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CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

IN

LAURA ZAMORA JORDAN, as her separate estate, and on behalf of others similarly situated,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC, a Delaware Limited liability company,

Defendant.

PLAINTIFF LAURA ZAMORA JORDAN'S OPENING BRIEF

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## I. INTRODUCTION

When Washington homeowners fall behind on their mortgages, Nationstar Mortgage, LLC locks them out of their homes. Nationstar frequently enters Washingtonians' homes and changes the locks before the trustee has issued a notice of default or instituted any non-judicial foreclosure proceedings. The certified questions ask this Court to determine whether pre-foreclosure lock outs, which Nationstar asserts are authorized by a form contract provision included in many borrowers' deeds of trust, are permissible under Washington law.

One evening in the spring of 2011, Plaintiff Laura Zamora Jordan ("Ms. Jordan") returned home from work as usual. When she took out her key to unlock her front door, she discovered that the lock on her front door had been changed and a lock box was installed on the front door. The back door of her house was barred from the inside. Ms. Jordan was alone, upset, and completely locked out of her home.

A sign posted on the inside of one of Ms. Jordan's windows said that her home was found unsecure or vacant. But Ms. Jordan was living in her home and had locked the door before leaving for work that morning. Her home was not vacant or unsecured.

Panicked, Ms. Jordan called the 1-800 number on the sign posted in her window and was connected to a customer service representative for

Nationstar. Ms. Jordan advised the Nationstar representative that she was living in her home and that all of her personal possessions, including clothing she needed for work, were in her house. The Nationstar representative did not immediately give Ms. Jordan the code to unlock the lockbox on her front door. Instead, the representative asked Ms. Jordan why she was late on her payments and advised her to put her home on the market and try to sell it.

Only after Ms. Jordan persisted in explaining that she needed to get into her house to get clothes for work the next day did the representative give her the code to unlock the lockbox containing the key to the locks that Nationstar installed on her front door. The next day, Ms. Jordan's family helped her move out of her home. As instructed by Nationstar, she then returned the key to Nationstar's locks to the lockbox Nationstar had installed on her door. Ms. Jordan has not been in her home since April 2011.

Sadly, Ms. Jordan is not alone. She represents a certified class of more than 3,600 Washington homeowners locked out of their homes by Nationstar or its vendors. Each of these homeowners has a home loan secured by a deed of trust containing a form contract provision that purportedly authorizes the lender—or its successor in interest—to enter the

home by force, change the locks, board up doors and windows, drain the pipes, and shut off the utilities (“Lockout Provision”).

The Lockout Provision, however, is inconsistent with Washington law and unenforceable. Nationstar concedes that Washington law does not permit a lender or mortgagee to take possession of the borrower’s property before foreclosure. RCW 7.28.230. The homeowner’s right of possession is exclusive. Nationstar argues that the Lockout Provision is nonetheless enforceable because the actions that the Lockout Provision purportedly authorizes, and that Nationstar takes, do not interfere with the homeowner’s exclusive right of possession. Nationstar is wrong. Entering a person’s home by force, changing the locks, boarding up doors and windows, draining water from the pipes, and turning off the utilities interfere with the homeowner’s right to exclusive possession. Accordingly, the answer to the federal court’s first certified question is no.

Moreover, the Lockout Provision is an impermissible attempt to circumvent the requirements of Washington’s receivership statutes, which provide the exclusive remedies available to a mortgagee who seeks to take control of the mortgaged property prior to foreclosure. Accordingly, the answer to the federal court’s second certified question is yes.

## II. CERTIFIED QUESTIONS

1. Under Washington's lien theory of mortgages and RCW 7.28.230(1), can a borrower and lender enter into a contractual agreement prior to default that allows the lender to enter, maintain, and secure the encumbered property prior to foreclosure?

2. Does RCW chapter 7.60, Washington's statutory receivership scheme, provide the exclusive remedy, absent post-default consent by the borrower, for a lender to gain access to an encumbered property prior to foreclosure?

To the extent that the Court interprets the first certified question to ask whether *any* contractual agreement to "enter, maintain, and secure" encumbered property could be permissible under Washington law, Ms. Jordan respectfully requests that the Court reframe the question to address the legality of the contractual provision at issue in the case. *See Perez-Farias v. Glob. Horizons, Inc.*, 668 F.3d 589, 593 (9th Cir. 2011). To do otherwise would be inconsistent with this Court's admonition that it does not "consider the legal issues in the abstract but instead consider[s] them based on the certified record that the federal court provides." *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 799 (2010).

### III. STATEMENT OF THE CASE

#### A. Statement of the Facts

Laura Zamora Jordan bought her home in Wenatchee in 2007 with a \$172,000 loan from Homecomings Financial, Inc. ECF No. 3-5, Ex. 19.<sup>1</sup> To secure the loan, Ms. Jordan signed a deed of trust encumbering the property. *Id.* By 2011, Nationstar had acquired the servicing rights to her loan. ECF No. 3-3 at ¶ 3. Early in 2011, she fell behind on her mortgage payments. ECF No. 3-3 ¶ 7. By March, she was three months behind but she was living in her home and had not abandoned or vacated it. *Id.*; ECF No. 3-5, Ex. A (Jordan Depo. at 104:2–25). Nationstar had not—and to this day still has not—issued a notice of default to Ms. Jordan. ECF No. 63-1, Ex. 1.

Nonetheless, on March 31, 2011, Nationstar issued to its vendors a work order directing them to enter Ms. Jordan's home, re-key her front door, and install a lock box upon Ms. Jordan's home. ECF No. 3-8 at ¶¶ 11–12. When Ms. Jordan returned home from work on the evening of April 4, 2011, the locks had been changed and she could not get back in. ECF No. 3-5, Ex. A (Jordan Depo. at 88:1–89:25).

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<sup>1</sup> Ms. Jordan refers to the certified record by the federal district court's Electronic Filing System (ECF) docket entry numbers.

When she called the 1-800 number on the sign posted on the inside of her window, Ms. Jordan was connected to a Nationstar representative. ECF No. 3-5, Exs. 38 (call recording), 36-4 (notice). The Nationstar representative asked Ms. Jordan if she was living in the home. ECF No. 3-5, Ex. 38. Ms. Jordan said yes, and she was panicked because all of her personal belongings were inside her home. *Id.* The Nationstar representative stated that it might be possible to let Ms. Jordan into the home, but then proceeded to ask Ms. Jordan what had caused Ms. Jordan to fall behind on her monthly payments. *Id.* The Nationstar representative then advised Ms. Jordan that she should put her home on the market and try to sell it. *Id.* Ms. Jordan reiterated her need to gain access to her home to at least get her clothes out so she could go to work the next day. *Id.*

Eventually, the Nationstar representative retrieved the code to the lockbox and gave it to Ms. Jordan, but instructed her to put the key back in the lockbox once she had removed her personal belongings from her home. *Id.*

Ms. Jordan entered her home that night via the key in the Nationstar lockbox and her family helped her move out the next day. ECF No. 3-5, Ex. A (Jordan Depo. at 105:2-23). As instructed, she returned the key to the lockbox and has not been back inside her home since. *Id.* (Jordan Depo.

at 141:11). Since Ms. Jordan moved out, Nationstar's vendors have winterized the property. ECF No. 3-8 at ¶ 18.

On December 29, 2011, Ms. Jordan demanded that Nationstar remove the locks and lockbox it installed on her home and restore her original locks to the home. ECF No. 63-1, Ex. 1. Nationstar never responded to the demand and did not remove its locks and lock box or restore Ms. Jordan's locks to the home. ECF No. 63 ¶ 3.

According to Nationstar, its actions with respect to Ms. Jordan and her home were authorized by the Lockout Provision in her deed of trust. ECF No. 3-3 ¶ 8. Nationstar believes that every mortgage loan it services is secured by a deed of trust that contains a provision identical to or materially the same as the Lockout Provision in Ms. Jordan's deed of trust. ECF No. 3-8 at ¶ 19.

Nationstar relies on vendors to determine whether a home is occupied and to enter borrowers' homes, change their locks, and do anything else Nationstar deems necessary under the Lockout Provision. ECF No. 3-8. Nationstar does not inspect its borrowers' properties to determine occupancy. ECF No. 3-8 at ¶¶ 3-6. Rather, Nationstar contracts with "property preservation vendors" to conduct the inspections when a loan is 45 days delinquent. *Id.* Nationstar relies on its vendors to decide whether a property is vacant, but "Nationstar does not specifically instruct

its vendors how to determine a property's occupancy status." *Id.* at ¶ 7. After one of its vendors deems a property vacant, Nationstar issues a work order directing a vendor to "gain access to the property interior...take photos of the interior...rekey a door and install a lockbox for future access...[and] board up the property if needed...." *Id.* at ¶ 11. This is all done "in accordance with Nationstar's standard practice and procedure." *Id.*

Nationstar "expects," but does not specifically instruct, that its vendors will place a notice on the borrower's property following a re-key informing the borrower that the property has been determined vacant and to contact Nationstar for access. *Id.* at ¶ 16.

Nationstar's policy is not to attempt to contact the homeowner to find out whether they are living in the home before changing the locks: "[o]ther than the notice a vendor is expected to post on the property, Nationstar has no specific policies or practices for communicating with borrowers whose property is found to be vacant prior to foreclosure. Nationstar does not call such borrowers." *Id.* at ¶ 20. Nationstar does not seek or obtain the borrower's permission or court approval before entering the property. ECF No. 3-8 at ¶¶ 6, 10, 11, 13.

#### B. Procedural History

Ms. Jordan filed this case in Chelan County Superior Court. After the superior court certified the case as a class action, Nationstar removed

the case to federal district court. The case is proceeding as a certified class action. Both parties moved for partial summary judgment on questions of law. Recognizing that the case raised unresolved and important questions of state law, the federal district court certified two questions to this Court and this Court accepted the certified questions.

#### IV. STANDARD OF REVIEW

“Certified questions are matters of law reviewed de novo.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 420 (2014). This Court considers the certified questions “in light of the record certified by the federal court.” *Id.*

#### V. ARGUMENT

**A. The Lockout Provision interferes with a property owner’s exclusive right of possession prior to foreclosure and is unenforceable.**

1. Under the plain language of RCW 7.28.230 and decades of Washington case law, property owners have an exclusive right of possession prior to foreclosure.

Washington is a lien-theory state, which vests the exclusive right of possession in the borrower prior to completion of a foreclosure. *Western Loan & Bldg. Co. v. Mifflin*, 162 Wash. 33, 39 (1931) (explaining that “the mortgage is nothing more than a lien upon the property to secure payment of the mortgage debt, and in no sense a conveyance entitling the mortgagee to possession or enjoyment of the property as owner.”). Lenders are

prohibited by statute from taking possession of the homeowner's property prior to foreclosure:

A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law[.]

RCW 7.28.230(1). Importantly, the borrower's statutory right of possession is exclusive. *See e.g., Norfor v. Busby*, 19 Wash. 450, 452–453 (1898) (“The statute is also expressive of the public policy of the state vesting the right of the possession in the mortgagor *absolutely* until decree and sale.” (describing the above-quoted statute, which has not been modified since its enactment in 1869)) (emphasis added).

The borrower's exclusive right to possession is so paramount that the Court affirms this right *even when* the borrower has abandoned the property. *Howard v. Edgren*, 62 Wn.2d 884, 885 (1963) (“A Mortgagor does not lose his right to the possession of mortgaged real property by failing to make payments on the mortgage, or by moving out of the community . . . . Nor does a mortgagee have *any* right to possession of the mortgaged real property without a foreclosure and sale . . . .” (citing RCW 7.28.230)) (emphasis added); *see also Coleman v. Hoffman*, 115 Wn. App. 853, 864 (2003) (explaining that RCW 7.28.230 gives the mortgagor the *sole* right to possession) (emphasis added).

Nationstar concedes, as it must, that a homeowner has the exclusive right of possession under Washington law, even after defaulting on a mortgage and abandoning the property. Nationstar also concedes, as it must, that lenders cannot enforce against borrowers contractual provisions that grant lenders possessory interests prior to foreclosure. *See, e.g., Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104–108 (2012) (rejecting lenders’ argument that the Court “should give effect to its contractual modification of a statute”); *Western Loan & Bldg.*, 62 Wash. at 42–43 (refusing to enforce contract term that conflicts with statute). Nationstar’s argument—that the Lockout Provision is nonetheless enforceable because it does not interfere with the homeowner’s right of exclusive possession—must be rejected.

2. The Lockout Provision authorizes a lender to forcibly enter a home and disrupt the owner’s right to exclusive possession before the lender has instituted foreclosure proceedings.

Nationstar claims it is authorized to lock out of their homes Ms. Jordan and members of the class by a form provision embedded in the deeds of trust securing loans on their homes. The Lockout Provision provides as follows:

If (a) Borrower fails to perform the covenants and agreements in this Security Instrument, . . . or (c) Borrower has abandoned the Property, then Lender may do and pay for *whatever* is reasonable or appropriate to protect Lender’s interest in the Property and rights under this Security

Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property . . . Securing the Property includes, *but is not limited to*, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off.

ECF No. 3-5, Ex.19; A6 (emphases added).

Ms. Jordan does not contend that the entire Lockout Provision is unenforceable. The sections authorizing the lender to conduct exterior inspections of the property, maintain the property's exterior, and pay fees and costs to protect the lender's lien interest in the property do not interfere with the borrower's exclusive right of possession and are enforceable.

The sections providing an unlimited right of entry into the borrower's home, coupled with an unlimited right to do "*whatever*" the lender deems necessary, which includes—"but is not limited to"—a host of actions that make it difficult if not impossible for the borrower to remain in her home are unenforceable. By its plain language, the Lockout Provision permits a lender to enter and "secure" the property any time that a borrower is behind on payments *or* abandons the property. Both conditions need not be satisfied. The Lockout Provision allows a lender to take the following actions the moment a borrower is late on a single payment to the lender: forcibly enter the borrower's home without notice; change all locks; replace

or board up all doors and windows; and shut off all utilities. Each of these are acts that interfere with the borrower's exclusive right of possession.

Moreover, the provision expressly authorizes the lender to "*change locks,*" not *install* locks on unsecured windows or doors. It is difficult to imagine an action that more clearly interferes with a homeowner's right to possession than breaking into the home and changing the locks, thereby excluding the owner from the home.

There is nothing in the Lockout Provision itself that requires the lender to provide homeowners with access after changing their locks. The Lockout Provision contains no restriction on who the property may be secured against: it can be the borrower, the borrower's agents, or the general public. Nor does the Lockout Provision require the lender to leave the borrower's property after it takes "whatever" measures it deems reasonable to "protect its interest" in the borrower's property.

3. Nationstar's actions under the Lockout Provision disrupt the borrower's exclusive right of possession.

Although the Lockout Provision authorizes lenders to secure "abandoned" property, Nationstar takes action under the Lockout Provision upon its determination that a property is "vacant," not that it is "abandoned" or unsecured. ECF No. 3-8 ¶ 10, Ex. 13 (report of inspection finding Ms. Jordan's home "VACANT SECURE"). A Nationstar Vice President

testified that once a property is deemed vacant by one of Nationstar's vendors, Nationstar issues a work order to:

Gain access to the property interior to confirm that it was secure and no immediate maintenance was required; take photos of the interior so Nationstar could evaluate the property's condition; rekey a door and install a lockbox for future access; [and] board up the property if needed . . . . This was in accordance with Nationstar standard practice and procedure.

ECF. No. 3-8 ¶ 11.

Nationstar admits that it forcibly enters a borrower's property merely because one of Nationstar's vendors deems the home vacant, not because it is unsecure. Nationstar un-secures the property by removing the borrower's locks and then re-secures the property in its own favor by installing its locks and lockboxes. The stated purpose of the installation of the locks and lock box is to give Nationstar "future access" to the property.

*Id.*

Nationstar maintains that after changing the homeowner's locks, it will give the homeowner access to the home. However, the fact that the owner has to call Nationstar for access demonstrates that the owner's exclusive possession has been disrupted. Moreover, Nationstar's claim that it will give the homeowner access is contradicted by the experiences of Ms. Jordan and other class members. ECF No. 63-2, Exs. 17-27.

The question for the Court is therefore whether the actions authorized by the Lockout Provision, and the actions that Nationstar takes under the Lockout Provision, disrupt the borrower's exclusive right of possession.

4. Under well-established legal principles the actions authorized by the Lockout Provision are possessory.

Well-established law provides guidance on the types of acts that constitute taking possession of real property. These definitions have been developed in the context of real property law, tort law, and landlord tenant law. In deciding what constitutes taking possession of property, Washington courts have examined broad categories of acts, such as occupation and control, as well as specific acts such as directing repairs and maintenance of the property, as well as changing locks on a residence.

A review of the cases demonstrates that Nationstar's lockout procedures disrupt the borrower's exclusive right of possession prior to foreclosure. Nationstar's occupation and control of borrowers' properties is the definition of possession. Whether this possession is complete or partial does not matter under Washington law. Once *any* possession has occurred, the borrower's *exclusive* right to possession has been defeated in violation of RCW 7.28.230.

*i. The Restatement Definition of Possession*

The Restatement of Property defines a Possessory Interest in Land as follows:

A possessory interest in land exists in a person who has

- (a) a physical relation to the land of a kind which gives a certain *degree of physical control* over the land, and an intent so to exercise such control as to exclude other members of society *in general* from *any* present occupation of the land; or
- (b) interests in the land which are substantially identical with those arising when the elements stated in Clause (a) exist.

Restatement (First) of Prop. § 7 (1936) (emphasis added).

The Lockout Provision grants the lender much more than a mere “degree” of physical control over the borrower’s property. The provision expressly allows a lender to do any number of the following: forcibly enter the borrower’s property, change locks, board up windows and doors, and turn off all utilities. These acts constitute near total physical control and occupation of the property.

As reflected in the Restatement, it is black-letter law that the ability to exclude others is a key aspect of property ownership and possession. *See also In re Perl*, 513 B.R. 566, 576 (B.A.P. 9th Cir. 2014) (“We further note that changing the locks on the Residence . . . was an act to exercise control over property of the estate in violation of [an automatic bankruptcy stay].”);

*Cocroft v. HSBC Bank USA, N.A.*, No. 10 C 3408, 2014 WL 700495, at \*7 (N.D. Ill. Feb. 24, 2014), *affirmed Cocroft v. HSBC Bank USA, N.A.*, --- F.3d ---, 2015 WL 4597537 (7th Cir. July 31, 2015) (“Defendants’ argument that [the lender] did not interfere with the Cocrofts’ possessory rights is preposterous; its contractor changed the locks on the house!”). Nationstar’s intent to exclude others “in general” is not simply implied by the lock changes and related activities on borrowers’ properties, but is expressly stated in writing when Nationstar posts notices on the borrower’s property as follows:

[T]he property has been secured *against entry* by unauthorized persons to prevent damage. The key will be available to the owner of the property or their representatives *only*.

ECF No. 72 at 6. (emphasis added).

Importantly, excluding so-called and undefined “unauthorized” persons via express notices (as Nationstar does) or via physical acts (such as removing the borrower’s locks and installing and maintaining the lender’s locks) is not just Nationstar’s common practice, but a practice of exclusion that any lender can take under the Lockout Provision.

Nationstar’s repeated claim that it does not intend to exclude the borrower when it changes the locks on a borrower’s property, or that the borrower can call them to get the code to the lockbox installed on the

borrower's property, is irrelevant to the analysis of possession under the Restatement definition for three reasons.

First, the key question here is whether the Lockout Provision conflicts with Washington law. The Court need not consider what Nationstar actually does under the provision to resolve that question.<sup>2</sup> For example, nothing in the Lockout Provision requires that the borrower be given any entry to their home, or that only one lock be changed. Nor do the provisions contain an express right of entry in favor of the borrower after a lock change, or limit in any way who the lender can exclude from the property.

Second, the borrower is excluded from the property the *moment* the borrower's lock is changed until the borrower is able, if at all, to get entry permission from Nationstar. The Restatement definition does not impose a temporal duration for possession to ripen. Possession occurs the moment physical control occurs with the intent to exclude others from the property.

Third, *total* control of the property with the intent to exclude *all* others is not required for possession under the Restatement definition. Rather, the Restatement definition requires only a certain "degree of

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<sup>2</sup> The certified record demonstrates, however, that Nationstar has kept class members out of their homes, including by changing the locks on multiple doors. *See* ECF No. 63-2, Exs. 17-27.

physical control of the land” with an intent to exclude other members of society “in general” from the property. These requirements are more than met by the Lockout Provision language, the language of any unrestricted cumulative right to enter, maintain, and secure the borrower’s property, and Nationstar’s standard practices and procedures.

*ii. The Tort Definition of a Mortgagee in Possession*

Washington courts have considered when a mortgagee is in possession of real property prior to foreclosure in the tort law context. In *Coleman v. Hoffman*, 115 Wn. App. 853 (2003), the Washington Court of Appeals held that a lender that entered a defaulted borrower’s property and paid utility and repair costs “to protect its investment” was in possession of the borrower’s property and could be liable for injuries sustained by the plaintiff. In defining a “possessor of land” the *Coleman* court held:

A possessor of land is (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

*Id.* at 860 (quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 655 (1994); Restatement (Second) of Torts § 328E (1965)).

The *Coleman* court also rejected the mortgagee's argument that under RCW 7.28.230, the mortgagee could not, as a matter of law, possess the property prior to foreclosure. *Coleman*, 115 Wn. App. at 863-64. Instead, the court recognized that a mortgagee's actions may demonstrate that the mortgagee has taken possession of the land, despite the statute. And that is exactly what Nationstar has done here.

Nationstar occupies a borrower's home when its vendors forcibly enter the borrower's home and change the borrower's locks and maintain their own locks upon the home. ECF No. 3-8 ¶¶ 6-11. This occupation occurs when the actual entry and lock changes are performed and continues as the locks are maintained on the homes, even in instances where the borrower demands that Nationstar remove the locks. ECF No. 63-1, Ex. 1. Importantly, the Lockout Provision purports to authorize each of these actions.

Nationstar's intent to control the home is evidenced by the locks themselves and Nationstar's posting of signs directing anyone trying to access the home to contact Nationstar. ECF No. 72 at 6. Nationstar exercises ongoing control over the property when Nationstar maintains its locks and lock box upon the borrower's home so Nationstar can have "future access" to the home at its discretion, all as provided for by the Lockout Provision.

Moreover, *Coleman* is instructive on the types of activities that are indicative of possession, characterizing as ‘possessory acts’ actions that are far less intrusive than removing the borrower’s locks and installing locks for the lender: “Similarly, [the lender] performed acts indicating possession and control: it paid utility bills and repair costs, collected rents, and hired [an agent].” *Coleman*, 115 Wn. App. at 862. Paying utility bills, turning utilities on or off, and making repairs are actions expressly authorized by the Lockout Provision.

*Colman’s* analysis and holding are directly relevant to the present case and dictate a similar result: a lender takes possession of a borrower’s property when it occupies the borrower’s property with the intent to control the borrower’s property prior to foreclosure. This possession disrupts the borrower’s exclusive right to possession in violation of RCW 7.28.230 as a matter of law.

*iii. Landlord–Tenant Law Recognizes the Significance of Changing Locks*

The act that most blatantly disrupts the borrower’s exclusive right of possession is the removal of the borrower’s locks and installation and maintenance of Nationstar’s locks and lock box upon the borrower’s home. The majority of cases addressing lock changes and possession are landlord-tenant cases. These cases are directly analogous to case before the Court

because they address the effect of a lock change on one's *exclusive* right to possession. Moreover, an analysis of the cases and statutes applicable to a landlord's ability to change a tenant's lock illustrate the extreme importance placed upon the *property owner's* ultimate right of possession of their property.

In *Aldrich v. Olson*, 12 Wn. App. 665, 667 (1975), the court determined that even where the tenant was no longer staying in the premises, had removed some of his possessions, and the premises contained a "substantial amount of rotten food, stench and garbage," the tenant had not abandoned the property and the landlord's changing of the locks on the premises was unlawful.

In reaching its decision, the *Aldrich* court considered the effect of changing a lock on a tenant's right to exclusive possession and held "[e]xcept as limited by the terms of the leasehold, a tenant has a present interest and estate in the property for the period specified, which gives him *exclusive possession against everyone, including the lessor.*" *Id.* (emphasis added). According to the court, "[i]t is difficult to visualize an act of a landlord more specifically intended as a reassumption of possession by the landlord and a permanent deprivation of the tenant's possession than a 'lock out' without the tenant's knowledge or permission." *Id.*; see also *Gray v. Pierce Cnty. Hous. Auth.*, 123 Wn. App. 744, 757 (2004) (explaining that

“no landlord, including one not governed by the RLTA, may ever use non-judicial, self-help methods to remove a tenant.”).

A landlord can re-take possession of the leased premises, but only after there has been a default *and* the tenant indicates by words or actions that he or she has abandoned the property. *See* RCW 59.18.310(2). The “[a]bandonment must be established by clear, unequivocal and decisive evidence.” *Aldrich*, 12 Wn. App. at 667–68. Further, the landlord must give the tenant reasonable notice of the possession. RCW 59.18.310(2).

A homeowner has an even stronger interest in possession of property that he or she owns, as reflected in RCW 7.28.230, than does a tenant in leased property. Indeed, as between a lender and borrower, the borrower’s right to possession of the property is paramount. RCW 7.28.230. Not even default on a mortgage payment coupled with an abandonment gives the lender *any* right to possession of the borrower’s property until the lender has completed a foreclosure and sale by law. *Western Loan & Bldg.*, 162 Wash. at 39, 40, 42; *Norfor*, 19 Wash. at 452–453. If a landlord cannot enter property the landlord owns and lockout a defaulted tenant without notice, then surely a lender cannot enter property that a defaulted borrower owns and lockout the homeowner without notice.

\* \* \*

In sum, RCW 7.28.230 vests in a homeowner the exclusive right to possess his or her property prior to foreclosure. The Lockout Provision, which authorizes the lender to enter the property and lock the borrower out after the borrower misses a single mortgage payment is plainly inconsistent with the statute and unenforceable. The actions that Nationstar takes under the Lockout Provision only reinforce that conclusion. Accordingly, Ms. Jordan respectfully submits that the answer to the first certified question is no. If the Court agrees, it is unnecessary to reach the second question.

**B. RCW chapter 7.60 *et seq.* provides the exclusive remedy, absent post-default consent by the borrower, for a lender to gain access to an encumbered property prior to foreclosure.**

When it enacted Washington's current receivership scheme, the Legislature created a "comprehensive, streamlined, and cost-effective procedure." Laws of 2004, ch. 165, § 1 (purpose section). One of the specific purposes of that statutory scheme is protection of lenders' interests in real property prior to foreclosure. This procedure is codified at RCW chapter 7.60 and is the exclusive remedy available to Nationstar when it wants to control and "secure" encumbered property prior to foreclosure without the borrower's post-default consent.

The legislature has set forth in great detail the process by which a lender may obtain a receiver to gain access to an encumbered property prior to foreclosure. There is no indication that the legislature intended to allow

the parties to vary these statutory procedures by contract. As previously stated by this Court, “[w]e will not allow waiver of statutory protections lightly.” *Schroeder v. Excelstor Mgmt. Grp., LLC*, 177 Wn.2d 94, 107 (2013) (quoting *Bain*, 175 Wn.2d at 108).

1. There is no common law remedy by which a lender may gain access to a borrower’s property before foreclosure, and the statutory protections under Chapter 7.60 cannot be contractually waived or modified.

Chapter 7.60 provides creditors with the ability to gain judicially supervised pre-foreclosure access to debtors’ properties in certain circumstances to protect and preserve the collateral. RCW 7.60.025. The legislature did not intend to allow parties to contract around the statutory requirements and judicial oversight provided under Chapter 7.60. This intent is evidenced by the fact that the statute requires its processes be followed and a receiver be appointed by the court, *even if* the appointment of a receiver “is provided for by agreement” of the parties. RCW 7.60.025(1)(b)(ii).

The Lockout Provision bypasses the clear statutory process by which lenders can obtain a receiver to preserve, maintain, and secure the collateral. Specifically, the Lockout Provision purports to permit Nationstar to “take charge” of a property, but without the court approval or supervision provided by the statute. Put another way, the Lockout Provision

purportedly grants Nationstar a private right of receivership—a right never contemplated by Washington law. *State v. Superior Court for King Cnty.*, 161 Wash. 550, 554 (1931) (“Since time immemorial,” courts have had “exclusive jurisdiction” over receivership powers).

This is not the first time a corporation has argued that this Court should give effect to contractual modification of a statute. See *Schroeder*, 177 Wn.2d at 107 (holding statutory requirement under Washington’s Deed of Trust Act that agricultural properties may only be foreclosed judicially cannot be waived by contract); *Bain*, 175 Wn.2d at 107 (holding statutory requirements and definitions under Washington’s Deed of Trust Act may not be contracted around); *Godfrey v. Hartford Ins. Cas. Co.*, 142 Wn.2d 885, 896-97 (2001) (holding statutory terms under Washington’s uniform arbitration act cannot be contracted around, a party cannot contract for “just the parts [of the statute] that are useful to them,” and parties to a contract “are not free to craft a ‘common law’ arbitration alternative to the [a]ct”); *State ex rel. Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 329 (1943) (holding that a corporation could not avoid statutory limitations on scope of practice by contract with those who could so practice); *Roche Fruit & Produce Co. v. Vaught*, 143 Wash. 601, 603–04 (1927) (holding that a contract provision allowing the lender to repossess mortgaged chattels

“should be construed with reference to the methods provided by statute for subjecting the security to the payment of the debt”).

In the mortgage context, it is well established that lenders cannot use pre-default contractual provisions to avoid the requirements mandated by the Washington Deed of Trust Act. *Schroeder*, 177 Wn.2d at 106–07. While RCW 61.12.020 allows parties to insert side agreements or conditions into mortgages,<sup>3</sup> this Court has consistently held that parties cannot contract around the statutory requirements set forth in Chapter 61.24. *Id.*; *see also, Bain*, 175 Wn.2d at 108.

In *Bain*, a corporation that claimed to be the beneficiary of a deed of trust argued that “the parties [to a deed of trust] were legally entitled to contract as they see fit,” and that the parties could alter the statutory provisions under the Deed of Trust Act by contract. *Id.* at 99. The Court rejected these arguments and stated:

The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these requirements by contract. We will not allow waiver of statutory protections lightly.

*Id.* at 108.

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<sup>3</sup> “Every such mortgage, when otherwise properly executed, shall be deemed and held a good and sufficient conveyance and mortgage to secure the payment of the money therein specified. The parties may insert in such mortgage any lawful agreement or condition.”

Similarly, in *Schroeder*, the lender and successor trustee argued to this Court that a contractual provision stating that the subject property has not been used, and will not be used, for agricultural purposes waived the statutory prohibition on trustee sales of land used principally for agriculture. *Schroeder*, 177 Wn.2d at 106. This Court disagreed:

The difficulty with the defendants' waiver argument is that RCW 61.24.030 is not a rights-or-privileges-creating statute. Instead, it sets up a list of "requisite[s] to a trustee's sale." . . . These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision.

*Id.* at 106–107.

Like the list of requisites to a trustee's sale under RCW 61.24.030, the receivership statute sets forth a list of requisites to a lender gaining access to a borrower's property under RCW 7.60.025. These requisites are limits on a creditor's ability to access, preserve, maintain, and secure its collateral, are subject to judicial supervision, and cannot be contracted around. The Court should reject Nationstar's arguments that it is free to craft a "common law" alternative to the statutory process adopted by the Washington legislature under Nationstar's contractual powers, just as the Court rejected the insurance company's similar contention in *Godfrey*. See *Godfrey*, 142 Wn.2d at 896 (parties to a contract "are not free to craft a 'common law' arbitration alternative to the [a]ct").

This Court has held that the Deed of Trust Act “must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” *Schroeder*, 177 Wn.2d at 105 (quoting *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915–16 (2007)). Similarly, the Court should construe any questions about the exclusivity of Chapter 7.60 in favor of property owners.

The Lockout Provision allowing Nationstar to enter borrowers’ homes and change the locks essentially grants Nationstar the power of a custodial receiver, without any judicial supervision or oversight. RCW 7.60.015. The provision allows Nationstar the discretion to directly act as a custodial receiver in violation of the requirements set forth in Washington’s receivership statute. *See e.g.* RCW 7.60.035(2) (a person cannot serve as a receiver if they are a party to—or an agent of a party to—the action). Private remedies created by contract in an effort to avoid the statutory requirements of Chapter 7.60, such as the Lockout Provision at issue in this case, are unenforceable to the extent they fail to comply with the statutory requirements.

2. The Legislature intended to provide an exclusive remedy under Chapter 7.60.

“If a remedy provided by statute is exclusive, the statute implicitly abrogates all common law remedies within the scope of the statute.” *Tacoma Auto Mall, Inc., v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 125 (2012). When a statute provides the exclusive remedy, it cannot be abrogated or displaced by contractual agreement. *Roche Fruit & Produce*, 143 Wash. at 604 (citing *Spencer v. Commercial Co.*, 30 Wash. 520 (1902)). To determine whether a statutory remedy is exclusive, the court must first examine the language and provisions of the statute in question. *Id.* The absence of an exclusivity provision does not defeat the case for preemption. *See id.* “If the language of the statute is inconclusive, the court may look to other manifestations of legislative intent,” such as “the comprehensiveness of the remedy provided by the statute, the purpose of the statute, and the origin of the statutory right.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 79–80, 84 (2008).

Chapter 7.60 does not contain an “exclusivity provision.” However, “other manifestations of legislative intent” including the “comprehensiveness of the remedy provided by the statute, the purpose of the statute, and the origin of the statutory right” demonstrate that the legislature intended Chapter 7.60 to be the exclusive remedy for

beneficiaries seeking to “take charge” of a property that is subject to an nonjudicial foreclosure proceeding. RCW 7.60.015; *see also* RCW 7.60.025.

*i. The remedy Provided by Chapter 7.60 Is Comprehensive*

Chapter 7.60 provides a comprehensive remedy. In enacting the statute, the legislature set forth an exclusive list of forty scenarios in which a receiver should be appointed. RCW 7.60.025(1)(a)-(mm). The list includes several circumstances in which a creditor may obtain access to an encumbered property to protect the collateral. *See* RCW 7.60.025(a), (b), (e), and (g). The legislature would not have set forth such specific, comprehensive provisions governing receiverships without intending those provisions to represent the exclusive avenue for exercising receiver powers; nor could the legislature have intended to empower the court with such specificity while still intending private parties to exercise receiver powers without supervision. Chapter 7.60 provides a comprehensive remedy.

*ii. The Purpose of Chapter 7.60*

The purpose of Chapter 7.60 is expressly stated:

The purpose of this act is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state *for the benefit of creditors* and other persons having an interest therein.

Laws of 2004, ch. 165, § 1 (emphasis added).

To further that express purpose, the legislature granted courts “the *exclusive* jurisdiction to determine *all controversies* relating to the collection, *preservation*, application, and distribution *of all the property*” a receiver may statutorily control. RCW 7.60.055 (emphasis added). Nationstar’s claim of a right to unilaterally determine and control property “preservation” activities directly contradicts the legislature’s intent that the courts have the “exclusive jurisdiction” relating to “preservation” of the property.

Further, the legislature intended to abrogate all receivership law not consistent with the 2004 revision of the statutory scheme: “Other provisions regarding receivers and receiverships are included, and duplicative, inconsistent and archaic statutes are repealed.” H.R. Bill Analysis of S.S.B. 6189 (Mar. 2, 2004). The statute’s purpose demonstrates the legislature’s intent to provide an exclusive remedy in enacting Chapter 7.60.

*iii. The Origin of the Statutory Right*

The legislature provides a history of Chapter 7.60:

[Prior to 2004, Chapter 7.60 consisted] of five relatively short sections, most of which were originally enacted over 150 years ago. Over time, there have been numerous statutes enacted throughout the code that authorize the appointment of a receiver under various circumstances. In addition, courts have developed some case law addressing some issues

of receiverships that are not explicitly addressed in the statutes.

H.R. Rep. S.S.B. 6189 (Mar. 5, 2004).

The 2004 version of Chapter 7.60 was “not intended to be a radical change from how receiverships [were] operating under [pre-2004] law;” but rather “a codification of case law.” *Id.* Thus the origin of the statutory right demonstrates the legislature’s intent to codify prior common receivership law into a modern, streamlined, comprehensive and exclusive statute.

Since “time immemorial,” Washington courts have had exclusive jurisdiction and authority over the appointment of receivers. *State v. Superior Court for King Cnty.*, 161 Wash. 550, 554 (1931). Here, the Lockout Provision, which purportedly permits Nationstar to “take charge” of plaintiffs’ homes, grants Nationstar those powers exclusively enjoyed by a custodial receiver. RCW 7.60.015 (receivers are appointed to “take charge” of “specific property”). Moreover, the Lockout Provision empowers an interested party to act as a receiver, in direct contravention of RCW 7.60.035(2).

As the text, purpose, and comprehensive nature of Chapter 7.60 indicates, the legislature intended statutory receivership to be the exclusive method of exercising a receiver’s power to “take charge” of collateral. Accordingly, Chapter 7.60, Washington’s statutory receivership scheme,

provides the exclusive remedy, absent post-default consent by the borrower, for a lender to gain access to an encumbered property prior to foreclosure.

**C. Pre-foreclosure lockouts are contrary to public policy.**

Whatever benign reasons Nationstar may offer for its actions under the Lockout Provision, the effect is to force homeowners who have fallen behind on their mortgages out of their homes. Doing so violates homeowners' fundamental property rights. *See Wenatchee Reclamation Dist. v. Mustell*, 35 Wn. App. 113, 117 (1983) ("Certainly, there is no greater property interest protected by the Constitution than that of a person's real property holdings.") Moreover, Nationstar's lockouts reduce a distressed property owner's ability to preserve value in the property through a sale and can put families struggling to save their homes out on the street.

The recent financial crisis has left many homeowners struggling to pay their mortgages and led to countless defaults and foreclosures. In addition to families who have lost their homes, communities have been harmed by abandoned foreclosed homes left to deteriorate. *See, e.g.,* Spokane Mun. Code § 17F.070.520(A) (establishing "an abandoned property registration program in order to protect the community from becoming blighted as a result of abandoned properties that are not properly secured or maintained.").

Lenders argue that provisions like the Lockout Provision at issue here help combat these ills—in addition to preserving the value of lender’s collateral. But turning homes into cold shells without power to light them or water to keep the grounds watered encourages blight. As lenders well know, borrowers are far less likely to contest foreclosure or remain in their homes as tenants at sufferance if they are removed from their homes prior to foreclosure. Pre-foreclosure lockouts can harm families and communities by making it more difficult for delinquent borrowers to avoid foreclosure through a sale, loan modification, or other means.

These concerns are magnified by the lack of oversight or supervision of the companies that inspect properties and perform lockouts. For example, the vendors Nationstar hires to inspect borrowers’ properties have an obvious interest in finding a property “vacant” so that the lender will order and pay them for additional “preservation” measures. The problems associated with unregulated and sometimes unscrupulous “property preservation” companies are well documented. *See, e.g.*, ECF No. 63, Ex. 29 (Complaint in *Illinois v. Safeguard Properties, LLC*, No. 2013CH20715 (Ill. Cir. Ct. Sept. 3, 2013) (suit by Illinois Attorney General alleging that one of the largest property preservation companies in the country violated the law by performing lockouts at occupied homes, including at least one case where a homeowner’s teenage daughter was actually at home)); ECF

No. 63, Ex. 28 (Federal Housing Finance Agency, Office of Inspector General, Audit Report dated March 25, 2014 (documenting fraudulent claims for payment for inspections never performed)). Nationstar acknowledges that it does not require its vendors to adhere to any specific criteria or guidelines when inspecting properties and changing locks.

In sum, policy considerations support Washington's prohibition on lenders taking possession of a mortgaged property prior to foreclosure, which has endured for over century. *See* Code of 1881 § 546; RCW 7.28.230. As this Court has recently recognized, lenders are not free to simply rewrite by contract statutory provisions designed to protect homeowners. *See Bain*, 175 Wn.2d at 96–97, 110. Those principles apply equally here. The Legislature, not lenders themselves, is the entity empowered to modify the statutory rights of lenders and borrowers. The Lockout Provision is unenforceable and against public policy because it runs afoul of the plain language of RCW 7.28.230 and is contrary to the comprehensive receivership scheme set forth in Chapter 7.60.

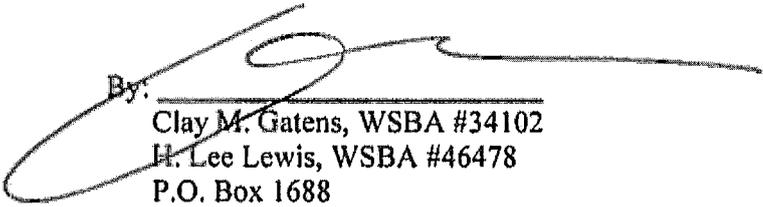
## VI. CONCLUSION

For all of the foregoing reasons, Plaintiff Laura Zamora Jordan and the certified class of homeowners she represents respectfully request that the Court answer the first certified question in the negative. If the Court

reaches the second certified question, Ms. Jordan and the class request that it be answered in the affirmative.

RESPECTFULLY SUBMITTED AND DATED this 16th day of September, 2015.

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CERTIFICATE OF SERVICE

I, Clay M. Gatens, certify that on September 16, 2015, I sent true and correct copies of the foregoing by U.S. Mail, postage prepaid from Seattle, Washington, to the counsel listed below:

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**RCW 7.28.230**

**Mortgagee cannot maintain action for possession — Possession to collect mortgaged, pledged, or assigned rents and profits — Perfection of security interest.**

(1) A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law: PROVIDED, That nothing in this section shall be construed as any limitation upon the right of the owner of real property to mortgage, pledge or assign the rents and profits thereof, nor as prohibiting the mortgagee, pledgee or assignee of such rents and profits, or any trustee under a mortgage or trust deed either contemporaneously or upon the happening of a future event of default, from entering into possession of any real property, other than farmlands or the homestead of the mortgagor or his or her successor in interest, for the purpose of collecting the rents and profits thereof for application in accordance with the provisions of the mortgage or trust deed or other instrument creating the lien, nor as any limitation upon the power of a court of equity to appoint a receiver to take charge of such real property and collect such rents and profits thereof for application in accordance with the terms of such mortgage, trust deed, or assignment.

(2) Until paid, the rents and profits of real property constitute real property for the purposes of mortgages, trust deeds, or assignments whether or not said rents and profits have accrued. The provisions of RCW 65.08.070 as now or hereafter amended shall be applicable to such rents and profits, and such rents and profits are excluded from Article 62A.9 RCW.

(3) The recording of an assignment, mortgage, or pledge of unpaid rents and profits of real property, intended as security, in accordance with RCW 65.08.070, shall immediately perfect the security interest in the assignee, mortgagee, or pledgee and shall not require any further action by the holder of the security interest to be perfected as to any subsequent purchaser, mortgagee, or assignee. Any lien created by such assignment, mortgage, or pledge shall, when recorded, be deemed specific, perfected, and choate even if recorded prior to July 23, 1989.

## **RCW 7.60.015**

### **Types of receivers.**

A receiver must be either a general receiver or a custodial receiver. A receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person's property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs. A receiver must be a custodial receiver if the receiver is appointed to take charge of limited or specific property of a person or is not given authority to liquidate property. The court shall specify in the order appointing a receiver whether the receiver is appointed as a general receiver or as a custodial receiver. When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property, or the giving of a notice of a trustee's sale under RCW 61.24.040 or a notice of forfeiture under RCW 61.30.040, the court shall appoint the receiver as a custodial receiver. The court by order may convert either a general receivership or a custodial receivership into the other.

## **RCW 7.60.025**

### **Appointment of receiver.**

(1) A receiver may be appointed by the superior court of this state in the following instances, but except in any case in which a receiver's appointment is expressly required by statute, or any case in which a receiver's appointment is sought by a state agent whose authority to seek the appointment of a receiver is expressly conferred by statute, or any case in which a receiver's appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate:

(a) On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action and in the possession of an adverse party, or when the property or its revenue-producing potential is in danger of being lost or materially injured or

impaired. A receiver may be appointed under this subsection (1)(a) whether or not the application for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment or other relief;

(b) Provisionally, after commencement of any judicial action or nonjudicial proceeding to foreclose upon any lien against or for forfeiture of any interest in real or personal property, on application of any person, when the interest in the property that is the subject of such an action or proceeding of the person seeking the receiver's appointment is determined to be probable and either:

(i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired; or

(ii) The appointment of a receiver with respect to the real or personal property that is the subject of the action or proceeding is provided for by agreement or is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property. For purposes of this subsection (1)(b), a judicial action is commenced as provided in superior court civil rule 3(a), a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8), and a proceeding for forfeiture is commenced under chapter 61.30 RCW upon the recording of the notice of intent to forfeit described in RCW 61.30.060;

...

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;

...

(g) Upon an attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction, or where the abandoned property's owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver;

...

(2) The superior courts of this state shall appoint as receiver of property located in this state a person who has been appointed by a federal or state court located elsewhere as receiver with respect to the property specifically or with respect to the owner's property generally, upon the application of the person or of any party to that foreign proceeding, and following the appointment shall give effect to orders, judgments, and decrees of the foreign court affecting the property in this state held by the receiver, unless the court determines that to do so would be manifestly unjust or inequitable. The venue of such a proceeding may be any county in which the person resides or maintains any office, or any county in which any property over which the receiver is to be appointed is located at the time the proceeding is commenced.

(3) At least seven days' notice of any application for the appointment of a receiver must be given to the owner of property to be subject thereto and to all other parties in the action, and to other parties in interest as the court may require. If any execution by a judgment creditor under Title 6 RCW or any application by a judgment creditor for the appointment of a receiver, with respect to property over which the receiver's appointment is sought, is pending in any other action at the time the application is made, then notice of the application for the receiver's appointment also must be given to the judgment creditor in the other action. The court may shorten or expand the period for notice of an application for the appointment of a receiver upon good cause shown.

(4) The order appointing a receiver in all cases must reasonably describe the property over which the receiver is to take charge, by category, individual items, or both if the receiver is to take charge of less than all of the owner's property. If the order appointing a receiver does not expressly limit the receiver's authority to designated property or categories of property of the owner, the receiver is a general receiver with the authority to take charge over all of the owner's property, wherever located.

(5) The court may condition the appointment of a receiver upon the giving of security by the person seeking the receiver's appointment, in such amount as the court may specify, for the payment of costs and damages incurred or suffered by any person should it later be determined that the appointment of the receiver was wrongfully obtained.

**RCW 7.60.035**

**Eligibility to serve as receiver.**

Except as provided in this chapter or otherwise by statute, any person, whether or not a resident of this state, may serve as a receiver, with the exception that a person may not be appointed as a receiver, and shall be replaced as receiver if already appointed, if it should appear to the court that the person:

(1) Has been convicted of a felony or other crime involving moral turpitude or is controlled by a person who has been convicted of a felony or other crime involving moral turpitude;

(2) Is a party to the action, or is a parent, grandparent, child, grandchild, sibling, partner, director, officer, agent, attorney, employee, secured or unsecured creditor or lienor of, or holder of any equity interest in, or controls or is controlled by, the person whose property is to be held by the receiver, or who is the agent or attorney of any disqualified person;

(3) Has an interest materially adverse to the interest of persons to be affected by the receivership generally; or

(4) Is the sheriff of any county.

**Paragraph 9 of Ms. Jordan's Deed of Trust (ECF No. 3-5, Ex. 19)**

**9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

## OFFICE RECEPTIONIST, CLERK

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**To:** Jerei L. Bargabus  
**Cc:** Mike Daudt\_efiling; bhandler@tmdwlaw.com; Beth E. Terrell; MikeSS3  
**Subject:** RE: 98081-8 Certification in Zamora v Nationstar

Received on 09-16-2015

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**From:** Jerei L. Bargabus [mailto:JereiB@JDSALaw.com]  
**Sent:** Wednesday, September 16, 2015 4:22 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Mike Daudt\_efiling <filing@tmdwlaw.com>; bhandler@tmdwlaw.com; Beth E. Terrell <Bterrell@tmdwlaw.com>; MikeSS3 <bkinsey@tmdwlaw.com>  
**Subject:** 98081-8 Certification in Zamora v Nationstar

Good afternoon,

Attached for filing is the Plaintiff's Opening Brief in the matter of

98081-8  
Certification in Zamora v Nationstar  
filed by  
Clay Gatens, WSBA #34102  
(509) 662-3685  
[ClayG@jdsalaw.com](mailto:ClayG@jdsalaw.com)

Please let me know if you have any difficulty

Jerei Bargabus  
Paralegal



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