conversation by placing the entities on A-check without the use of a cross-collateralization or cross-default provision that applied.

For the final point, Your Honor, I have is in relation

to the breach of covenant of good faith and fair dealings claim. There, Your Honor, we rely on *Hilton Hotels Corporation versus Butch Lewis Productions*.

But Fannie Mae does not dispute that -- Fannie Mae simply disputes that those claims were based on a breach of implied covenant of good faith and fair dealing, but states that other tort claims apply. There's no such statement within that case, Your Honor. Instead the Hilton Hotel court said that the additional parties that were sought to be pled into that case were not privy to the Hilton doer contract. And their only remaining contract that applied -- or their only remaining claim that applied in that action was implied covenant of good faith and fair dealing claims.

As such, when the improper actions occurred related to the contract, the Nevada Supreme Court ruled that tort liability related to the implied covenant of good faith and fair dealing could be found without specification of the particular tort-based claims to which it would apply.

Additionally, Fannie Mae's reliance on other cases such as *GECCMC versus JPMorgan Chase* are not applicable. They're either decided on the law of other states or federal common law. *GECCMC* was based on federal common law. *Bell versus Bimbo* was based on the law of Missouri, Pennsylvania, and Illinois. *Bertsch versus Discover* was an identity theft case where no agreement existed between any of the parties to

the action. *Macionski versus Alaska Airlines* was an at-will, wrongful termination case, decided on summary judgment. And *Langlois versus Harrah's Tahoe Inc.* was an at-will Nevada wrongful termination case, decided on summary judgment after trial with a specific exclusion for breach of contract claims, in an employment manual.

These are all vastly dissimilar to the current case and don't apply, Your Honor.

Finally, the reply improperly treats *American Federation of Musicians versus Reno Riverside Hotel* as an NRLV matter. To be clear, despite movant's assertion that it's a case that was limited to the issue of jurisdiction related to the NRLV, movants are mistaken. The Court stated a labor dispute never existed between the parties at action, at page -- or at 86 Nev. 697.

Thus, while the union stated that the defaulters list action may be reviewed only by the NRLV and the State Court was powerless to act, the Court disagreed. Instead the Nevada Supreme Court found that *American Federation of Musicians* actions were based on claims against the buyer of the hotel who had elected not to assume the musician's contracts, and thus was not a party to the contract before finding that the *American Federation of Musicians* placed the hotel on the national defaulter's list.

This is -- on that basis, the Court found that the

conduct was coercive by the union. And the trial Court properly enjoined that unlawful agreement coercion and awarded compensatory and punitive damages. This case is squarely on point, Your Honor, and would apply here.

So to the extent that the basis for that case was not a breach of implied covenant of good faith and fair dealing, the counterclaimants would request leave to amend to state a business tort claim.

THE COURT: All right. Is that it? It's 11:30 now.

I've indicated I've got to recess at noon. I'm in trial. I have to give my staff a lunch break. Okay? So --

MR. HOFSAESS: Okay. Your Honor, I'll actually -- I'll rest on the motion papers at this point for this particular motion.

THE COURT: All right. Let me ask this. I know that the moving parties wish to respond. All right? I want to make sure I have enough time to hear the additional motion.

How much time -- let me -- with respect to the Grandbridge motion, how much time is that going to take, do you think?

MS. HAAS: Your Honor, at most, I think I need 15 minutes. This is Cheryl Haas for Grandbridge.

THE COURT: For the entire argument, for both sides, you think it's just going to take 15 minutes?

MS. HAAS: No. For my side is what I would like to

reserve.

THE COURT: Okay. All right. I'm thinking that maybe what I ought to do is move that motion to Monday. All right?

MS. HAAS: Okay.

THE COURT: Anybody have an objection to that? I could set it at 11 o'clock on Monday morning.

MR. WILLIS: No objection from Fannie Mae, Your Honor.

MALE SPEAKER: No objection, Your Honor, the Westland parties.

THE COURT: Okay. Why don't we go ahead and just move the counterdefendant Grandbridge Real Estate Capital LLC's motion to dismiss, which is now on calendar, I'll move that to Monday at 11:00 a.m. I'll set it and give it a separate setting from the other motions that are on the calendar. Okay?

My problem is I'm in a trial right now --

MS. HAAS: Okay.

THE COURT: -- and people have come from Japan, and they're very limited from the standpoint of being able to move things around at this point. Okay? So I have to be in session at 1 o'clock in that trial this afternoon. And so we'll just -- I'll hear that motion Monday at 11:00. Okay?

MALE SPEAKER: Thank you, Your Honor.

MS. HAAS: Thank you.

THE COURT: So now we'll go ahead -- we'll go ahead

now with the response by plaintiff and FHFA, relative to the motion to dismiss.

MR. WILLIS: Thank you, Your Honor. Jeff Willis, again, for Fannie Mae.

As I said, listening to Counsel's arguments, I think I heard him say that our position of the counterclaims is it should be dismissed because of a lack of contractual basis, a lack of privity or a lack of relationship. The only one that they were defending was Count 4, which is the breach of the duty of good faith and fair dealing.

To that end, whether they intended to make those claims solely between the contracting parties, that is Claims 1 through 10, excepting 4, it is not clear at all from the counterclaim that that's a case.

So at a minimum, we would need an order noting that to the extent that these contractually based claims were pled by any party other than a contracting party, then they're dismissed as to those parties.

As to the fourth counterclaim, which is the breach of the duty of good faith and fair dealing, it is just a matter of Blackletter law that the only parties -- the only party that can assert a breach of the implied covenant, whether in tort or in contract, is one of the contracting parties.

And here there's just a mishmash of contracts. And as we said, we don't dispute that the -- the claim, as pled, may

proceed on behalf of Village Square Liberty Village, but as to the credit facility entities suing under the MCFA, the forum selection clause, contrary to Counsel's arguments, is mandatory.

And in fact, in Section 15.01 of the contract, which is cited in our brief, it specifically states that the borrowers, the credit facility entities themselves, waive any other jurisdiction that might otherwise be appropriate for whatever claim they may choose to grant. It is a mandatory forum selection clause, and because of that, the claims they've asserted in the fourth counterclaim must be dismissed.

It's not to say they can't bring them in Washington, DC, but they cannot bring them in the state of Nevada.

Another glaring omission in the pleading of the breach of the good faith and fair dealing is that there is no assertion that there was any special relationship between Fannie Mae and any of the parties making the claim. And that's because they can't make that assertion, because it's been recognized forever that a debtor/creditor relationship does not create the special relationship that might support a tortious breach of the duty of good faith and fair dealing.

I would urge the Court, in light of your schedule -- and I know that we have a number of points to address on the -- the penalty bar, but I would urge the Court, if you have the opportunity, please review our moving papers and our

reply on this.

Every argument that Counsel brought up is refuted, and we are entitled to the relief we request. And I appreciate Your Honor's time. If you have any questions, I would be happy to answer them.

THE COURT: All right. Not at this time.

MR. WILLIS: I yield to Mr. Johnson.

THE COURT: Okay.

MR. JOHNSON: Thank you, Mr. Willis. And thank you, Your Honor.

I really have a very limited set of points to make in rebuttal.

I want to first address counterclaimants' continued argument that punitive damages are not amounts barred by the penalty bar because they are not in the nature of a penalty.

Counsel makes the point that Congress could have said, punitive damages are barred. That the agency or its conservatees shall not be liable for punitive damages. It didn't say that. We agree. It used a broader term. It said they can't be liable for anything in the nature of a penalty.

Punitive damages are the quintessential example of something that's in the nature of a penalty. And the *Webb versus Shull* decision of the Nevada Supreme Court makes that crystal clear. It says punitive damages are awarded not as compensation to the victim, but to punish the offender for

severe wrongdoing. Punitive damages are a form of punishment. Punishment is a form of penalty. Therefore, punitive damages are in the nature of a penalty.

The counterclaimants never explained -- not once in their moving papers, not once in their argument to the Court -- how that something that is awarded not as compensation, but as punishment is not in the nature of a penalty. It's counterintuitive. It's contrary to the express terms of the statute. It's not correct.

Counterclaimants state that *Higgins* is somehow distinguishable because counterclaimants here didn't negotiate for liquidated damages, and the plaintiffs in *Higgins* didn't negotiate for liquidated damages either.

Well, our point is not that any of the parties to either case negotiated for liquidated damages. It's that the Court and the legislature drafting the statute at issue in *Higgins*, the Court found, and the legislature intended, the statutory damages in that case to be the functional equivalent of liquidated damages. That is an amount intended as an estimate to compensate for actual harm.

Here, we know from *Webb versus Shull* that punitive damages are not awarded as compensation. They're not an estimate for compensation. They're not liquidated damages for compensation. They've got nothing to do with compensation. They are awarded to punish the offender. They are penal in

the nature of a penalty.

My friend, Mr. Hofsaess, is just mistaken about the Nevada Supreme Court's jurisprudence on the federal foreclosure bar. He said that that statute protects property of Fannie Mae.

The statute actually reads very similarly to the penalty bar. It says that no property of the agency shall be subject to garnishment, foreclosure, et cetera, et cetera, et cetera. So it uses the same terms of the agency. It refers to the agency.

And courts everywhere, in this state and in many other states, construe it to protect not just the agency as conservator, but its conservatee Fannie Mae. That's the exact same logic that courts apply around the country to hold that the penalty bar precludes penal claims against Fannie Mae.

Finally, Mr. Hofsaess made some arguments about attorney's fees, but I don't think he ever addressed the dispositive statutes in Nevada which state unequivocally that attorney's fees, unless provided for by contract or some other statute, which is not the claim here, are available to punish and deter conduct. So the attorney's fees that counterclaimants seek here are available to punish and deter -- that makes them penal, and in the nature of a penalty for purposes of penalty bar.

Unless the Court has questions, I'll rest on the

arguments today and the moving papers.

The Court should dismiss all the requests for punitive damages and attorney's fees against Fannie Mae.

THE COURT: All right. I had a question that relates to the additional counterclaimants.

They weren't originally sued. They weren't originally defendants. But my understanding is that based upon the stipulation and order to amend defendant's answer counterclaim and third-party complaint and extend deadlines and deposition limits, which was entered on August 26, 2021, those additional counterclaimants came into this action. Is that -- that's correct, isn't it?

MR. JOHNSON: Yes, Your Honor.

THE COURT: Okay. And I think, if I'm looking at paragraph 7 of the stipulation, 7A and 7B, I recall hearing counsel -- I forget who made the statement -- that granting this motion wouldn't dismiss all counterclaims. It would -- there would be 10 counterclaims remaining, or something to that effect, as I recall.

MR. WILLIS: Correct, Your Honor.

THE COURT: My question has to do with whether or not any of the counterclaims by those additional counterclaimants would remain?

MR. JOHNSON: Not in our view, Your Honor. The -- those parties or the claims that those parties were associated

with would have been dismissed.

THE COURT: Okay. All right. Is there -- relative to the forum selection clause aspect, can it be contended that these are -- would be called compulsory counterclaims?

MR. JOHNSON: They have contended that, Your Honor. They are not compulsory counterclaims. They do not arise from the same transactions or occurrences as the suit that was initiated by Fannie Mae against the two borrowers.

But as we discussed in our moving papers, even if they are compulsory, the mandatory forum selection should still apply. If you carved out compulsory counterclaims from mandatory venue provisions, then you would essentially carve out mandatory venue selections totally.

So they are not compulsory. But even if they were, that wouldn't prevent the venue provision from being enforced.

THE COURT: It's interesting --

MR. HOFSAESS: Your Honor, from the counterclaims perspective, we believe they are compulsory. And I don't believe that, as Fannie Mae's counsel states, it would gut the rule.

There's a variety of other ways that claims are brought into an action -- a direct claim against either one of the parties. So counterclaim, the counterclaim situation is relatively slim.

THE COURT: All right.

And I note that that stipulation and order that I referenced specifically indicates that by entering into the stipulation, the plaintiffs are not waiving any of their contentions, relative to substance or procedure. I'll put it that way, which -- all right? So --

MR. HOFSAESS: Yes, Your Honor.

THE COURT: So are you saying, though -- I want to make sure I understand this contention about forum selection. Are you saying that a plaintiff could come into Court, file an action, sue a defendant -- let's just say there's a single plaintiff and a single defendant -- sue a defendant. The defendant then files a counterclaim. Okay? And --

MR. HOFSAESS: Yes.

THE COURT: -- and the plaintiff could then maintain that the counterclaim should be -- if there's a forum selection clause, that it should go to that forum?

MR. WILLIS: No, Your Honor. That would not be the result in this case or the hypothetical you advance.

THE COURT: Okay.

MR. WILLIS: If a plaintiff comes in and asserts a claim on a particular contract, and the defendant contracting party then asserts a counterclaim based on the contract, then that would not invoke the mandatory forum selection because the defendant is not the one initiating the case or the claims.

THE COURT: All right.

MR. WILLIS: Here, the credit facility entities brought these claims. They were not a party to the action as filed. They weren't a defendant; they weren't a plaintiff. But when they -- they joined the amended counterclaim as additional counterclaimants and then brought those claims in Nevada, that is subject to the Mandatory Forum Selection provision.

THE COURT: All right. Well, thank you very much. Very interesting. Very well briefed. Very well argued.

I'll review it further and issue my ruling as soon as I can.

I'm in the midst of moving from the 3rd floor to the 16th floor in the RJC, so that's taking a little bit of time too. But I'll get to this as soon as I can. Okay? And I'll -- of course, I'll be --

MR. JOHNSON: Thank you, Your Honor.

MALE SPEAKER: Thank you, Your Honor.

THE COURT: -- the case will be coming before me again on Monday. I'll be in a different courtroom then. Hopefully, everything will be working. Okay?

MR. JOHNSON: Yes, Your Honor.

THE COURT: Thank you very much.

MS. HART: Thank you.

THE COURT: Okay. Thank you. Bye.

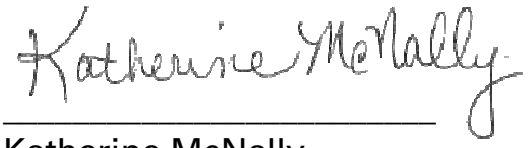
MALE SPEAKER: Thank you, Your Honor.

THE COURT: All right.

[Proceeding adjourned at 11:46 a.m.]

* * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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