No. 84575

IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Petitioner,

v.

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

Respondents,

and

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

Real parties in interest.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF PROHIBITION

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INTRODUCTION

Fannie Mae's Petition raises one issue: whether the forum selection provision in the Master Credit Facility Agreement ("MCFA") requires the dismissal of the MCFA Plaintiffs'[1] claims because the MCFA mandates that any claims by a borrower be brought in the District of Columbia: "Borrower agrees that *any controversy arising under or in relation to the Notes, the Security Documents* (other than the Security Instruments), *or any other Loan Document shall be*, except as otherwise provided herein, *litigated in the District of Columbia*." IAPP152 (emphasis added). It does.

The Petition does not, as Westland's Answer argues, collaterally challenge the preliminary injunction that is already the subject of a prior appeal, or whether Westland Village Square and Westland Liberty Village defaulted under their loan obligations.[2] Indeed, this Court has now adjudicated that appeal, ordering that the preliminary injunction be vacated and holding that "[t]he loan agreements define what constitutes a default, and under the agreements, Westland defaulted."

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[1] The names and terms have the same meaning as assigned in the Petition.

[2] While Fannie Mae disputes many of the factual averments in Westland's Answer, it does not address them here, as they are irrelevant to the legal question at issue.

For the purposes of the Petition, the MCFA Plaintiffs, sophisticated real estate entities, brought suit against Fannie Mae for in excess of $90 million in damages for an alleged breach of the MCFA. The MCFA Plaintiffs allege that Fannie Mae improperly refused to extend them a line of credit based on Fannie Mae wrongfully claiming that Westland Liberty Village and Westland Village Square defaulted.[3] There is no dispute that the MCFA governs and includes a forum selection provision requiring that claims be asserted under the MCFA, against Fannie Mae, only in the District of Columbia. The MCFA Plaintiffs now labor to relieve themselves of the forum selection provision but fail to provide any sound or cogent basis as to why it does not control. In light of this Court's recent ruling that Westland Liberty Village and Westland Village Square defaulted under the loan agreements, the MCFA Plaintiffs' claims are not substantively viable.[4] Regardless, the MCFA Plaintiffs were not entitled

[3] Asserted damages amounts range from $90 million to a total of approximately $136 million.

[4] Because the MCFA Plaintiffs' claims, which include fraud in the inducement and breach of the covenant of good faith and fair dealing, remain pending before the district court, a live controversy remains between the parties. Fannie Mae therefore continues to seek a ruling through this writ proceeding confirming that *any iteration* of claims

to bring them in Nevada in the first instance, and they should be dismissed, at a minimum, based on the MCFA's forum selection provision.

The Answer's arguments each fail in turn. First, the Answer argues that writ relief is not procedurally proper, but it is, and indeed is the only meaningful mechanism to challenge the denial of dismissal under a forum selection provision. Next, the Answer argues that the forum selection provision is permissive rather than mandatory because it excepts certain disputes from its scope, but a limitation on the scope of the provision does not render an otherwise mandatory provision permissive. The Answer further argues that the MCFA Plaintiffs' claims are compulsory counterclaims, but as Fannie Mae never sued the MCFA Plaintiffs, their claims cannot be compulsory counterclaims as a matter of law and, even if they were, the Answer does not even attempt to establish facts or circumstances that would make them somehow exempt from the forum selection provision. Finally, the Answer's remaining

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based on the MCFA may be brought only in the District of Columbia pursuant to that agreement's forum selection clause.

arguments, including unspecified protestations of inconvenience or unfairness, fail.

In sum, the MCFA Plaintiffs' Answer offers no sound basis to deny the Petition and allow them to avoid their contractual obligation to bring claims under the MCFA in the District of Columbia. The Court should grant the Petition and direct dismissal of the MCFA claims.

ARGUMENT

I. Writ Relief Is Proper and Warranted.

The MCFA Plaintiffs argue that writ relief is not available because Fannie Mae moved to dismiss the MCFA claims, and in so doing somehow conceded that the district court had jurisdiction over the dispute. In other words, they incorrectly frame Fannie Mae's position as if it were arguing that the district court exceeded its jurisdiction by *deciding* its motion to dismiss – not, as is actually the case, that the district court exceeded its jurisdiction by *denying* its motion to dismiss. Ans. at 3. Regardless, the MCFA Plaintiffs' argument is circular and nonsensical.

Neither of the two cases cited in the Answer is helpful to their argument; neither concerns venue, nor has any other features similar to this case. *Mineral County v. State, Department of Conservation &*

Natural Resources, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001), merely articulates legal standards pertaining to writs of both mandamus and prohibition but nothing about *Mineral Springs* is otherwise relevant to this dispute. *Nevada State Board of Architecture, Interior Design & Residential Design v. Eighth Judicial District Court*, 35 Nev. 375, 379, 449 P.3d 1262, 1265 (2019), is likewise wholly inapposite, holding that a district court lacked jurisdiction over a petition for judicial review that had been prematurely filed.

Indeed, nothing in the Answer explains or establishes why writ relief would not be appropriate here or is "procedurally improper." Nor do the MCFA Plaintiffs respond in any way to the authority Fannie Mae cited in its Petition establishing that "[t]here is no adequate way immediately to review a denial of a motion to dismiss based on a forum selection clause." *In re Lloyd's Reg. N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015) (citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988)).

There is no serious legal question that writ relief is the appropriate procedural vehicle to challenge the denial of a motion to dismiss based on a forum selection provision. Westland's undeveloped and unsupported

claim that Fannie Mae could not challenge the denial of the motion to dismiss by filing a writ petition lacks all merit.

II. The Forum Selection Provision Is Mandatory and Enforceable.

A. The Forum Selection Provision Is Mandatory.

The MCFA includes a section composed of choice of law, consent to jurisdiction, and forum selection provisions, and states:

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

IAPP152 (emphasis added).

1. *The forum selection provision is unequivocal and exclusive.*

The bolded language above is both unequivocal and exclusive, providing that "any controversy … shall be … litigated in the District of Columbia." The MCFA Plaintiffs argue instead that the phrase, "except as otherwise provided herein" or other limitations somehow erase its mandatory character. This is not so.

To start, the Answer butchers the above provision, as if chopping it into unintelligible or falsely paraphrased pieces will convince the Court that it is permissive. The Answer, for example, argues that the provision is not exclusive because it "permits suits to be brought not only in DC, but also in any other jurisdiction…." Ans. at 19. This is a disingenuous mischaracterization, when the provision in fact *requires* a borrower to bring suit in the District of Columbia, while Fannie Mae is permitted to bring suit in any other jurisdiction. IAPP152. That makes the provision mandatory and non-reciprocal, not permissive, as delineated below.

Likewise, the fact that the *scope* of the forum selection provision contains limitations does not alter its mandatory nature. While the MCFA Plaintiffs purport to identify various such "limitations," they do not support or explain their position that a forum selection provision's

excepting certain types of suits from its scope renders the provision permissive as opposed to mandatory. To start, as sophisticated real estate business entities, the MCFA Plaintiffs surely understand, or should understand, that the "exceptions" they identify in the forum selection provision are necessitated by the fact that actions pertaining to enforcement of security interests in real property generally must be brought where the real property is located. *See, e.g.*, NRS 13.010.

Regardless, the MCFA Plaintiffs provide absolutely no law supporting their position that a forum selection provision pertaining to certain types of actions is permissive as opposed to mandatory, or that because the provision is not reciprocal, it is permissive. Indeed, the scope of a forum selection provision is a separate inquiry from whether it is mandatory or permissive. *See, e.g.*, *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 876 (D.C. Cir. 2019); *see also LV Car Serv., LLC v. AWG Ambassador, LLC*, 134 Nev. 975, 416 P.3d 206 (2018) (recognizing that an otherwise mandatory and enforceable forum selection clause may exclude certain types of claims). To the extent the Answer argues otherwise, it does not do so cogently or with any legal support.

2. *That the provision is not reciprocal does not mean that it is permissive.*

Fannie Mae's Petition argued that "the MCFA Plaintiffs cited no authority for the proposition that an otherwise mandatory forum selection clause that is non-reciprocal is therefore permissive, because that is not the law." Pet. at 16. Again, without any legal support or analysis, the MCFA Plaintiffs' Answer baldly asserts that the forum selection provision is merely permissive because Fannie Mae may elect to bring suit under the MCFA in other jurisdictions. The MCFA Plaintiffs' position lacks all support, and their failure to rebut that point in the Petition should operate as a concession. *LN Mgmt., LLC v. JPMorgan Chase Bank*, N.A., 957 F.3d 943, 950 (9th Cir. 2020) ("Failure to respond meaningfully in an answering brief to an . . . argument waives any point to the contrary.").

3. *The MCFA Plaintiffs' reading of certain pieces of the provision section in isolation is unsound and violates Nevada's canons of contract interpretation.*

The MCFA Plaintiffs' creation of a laundry list of out-of-context piecemeal provisions in an attempt to read them in isolation as permissive is unsound and violates Nevada's canons of contract

interpretation. Contracts must be read as a whole to avoid negating any provision. *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d 377, 380 (2012). "Contractual provisions should be harmonized whenever possible," and "no provision should be rendered meaningless." *Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev. 456, 459, 453 P.3d 1229, 1231–32 (2019). Without any analysis, the Answer lists purported "limitations," for example quoting from the choice of law section, and summarily concludes that "the forum selection clause is not mandatory…." Ans. at 21-22. But quoting from the choice of law or consent to jurisdiction sections, when neither is the key mandatory, exclusive forum selection language, is irrelevant. Because the MCFA Plaintiffs do not show why the otherwise exclusive provision, requiring that they bring suit against Fannie Mae in the District of Columbia, is not mandatory, the writ should issue.

B. Fannie Mae's Bringing Suit Against Westland Liberty Village and Westland Village Square in No Way Waived the Application of the Forum Selection Clause.

Westland argues that Fannie Mae somehow waived the forum selection provision by "exercis[ing] rights in a jurisdiction other than DC

when it chose to file the present action related to the Loan Agreements in Nevada…." Ans. at 22; *see also* Ans. at 25 ("Fannie Mae chose the initial jurisdiction in which to sue."). This argument fails.

First, the non-reciprocal forum selection provision explicitly allows Fannie Mae to bring suit in any jurisdiction. As such, it does not waive the enforcement of the borrower-side forum selection provision by exercising its own explicit rights.

Second, here, Fannie Mae did not in fact sue *any* of the MCFA Plaintiffs or bring suit under the MCFA in Nevada in any respect. Rather, Fannie Mae initiated suit in Nevada against only Westland Liberty Village and Westland Village Square under only their loan agreements, and only to appoint a receiver to protect its security interests in the two mortgaged Las Vegas properties owned by those two entities, neither of whom are MCFA Plaintiffs. As such, Fannie Mae's limited action could not have effected a waiver under the MCFA.

Relatedly, while the Answer repeatedly asserts that Fannie Mae "chose" Nevada as its forum for this dispute, that is not accurate. Rather, Fannie Mae was required to sue Westland Liberty Village and Westland Village Square in Nevada under NRS 13.010 (mandating that actions

concerning real property, including an interest in real property, be brought in the county where the real property is located); *see also In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 244, 277 P.3d 449, 457 (2012). Indeed, that is consistent with the explicit exception in the forum selection provision, which contemplates that such actions to enforce interests in real property must be brought locally.

C. The MCFA Plaintiffs' Argument that the Breach of the MCFA Claim Is Outside of the Scope of the MCFA Fails Because Westland Raises it for the First Time on Appeal and on Its Merits.

The MCFA Plaintiffs argue that their breach of contract claim, based on Fannie Mae's alleged breach of the MCFA, is not subject to the forum selection clause because the claim is outside the scope of the MCFA. Ans. at 13 (arguing that because "the breach is alleged to have arisen out of the Credit Facility Entities status on ACheck, not any of the MCFA's terms, … the claim [is] outside the scope of the MCFA clause"). Westland also asserts that "the breach did not focus on any substantive term of the MCFA." Ans. at 8.

First, Westland raises this argument for the first time in its Answer and did not raise it before the district court. *See* IIAPP179-83. This

Court may and should decline to consider it for that reason alone. *See State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) (holding that this Court "generally will not consider arguments that a party raises for the first time on appeal").

Substantively, the argument fails because the MCFA Plaintiffs may not simultaneously sue to enforce the MCFA, while also disavowing the forum selection clause. Nor do the MCFA Plaintiffs explain how their claims do not arise from that contract when based on an alleged breach of that contract. They do not even attempt to argue that this suit falls within any exception in the forum selection provision, because it doesn't. Their claim that the genesis for the breach is somehow beyond the MCFA, while suing under the MCFA, is untenable.

III. The MCFA Claims Are Not Compulsory Counterclaims but Are Governed by the Forum Selection Clause Regardless.

A. The MCFA Claims Are Not Compulsory Counterclaims.

The MCFA Plaintiffs argue that their claims are compulsory counterclaims, offering a tortured analysis concerning the involvement of "one original party" along with non-parties that meet the joinder requirements under NRCP 19 or 20. But Westland's analysis at best

concerns the joinder of additional parties, such as under NRCP 13(h); it does not apply to compulsory counterclaims under NRCP 13(a). Notwithstanding the MCFA Plaintiffs' attempts to manufacture compulsory counterclaims through joinder, none of their cited authority supports that position. As explained below, the MCFA Plaintiffs' claims are necessarily not compulsory counterclaims, as Fannie Mae did not bring suit against any of them in the first instance. Before a counterclaim can be deemed "compulsory," it must first be deemed a counterclaim. Plaintiff's claims are not counterclaims. Therefore, they cannot be compulsory.

First, it is important to recall who the MCFA Plaintiffs are – eleven Westland-affiliated entities that fall into two groups: the "Credit Facility Entities" and the "Securities Entities." ***The original Westland Defendants, whom Fannie Mae sued – Westland Liberty Village and Westland Village Square – are not MCFA Plaintiffs***.[5]

Starting with NRCP 13(a), which governs compulsory counterclaims and is the same as the federal counterpart, it provides that

[5] The Answer also states that the MCFA Plaintiffs "have no relationship to those loan agreements…." Ans. at 19, n.3.

a "pleading must state as a counterclaim any claim that … the pleader has against ***an opposing party***." (emphasis added); *see also Depner Architects & Planners, Inc. v. Nevada Nat'l Bank*, 104 Nev. 560, 563, 763 P.2d 1141, 1143 (1988) (recognizing that "[a] counterclaim is a claim against an opposing party"). "Opposing party" has a particular meaning in this context: "an 'opposing party' must be one who asserts a claim against the prospective counter-claimant in the first instance." *First Nat'l Bank v. Johnson Cy. Nat'l Bank & Trust Co.*, 331 F.2d 325, 328 (10th Cir.1964); *Avemco Ins. Co. v. Cessna Aircraft Co.*, 11 F.3d 998, 1003 (10th Cir. 1993); *Transamerica Occidental Life Ins. Co. v. Aviation Off. of Am., Inc.*, 292 F.3d 384, 390 (3d Cir. 2002); *Augustin v. Mughal*, 521 F.2d 1215, 1216 (8th Cir. 1975). Indeed, "[t]he very concept of a counterclaim presupposes the existence or assertion of a claim against the party filing it." *First Nat'l Bank*, 331 F.2d at 328; *see also Nancy's Prod., Inc. v. Fred Meyer, Inc.*, 811 P.2d 250, 253 (Wash. App. 1991). In other words, "a compulsory counterclaim is a defendant's cause of action 'arising out of the transaction or occurrence that formed the subject matter of the plaintiff's claim.'" *Montgomery Ward Dev. Corp. v. Juster*, 932 F.2d 1378, 1381 (11th Cir. 1991).

That is why there can be no compulsory counterclaims between, for example, adverse co-defendants because such claims would necessarily be cross-claims, and not counterclaims. *See, e.g.*, *Augustin*, 521 F.2d at 1216 (recognizing that, in contrast to a cross-claim, a counterclaim must be asserted against an "opposing party," where an opposing party is "one who asserts a claim against the prospective counterclaimant in the first instance"); *Depner Architects & Planners, Inc.*, 104 Nev. at 563, 763 P.2d at 1143 (recognizing that "[a] counterclaim is a claim against an ***opposing party***" under NRCP 13(a), in contrast to a cross-claim). As such, the parties' relationship in the litigation is necessary to whether a claim is a compulsory counterclaim – it is not sufficient that the parties merely be adverse.

Here, Fannie Mae did not assert any claims against the MCFA Plaintiffs and therefore cannot be, by law, an "opposing party" under NRCP 13(a). It necessarily follows that the MCFA Plaintiffs' claims are not compulsory counterclaims as a matter of law.

The Answer's arguments that the claims are compulsory counterclaims because they arise from "Fannie Mae's adverse action of placing each [MCFA Plaintiff] on ACheck" (Ans. at 16) or because each

MCFA Plaintiff was "adverse to Fannie Mae" (Ans. at 17) or "adversely affected by Fannie Mae" (Ans. at 18) do not alter this conclusion because nothing about these allegations changes the fact that Fannie Mae is not an "opposing party." Indeed, the MCFA Plaintiffs seem not to appreciate the meaning of "opposing party," as they use the phrase colloquially in their Answer, attributing that term to anyone on opposite sides of a claim. *See, e.g.*, Ans. at 17 (NRCP 13 "broadly permits counterclaims to be asserted against opposing parties.").

That misunderstanding also infects the Answer's analysis of *Depner Architects and Planners*. Factually, that case has little in common with this one. Depner Architects and Planners filed a complaint to enforce a mechanic's lien more than six months after recordation because of an intervening bankruptcy filed by the property owners. 104 Nev. at 561, 763 P.2d at 1141. A bank holding a deed of trust on the subject property, wishing to invalidate the Depner Architects' lien, argued in part that Depner Architects' lien claim was barred because it was a compulsory counterclaim in an action by another mechanics' lien claimant in which Depner Architects had also been named as a defendant. *Id.* at 563, 763 P.2d at 1143. This Court flatly rejected that

argument because any claim as between Depner Architects and the bank would have necessarily been a cross-claim and could therefore not have been a compulsory counterclaim, based on the parties' roles in the litigation. *Id.*

Though that holding only underscores Fannie Mae's above analysis of compulsory counterclaims, the Answer instead claims that the "Court commented in favor of the parties being cross-claimants" because they were "similarly situated lien claimants that were adverse to the debtor," and here, the MCFA Plaintiffs "are similarly situated, and each is adverse to Fannie." Ans. 17. But that "explanation" fundamentally misunderstands the holding of that case and also wholly undermines any argument the MCFA Plaintiffs wished to advance that the MCFA Plaintiffs' claims could ever legally be compulsory counterclaims. No claims in *Depner Architects* were compulsory counterclaims and that case in no respect supports the MCFA Plaintiffs' untenable position.

There is also no merit to the contention that Fannie Mae somehow "conceded" that the MCFA-based claims are compulsory counterclaims by not attempting to prevent the MCFA Plaintiff from joining the suit. Ans. at 24. An opposition to the original Westland defendants' motion to

amend their Answer and Counterclaims would not have been the proper procedural mechanism for asserting the applicability of the forum selection clause. And in stipulating to permit amendment of that responsive pleading, the parties agreed that "[a]ll arguments and defenses related to the allegations and claims contained in First Amended Answer and First Amended Counterclaim are not waived and are hereby expressly reserved." Fannie Mae thus timely moved after Westland filed its amended pleading to dismiss the new MCFA-based counterclaims.

In sum, the MCFA Plaintiffs' argument that the MCFA claims are compulsory counterclaims, as well as any argument that depends on that premise, is wrong, and provides no basis to deny the Petition.

B. Compulsory Counterclaims Are Nonetheless Subject to Dismissal Under a Forum Selection Clause.

Fannie Mae's Petition argued explicitly and at length that even if the MCFA Plaintiffs' claims were somehow compulsory counterclaims, which they are not, they are nonetheless subject to the MCFA's forum selection provision. However, while the Answer argues about whether the MCFA Plaintiffs' claims are compulsory counterclaims, they fail to

respond to the second part of the syllogism – that they are nonetheless still subject to dismissal pursuant to the forum selection provision. Indeed, the MCFA Plaintiffs did not grapple with any of Fannie Mae's authority on this point. *See generally*, Answer; *Publicis Commc'n v. True N. Commc'ns Inc.*, 132 F.3d 363, 366 (7th Cir. 1997) (enforcing forum selection clause "whether or not they would be 'compulsory' counterclaims" because the defendant had "promised not to assert such claims in other forums"); *Mil-Ray v. EVP Int'l, LLC*, No. 3:19-CV-00944-YY, 2021 WL 2903224, at *10 (D. Or. July 8, 2021) (agreeing with *Publicis Communication*'s holding, and stating that "other courts have similarly dismissed or transferred counterclaims that are subject to a forum selection clause"); *Reading Rock Ne., LLC. v. Russel*, No. CV 20-5728 (RBK/KMW), 2021 WL 870642, at *8 (D.N.J. Mar. 8, 2021) (unpublished) (same). Because the MCFA Plaintiffs have not offered any response to this point, the Court should consider it conceded. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating failure to respond to an argument in their answering brief as a confession of error).

IV. The MCFA Plaintiffs' Arguments Complaining about Bifurcation and Fairness Ignore the Import of a Forum Selection Clause.

The MCFA Plaintiffs raise unspecified objections that requiring them to litigate in the District of Columbia, even if they agreed to do so, is somehow unfair, and that the matter should not be "bifurcated," even though the MCFA Plaintiffs were not part of the original action. In other words, the MCFA Plaintiffs attempted to join this action more than a year into it, bringing new claims under a contract not at issue in the original case, but now complain that their claims should not be "bifurcated" as though they were always part of the same suit. Regardless, the MCFA Plaintiffs' general distaste for litigating in the District of Columbia is no basis not to enforce the forum selection provision.

Under Nevada law, forum selection provisions that have been obtained through freely negotiated agreements and that are not unreasonable and unjust are enforceable. *Tandy Computer Leasing v. Terina's Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8 (1989). Federal law likewise provides that "when the parties' contract contains a valid forum-selection clause, which represents the parties' agreement as to the

most proper forum," it should "be given controlling weight in all but the most exceptional circumstances." *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 63 (2013). When a contract contains a forum-selection clause, the parties' private interests are irrelevant because when parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or for their pursuit of the litigation. *Id.*; *see also M.B. Restaurants, Inc. v. CKE Restaurants, Inc.*, 183 F.3d 750, 753 (8th Cir. 1999) (holding that inconvenience to a party is an insufficient basis to defeat an otherwise enforceable forum selection clause).

This case bears no resemblance to the rare situation that would justify disregarding a forum selection provision. For example, this Court declined to enforce a forum selection clause in *Tandy Computer Leasing*, which predated *Atlantic Marine*. *Tandy Computer Leasing*, 105 Nev. at 843, 784 P.2d at 8. That case involved a consumer dispute where neither party knew about the fine-print forum selection clause and the amount in controversy was very low. *Id.* The Court reasoned that enforcing the clause would incentivize parties to settle rather than fully litigate the

case and concluded that it was "unrealistic for a consumer to expect to defend himself in Texas" under those circumstances. *Id.*

This is not a consumer dispute. The MCFA Plaintiffs are sophisticated businesses that are suing Fannie Mae for in excess of $90 million for an alleged breach of the MCFA. Along with their Nevada counsel, the MCFA Plaintiffs are being represented by Cooper & Kirk PLLC, a District of Columbia-based law firm, which negates any claim of inconvenience or unfairness. And the MCFA Plaintiffs are part of the "Westland family," which it boasts is "the owner and operator of Multi-Family Residential, Retail Properties, and Manufactured Home Communities," including 14,000 units and a forty-year history.[6] They agreed, under the MCFA, 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," though they would like not to be held to its terms.

[6] *See* https://www.westlandrealestategroup.com/philosophy (last accessed August 15, 2022).

Yet, the MCFA Plaintiffs assert, for example, that they should not have to litigate their claims in the District of Columbia because "[t]he District of Columbia is not a viable forum for the Credit Facility Entities' claims" and raise some concern that litigating the MCFA claims separately from the current litigation could lead to inconsistent judgments." But the Nevada litigation for appointment of a receiver for two properties unrelated to the MCFA is so different from the MCFA Plaintiffs' claims. Moreover, this concern could have been easily remedied by staying the District of Columbia litigation until the conclusion of the Nevada litigation. That concern is also now mooted by this Court's recent holding that Westland was in default on the two multifamily properties – that issue is now primarily determined, minimizing (and almost eliminating) any such risk. Nor would the MCFA Plaintiffs, themselves, be litigating in multiple venues, as enforcement of the forum selection clause will lead to their dismissal from the Nevada action. They simply will be required to bring their claims in the District of Columbia – as they contractually agreed long ago – and they will not be subject to the possibility of inconsistent verdicts. In sum, the MCFA Plaintiffs do not identify or establish any injustice or

unfairness that would justify declining to enforce the forum selection provision.[7]

Regardless, the MCFA Plaintiffs' complaints about litigating in the District of Columbia are irrelevant. Their desire not to litigate in the District of Columbia does not and cannot invalidate the forum selection provision.

CONCLUSION

The Court should grant the Petition and direct dismissal of the MCFA claims.

DATED: August 16, 2022

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[7] The MCFA Plaintiffs do not argue that either the MCFA or the forum selection provision is unconscionable, nor does there exist any colorable basis to support such an argument.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook, 14 point, and is 5,336 words.

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

the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 16, 2022

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On August 16, 2022, I caused to be served a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR A WRIT OF PROHIBITION** by the method indicated:

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

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

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