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SUPREME COURT
OF THE STATE OF WASHINGTON

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 REPLY BRIEF

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I. INTRODUCTION

The federal district court certified to this Court two questions about the legality of contractual provisions embedded in form deeds of trust. The first certified question focuses on the borrowers' statutory right to exclusive possession prior to foreclosure under RCW 7.28.230. The degree to which Nationstar takes possession of a borrower's home is irrelevant because RCW 7.28.230 concerns itself solely with the *borrower's* right of exclusive possession and does not allow for *any* possession by Nationstar prior to foreclosure.

The specific contract language that Nationstar relies upon when it forcibly enters a borrower's home and changes the locks on the borrower's home controls the answer to the first question. Because the Lockout Provision conflicts with RCW 7.28.230 the answer to the first certified question is "No." In answering the first certified question in the negative, the Court need not resolve the second certified question.

If the Court does reach the second certified question, the answer is "Yes." If a borrower's home is actually subject to damage or waste such that a lender is compelled to take possession of the borrower's home prior to completion of a foreclosure, then, absent the express consent of the borrower, the lender must exercise this possession through a receiver under chapter 7.60.

II. ARGUMENT

A. **The Court should resolve the first certified question based on the plain language of the contractual provision at issue.**

The federal district court issued its order certifying questions to this Court after the parties filed cross-motions for partial summary judgment on the question of whether two contractual provisions included in Ms. Jordan's deed of trust are enforceable under Washington law. *See* ECF No. 72 (Order Certifying Questions to the Washington Supreme Court ("Order")). Both the Order and Ms. Jordan's opening brief focus on Paragraph 9 of Ms. Jordan's deed of trust, which is the full text of the Lockout Provision. Importantly, the Order incorporated and reproduced in its entirety the Lockout Provision. Order at 5. As such, this Court should resolve the certified questions based on the text of the Lockout Provision. *See Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 337, 334 P.3d 14 (2014) (explaining that this Court addresses the "actual issues pending in the federal proceeding" and resolves certified questions "not in the abstract but based on the certified record provided by the district court.").

The district court did not interpret the Lockout Provision. Nationstar refers to the district court's "interpretation" or construction of the Lockout Provision at least thirteen times. *See* Br. at 2, 27–29, 31–32. However, not one of those thirteen references is supported by a citation to the record because the district court did not adopt any interpretation of the

Lockout Provision, much less the generic, cumulative, and unrestricted right to “enter, maintain, and secure” advocated by Nationstar. *See* Order at 3 (“Nationstar contends the Provisions—akin to a limited license or similar non-possessory interest in land—merely grant the lender the ability to enter, maintain, and secure the encumbered property.”) (emphasis added). The fallacy of Nationstar’s argument is clearest when Nationstar claims that the district court “correctly construed the Entry Provisions’ words to authorize reasonable and appropriate entries to protect property but not dispossess the borrower, thus upholding the Entry Provisions’ validity and legality.” Nationstar Br. at 29. If that statement were true, the district court would have granted Nationstar’s motion for partial summary judgment, not certified questions about the enforceability of the Lockout Provision to this Court.

The district court’s first certified question uses the phrase “enter, maintain, and secure” as shorthand for the full Lockout Provision. However, even if the Lockout Provision is interpreted to allow Nationstar to “enter, maintain, and secure” a borrower’s property whenever the borrower misses a loan payment, this collective and unrestricted right to enter, maintain, and secure a borrower’s property still violates RCW 7.28.230. This is true because the unrestricted and cumulative power to enter (including by force), maintain (by any means the lender

sees fit) *and* secure (against all others, including the borrower) violates the borrower's right to exclusive possession of their home prior to foreclosure.

Both parties' arguments require that this Court interpret the actual language of the Lockout Provision. Nationstar's argument that parties are free to contract and courts must enforce those contracts, as written, requires that the Court look to what is actually written in the contract. *See, e.g., Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (explaining that Washington follows the objective manifestation theory of contract interpretation and interprets what was written in the contract, not what was intended to be written)

The Lockout Provision provides the only purported authorization for Nationstar's entries into defaulted borrowers' homes. Nationstar Br. at 9–10. However, Nationstar nonetheless urges the Court to disregard the actual words of the Lockout Provision. *Id.* at 2. Not only does Nationstar ask this Court to ignore the text of the Lockout Provision at issue, Nationstar also asks the Court to look only to what Nationstar represents are its "normal practices" when acting under the Lockout Provision.¹ *Id.* Nationstar's defense of the Lockout Provision while also distancing itself

¹ Nationstar's actions under the provision are disputed. *See* Order at 8 n.6 ("Whether Nationstar's vendors['] actual activities exceed the scope of the lender's permission, relevant for Plaintiffs' trespass claims, is a question of fact not yet before the Court.").

from the full scope of the actions the Lockout Provision authorizes reveals its awkward position and speaks directly to the unenforceability of the Lockout Provision. Even Nationstar does not think a lender may take all the actions authorized by the Lockout Provision.

Nationstar also distances itself from the Lockout Provision by glossing over its plain language. For example, Nationstar asserts the provision authorizes a lender to act when the borrower has defaulted *and* left the property “apparently vacant.” *See, e.g.*, Nationstar Br. at 1, 3, 9–10. The Lockout Provision, however, uses the disjunctive “or” and by its terms applies when either of those conditions are met. *See* App’x at 6; *see also Knight v. Wells Fargo*, No. 12-cv-12123, 2013 WL 396142, at *8 (E.D. Mich. Jan. 8, 2013) (“Satisfying any one of the applicable paragraph 9 conditions would trigger Wells Fargo’s right to enter the Property.”). The plain language of the contract permits Nationstar to forcibly enter and change the locks on a home after the borrower misses a single payment.

Nationstar likewise reframes the district court’s first certified question to ask whether a deed of trust provision permits a lender to “enter, maintain, and secure a defaulted borrower’s apparently vacant property.” Nationstar Br. at 1 (emphasis added). The phrase “apparently vacant” appears often in Nationstar’s brief, but never in the Order or the Lockout Provision.

Nationstar's assertion that the Lockout Provision limits lenders to "whatever is reasonable or appropriate to protect the Lender's interest in the Property" and thereby safeguards against abuse is also unavailing. The terms "reasonable and appropriate" do not qualify the terms that follow—the terms that follow the "reasonable and appropriate" clause, including entry and lock changes, are specific examples of "reasonable and appropriate" actions under the Lockout Provision. The prefatory "reasonable and appropriate" language permits the lender to take additional steps beyond those specified, but does not constrain entry and lock changes. In addition, limiting a party's conduct to "whatever" it thinks is reasonable or appropriate to protect its own interests is no limit at all.

Lastly, Nationstar's focus on the terms "reasonable and appropriate" conflicts with its argument that the Court should ignore the text of the Lockout Provision and consider instead a generic concept of "enter, maintain, and secure." If the Court did so, then the "reasonable and appropriate" language Nationstar believes saves the Lockout Provision would also have to be disregarded. In short, the Court should look to the Lockout Provision's unambiguous text to determine whether the provision authorizes a lender to interfere with the homeowner's right of exclusive possession prior to foreclosure in violation of RCW 7.28.230.

B. The Lockout Provision is unenforceable because it authorizes a lender to interfere with the homeowner’s right of exclusive possession prior to foreclosure.

Washington has long recognized that under its lien theory of mortgages, a lender may not “recover possession of the real property, without a foreclosure and sale according to law.” RCW 7.28.230(1); Rem. Rev. Stat. § 804. Under RCW 7.28.230(1), a lender does not have “any right to possession of mortgaged real property without a ‘foreclosure and sale according to law.’” *Howard v. Edgren*, 62 Wn.2d 884, 885, 385 P.2d 41 (1963) (emphasis added) (quoting RCW 7.28.230). The homeowner’s right of possession is absolute and exclusive, even after a homeowner stops making payments on the mortgage and abandons the property. *Id.*; *Western Loan & Bldg. Co. v. Mifflin*, 162 Wash. 33, 41, 297 P. 743 (1931) (explaining that the statute² is “expressive of the public policy of the state vesting the right of possession in the mortgagor absolutely until a decree of sale”).

Nationstar does not challenge these indisputable principles. Nationstar Br. at 10–11. Instead, Nationstar argues that prior to initiating foreclosure, a lender may determine that a home is vacant, enter the home, change the locks, and take whatever other actions it deems “reasonable” to

² RCW 7.28.230(1) is almost identical to Rem. Rev. Stat. § 804, enacted in 1869. See *Norfor v. Busby*, 19 Wash. 450, 452 (1898) (discussing adoption of the statute).

maintain and secure the property because in doing so, the *lender* does not take *exclusive* possession of the property. Nationstar Br. at 9–10. Nationstar subtly shifts the focus from whether the Lockout Provision authorizes the lender to take actions that interfere with the *homeowner's* right of exclusive possession to whether the Lockout Provision authorizes the *lender* to take exclusive possession of the property. According to Nationstar, contract provisions permitting lenders to take possession of property prior to foreclosure are allowed, so long as the lender stops short of totally excluding all others—including the homeowner—from the property. That argument contradicts this Court's long line of cases applying the statute and the plain language of RCW 7.28.230(1).

1. This Court has repeatedly rejected lenders' attempts to take possessory actions that stop short of physically occupying the property and excluding all others.

This Court held in a number of cases that provisions in mortgages or deeds of trust authorizing the lender to collect rents or other profits from the property prior to foreclosure were unenforceable. *See Clise v. Burns*, 175 Wash. 133, 134, 138, 26 P.2d 627 (1933); *Western Loan & Bldg. Co.*, 162 Wash. at 37, 39; *Norfor v. Busby*, 19 Wash. 450, 452–455 (1898).³ In those cases, the Court explained that a mortgagee

³ RCW 7.28.230 was amended in 1961 to permit these types of agreements in mortgages or deeds of trust.

impermissibly took “possession” of mortgaged property prior to foreclosure by collecting rents or other profits from the property. *See Norfor*, 19 Wash. at 455 (“[I]t is evident that the statute cannot be evaded by taking the most valuable incidents of possession from the mortgagor under the guise of rents and profits.”); *Western Loan & Bldg. Co.*, 162 Wash at 37 (reversing superior court order appointing a special receiver to “take charge” of the property and “collect the rents and income therefrom pending the foreclosure action”). Importantly, nothing in either case indicates that the mortgagee or receiver proposed to or did physically occupy the property and exclude all others therefrom.

The Legislature responded to *Norfor*, *Western Loan & Building Co.*, and *Clise*, by amending RCW 7.28.230 to expressly permit a mortgagee to collect rents or profits promised in a promissory note or deed of trust after the borrower’s default. The Legislature did not, however, repeal or modify the language relied on in those cases. Instead, the amendment provides the statute should not be read to prohibit the mortgagee “from entering into possession of any real property . . . for the purpose of collecting the rents and profits thereof.” RCW 7.28.230(1). The statute recognizes that a mortgagee may “enter into possession” of the property by collecting rents and profits. Landlords regularly collect rents and profits without permanently occupying a property or excluding *all*

others from the property. If merely collecting rent is “possession,” then surely changing the locks on a home is as well.

2. A lender may take “possession” in violation of RCW 7.28.230 without permanently excluding all others.

To define the term “possession” in RCW 7.28.230, Nationstar focuses on section 7 of the Restatement (First) of Property (“section 7”). According to Nationstar, the Restatement requires “physical control over land and improvements to the exclusion of all others.” Nationstar Br. at 12; *see also id.* at 9. The word “all,” however, does not appear in section 7.

Section 7(a) defines a “possessory interest in land” as “a physical relation to the land of a kind which gives a certain degree of physical control over the land and an intent to so exercise such control as to exclude other members of society in general from any present occupation of the land.” *Restatement (First) of Prop.* § 7(a) (1936). The comments explain:

Possession of land ordinarily involves two elements. The first element is a physical relation to the land that to a certain extent is adapted to give control over the land and to exclude other persons therefrom.

...

The second element is an intent to exclude other persons in general from the physical occupation of the land.”

Id. § 7 cmt. b. The acts authorized by the Lockout Provision—and the actions that Nationstar actually takes—satisfy both elements of the section 7 definition.

The Lockout Provision authorizes the lender to enter a home and secure the property, which “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; App’x 6. Changing locks and boarding up a house are actions that at least to “a certain extent” give the lender control over the property and reflect an intent to “exclude other persons in general.”

First, when Nationstar drills out the homeowner’s locks and replaces them with its own (ECF No. 3-8 at ¶ 13) and then posts a sign stating that Nationstar will grant access only to authorized persons (ECF No. 3-8 at ¶ 16), it has taken a “certain degree of physical control over the land” and has to at least “a certain extent” excluded others. Section 7 does not define possession to require permanent occupancy.

Second, Nationstar intends to exclude “other persons in general” from delinquent borrowers’ homes. *See* ECF No. 3-8 at ¶ 5 (Nationstar secures abandoned properties in part to keep out vagrants). Nationstar’s intent is plain from the signs it posts in homes, stating that the home has

been “secured against unauthorized persons” and that no one “except the owner” or the owner’s representative will be permitted access. ECF No. 3-3 at ¶ 2(c), Ex 36-4. While Nationstar points to vagrants as a group of persons it intends to exclude, nothing in the Lockout Provision or Nationstar’s notices limits the exclusion of others to vagrants. Nationstar’s notices undeniably show Nationstar’s intent to exclude “other persons in general.”

Moreover, even if a lender is only in possession for purposes of RCW 7.28.230 if it acts with intent to exclude every other person in the world, including the homeowner, the certified record demonstrates that Nationstar’s actions satisfy that test. Nationstar admits that when a home has only one entry, it changes the locks on that entry. ECF 3-8 at ¶ 13. That is exactly what Nationstar did at Ms. Jordan’s home. ECF No. 3-5, Ex. A (Jordan Depo. at 88:1–89:25). Nationstar knowingly changes the locks on the only door to a house, excluding all others.

If the homeowner’s exclusion only lasts as long as it takes to call Nationstar and obtain an access code for Nationstar’s lockbox, the homeowner has still been deprived of her exclusive right of possession during that time. Neither RCW 7.28.230 nor any of the cases applying RCW 7.28.230 allow temporary interference with the borrower’s right to exclusive possession.

3. The Lockout Provision authorizes acts that are possessory under any definition.

An adverse possessor cannot obtain title to land legally owned by another without showing that his possession is exclusive. *See ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757–59, 774 P.2d 6 (1989) (finding purported adverse possessor who merely uses property that others also use does not have exclusive possession). Adverse possession law, just like RCW 7.28.230, requires a zero-sum game analysis of exclusive possession. If a single property has two users then neither user has exclusive possession of the property. In the context of adverse possession, interference with the adverse possessor’s exclusivity destroys a claim of adverse possession. In the context of RCW 7.28.230, interference with the homeowner’s exclusivity violates the law. *See Howard*, 62 Wn.2d at 885; *Norfor*, 19 Wash. at 452–53. Nationstar’s reliance on adverse possession law does not further its arguments.

4. The Lockout Provision is not a license.

Nationstar has retreated from its original position that the Lockout Provision is a license (*see* ECF No. 45), and now suggests that it is analogous to a license. Nationstar Br. at 14. The cornerstone of this quasi-license argument is that the Lockout Provision only provides a “limited permission” to enter the borrower’s property. *Id.* at 15. However, the Lockout Provision contains no limiting language. Once a

triggering event occurs, like a late loan payment, the lender can do “whatever” it deems necessary “including, but not limited to” changing locks, boarding up windows, and shutting off utilities.

The Lockout Provision also is not a license because a license “is revocable and nonassignable.” *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956).

Nationstar does not treat the Lockout Provision as revocable. Ms. Jordan demanded that Nationstar remove its locks and lockbox from her home. ECF No. 63-1, Ex 1. Nationstar did not respond or remove its locks or lockbox. ECF No. 63 ¶ 3.

Additionally, the Lockout Provision expressly authorizes assignment. ECF No. 72 at 5 n.2; ECF No. 3-5 at 63. Ms. Jordan initially obtained her loan from Homecomings Financial, Inc. ECF No. 3-5, Ex. 19. Without the assignment provision, Nationstar could not enforce the Lockout Provision. Because licenses are not assignable, *see Bakke*, 49 Wn.2d at 170, the Lockout Provision cannot be enforced as a license.⁴

⁴ Nationstar cites non-Washington cases that it claims stand for the proposition that a license coupled with an interest is assignable. Nationstar Br. at 14 n.3. Those cases rule that a license coupled with an interest is irrevocable, not that such a license is assignable.

5. The out-of-state cases Nationstar cites do not analyze a statute similar to RCW 7.28.230.

The out-of-state decisions that Nationstar says upheld lender actions under provisions like the Lockout Provision are of limited use. None of those cases involved a statute that is similar to RCW 7.28.230. Indeed, a number of jurisdictions from which Nationstar's cases come apply rules directly contrary to RCW 7.28.230. Both Georgia and New Hampshire follow the title theory of mortgages, not the lien theory of mortgages followed in Washington. *See e.g., Tacon v. Equity One, Inc.*, 280 Ga. App. 183 (2006); Ga. Code Ann. § 44-14-60 (describing conveyance of title to lender); *Case v. St. Mary's Bank*, 63 A.3d 1209, 1213 (N.H. 2013) ("New Hampshire is one of the fewer than ten jurisdictions that follow some form of the "title" theory of mortgages."). Similarly, Maryland enforces deeds of trust providing that once the lender gives the borrower notice of default, the borrower is no longer in possession of the property. *See McCray v. Specialized Loan Servicing*, No. RDB-12-02200, 2013 WL 1316341, at *4-5 (D. Md. Mar. 28, 2013).

Nationstar asks this Court to follow other jurisdictions that either do not have a statute similar to RCW 7.28.230 or have statutes that directly counter RCW 7.28.230. Nationstar's arguments should be rejected.

C. A lender cannot take control of a delinquent borrower's property without following the procedures set forth in RCW Chapter 7.60.

The Lockout Provision is Nationstar's only basis for entering and changing the locks on the homes of Ms. Jordan and members of the class. Without the Lockout Provision, a lender would have to obtain a receiver under RCW Chapter 7.60 ("Chapter 7.60") to take the kinds of actions the Lockout Provision authorizes. Accordingly, the issue is whether parties may contract around Washington's comprehensive statutory receivership scheme.

Washington's receivership statutes protect the interests of a lender after a borrower defaults on a home loan. Washington's statutory receivership scheme provides for appointment of a receiver during non-judicial foreclosure proceedings. RCW 7.60.025(a), (b), (e), (g), and (cc). Subsections (b) and (cc) of RCW 7.60.025 specifically discuss appointment of receivers in the non-judicial foreclosure context and subsection (cc) cross references the Deeds of Trust Act. The powers of a duly appointed custodial receiver include taking actions necessary to preserve the property and to pay expenses associated with preservation of the property. *See* RCW 7.60.060(1) (listing the powers and duties of a receiver). The powers of a custodial receiver therefore include the powers assigned to the lender under the Lockout Provision.

Given the comprehensive nature of the receivership statute, and its specific applicability in the non-judicial foreclosure context, this Court should hold that parties may not contract around the protections afforded to both debtors and creditors by the statute. *See, e.g., Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106–107, 297 P.3d 677 (2013) (rejecting the argument that deed of trust provisions may waive statutory protections for homeowners in the non-judicial foreclosure process); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 107–108, 285 P.3d 34 (2012) (same).

Nationstar wrongly asserts that limiting lenders seeking to take control of residential property after a default to the procedures in Chapter 7.60 is in derogation of the common law. *See, e.g., Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008) (“We decline to recognize the abrogation of a common law cause of action in the absence of either an explicit statement or clear evidence of the legislature’s intent to abrogate the common law.”). Statutory remedies are generally presumed to be in addition to common law remedies. *See Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 168 Wn. App. 111, 126, 279 P.3d 487 (2012). But Nationstar identifies no common law cause of action for which the remedy would be entering, maintaining, and securing the property of another. No such common-law remedy exists.

Nationstar is apparently referring to general principles of freedom of contract. The rules governing formation and enforcement of contracts, however, are not a “remedy” of the kind contemplated in the Court’s cases analyzing whether statutes provide exclusive remedies. And, parties cannot waive statutory protections by contract. This rule has long been applied in cases involving private parties’ attempts to create by contract private remedies that are not permitted under statute. For example, in *Roche Fruit & Produce Co. v. Vaught*, 143 Wash. 601, 604, 255 P. 953 (1927), the Court held that a lender could not bypass statutory requirements and foreclose a chattel mortgage by simply taking possession of the chattels, even where a contract provided for such a remedy. Similarly, in *Godfrey v. Hartford Casualty Insurance Co.*, 142 Wn.2d 885, 896, 16 P.3d 617 (2001), this Court held that arbitration is a statutory proceeding and the parties to an arbitration contract “are not free to craft a ‘common law’ arbitration alternative to the Act.” Just as parties may not contract for a common law arbitration alternative, they may not contract for a common law receivership alternative.

Nationstar’s lender-centric policy argument that appointment of a receiver is an expensive, time-consuming, and uncertain remedy fails in light of the express legislative intent and purpose behind the receivership statute: “The purpose of this act is to create a more comprehensive,

streamlined, and cost-effective procedure 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.

D. Public policy strongly disfavors enforcement of the possession provision.

The first place this Court should look for expression of this State’s public policy is its statutes. The Lockout Provision is unenforceable because it is “in violation of the policy of the law that a mortgage is a lien and not a conveyance and vests the right of possession in the mortgagor until after foreclosure.” *Clise*, 175 Wash. at 138; *Western Loan & Bldg.*, 162 Wash. at 41 (“The statute is also expressive of the public policy of the state vesting the right of possession in the mortgagor absolutely until a decree and sale.”). Because the unambiguous text of the Lockout Provision runs afoul of RCW 7.28.230, there is no need for further consideration of policy. If the Court considers them, however, Nationstar’s policy arguments should be rejected.

1. Vacant property ordinances and related studies do not support enforcement of the Lockout Provision.

Nationstar argues select municipal codes necessitate the Lockout Provision. Nationstar Br. at 22–23. Both the language of, and purpose behind, those codes belie Nationstar’s argument. First, many of the cited

codes do not apply to a property like Ms. Jordan's where the lender has not initiated foreclosure.⁵ Second, the codes' focus is on holding lenders and investors—not borrowers—accountable to the community during and after the completion of a foreclosure.⁶ And importantly, none of the codes cited by Nationstar call for locking out a borrower simply because the borrower is late on a loan payment—as permitted by the Lockout Provision.

Similarly, the reports upon which Nationstar relies demonstrate that the Lockout Provision not only fails to mitigate, but exacerbates, the harms done to communities identified by those reports. For example, Nationstar relies heavily on the “Woodstock Report.” *See* Nationstar Br. at 22. The Woodstock Report, however, examined “the extent to which *servicers* are walking away from foreclosures ... creating zombie

⁵ *See* Spokane Mun. Code § 17F.070.520(B)(1) (applies only to “a property that is vacant *and* (1) is under a current notice of default and/or notice of trustee's sale)(emphasis added); Cincinnati, OH Mun. Code § 1123-1 *et seq.* (applies only to “vacant, *foreclosed* properties”) (emphasis added); Ft. Lauderdale, FL Code of Ordinances § 18-12.5 (requiring lender compliance when a property is abandoned and “in foreclosure.”); Los Angeles, CA Mun. Code § 164.00 *et seq.* (“Foreclosure Registry Program” applies after the filing of a notice of default); Oakland, CA Mun. Code § 8.54.320 (requiring lender to maintain property *after* a formal notice of default is filed).

⁶ *See, e.g.,* <https://my.spokanecity.org/citycouncil/meetings/2014/10/20/legislative-meeting/> from 2:33:30-2:58:50 (Spokane City Councilwoman explaining that the “biggest problem” the ordinance intended to address is the unwillingness of banks to respond to city requests for information about and assistance with maintaining foreclosure properties.).

properties.” *Id.* at 2 (emphasis added). The Report defines a ‘zombie property’ as a property “for which a foreclosure case has been filed but not resolved for more than three years” and notes that servicers create zombie properties for their own strategic gain:

A servicer may choose to ‘walk away’ from a foreclosure and property if it determines that the costs of proceeding with the foreclosure and securing and maintaining the property until it can be sold to a third party will exceed its expected return from fees and sale of the property.

Id. at 3.

Such action creates a type of “limbo in which neither the current owner nor the foreclosing servicer has clear ownership and control of the property” with the result that borrowers are more inclined to vacate their homes, because they “incorrectly believe that the servicer has taken, or will take, title to the property and assume responsibility for taxes and other legal and financial obligations of ownership, *while the owner actually remains liable for all of those expenses.*” *Id.* at 3-4 (emphasis added).

The Lockout Provision exacerbates this problem. The Lockout Provision does not require that the lender actually start or proceed with a foreclosure, prolonging the “limbo” period described in the Woodstock Report. And unlike the commencement of a foreclosure, the Lockout Provision requires no notice to anyone (including the borrower) and

avoids creation of a record for municipalities to track. If merely receiving notice of a foreclosure action causes some borrowers to vacate their homes, then entering borrowers' homes and changing their locks further increases the likelihood that borrowers will vacate their property, just as Ms. Jordan and numerous other class members did.

To address these concerns, the Woodstock Report recommends *increased* servicer transparency, that is, that servicers be required to notify borrowers and local governments when they abandon foreclosure and coordinate with local governments to put foreclosure property back to productive use as soon as possible. *Id.* at 12. Notably absent from the Report's recommendations are mortgage terms approving lock changes on a borrower's already secure home, as Nationstar suggests.

2. Nationstar's policy argument is based on an assumption contradicted by the record.

Nationstar conflates mere borrower delinquency with a "substantial" risk of abandonment. Nationstar Br. at 21 (citing to ECF No. 3-8 at ¶ 5). Nationstar's conflation is premised not on judicial authority, external study, or first-hand experience, but on a single declaration from its own employee. *Id.* Nationstar's 'parade of horrors' justification for the Lockout Provision is not supported by the record. What is in the record are numerous declarations from class members establishing that despite a

default on their loan payments, borrowers *do* remain in their homes, *do* monitor their homes during the foreclosure process, *do* pay utilities, and *do* attempt to facilitate the sale of the home to a third party buyer.⁷

3. The Lockout Provision benefits lenders to the detriment of borrower and communities.

Because lenders already have the ability to protect and gain possession of their collateral pursuant to RCW chs. 7.60 and 61.24, the Lockout Provision materially benefits only lenders by making foreclosure more convenient and less expensive than the process provided by the Legislature. The Lockout Provision is not the innocuous, pro-borrower provision that Nationstar would have this Court believe.

Nationstar asserts that the Lockout Provision actually benefits borrowers by preserving the value of their homes and reducing the amount of income taxable as forgiven debt. But the IRS excludes cancelled debt income from qualified principal residences like Nationstar's borrowers' homes. IRS Pub. 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments (For Individuals)*, at 8. Rather than benefit Nationstar's borrowers, the Lockout Provision violates borrowers' long-

⁷ Renovating: ECF 63-1 at 34; Renting: ECF 63-1 at 36 and 63-2 at 66; Living In/Had Personal Property: ECF 63-1 at 31, 39, 44, 48, 54, and 63-2 at 61, 69, 93; Negotiating Short Sale or Deed in Lieu: ECF 63-1 at 25, 28, 42, 51, 56, 59 and 63-2 at 64 and 63-2 at 71, 75, 77, 80, 83, 87; Paying Utilities: ECF 63-1 at 258, 28, 31, 34, 42, 44, 48, 54, 56, 59 and 63-2 at 71, 77.

standing legal right to exclusive possession of their homes. *See* RCW 7.28.230, RCW ch. 7.60 *et. seq.*, and RCW ch. 61.24 *et. seq.*

The Lockout Provision also negatively impacts the local community by forestalling the foreclosure process and increasing the likelihood that borrowers will leave their homes before foreclosure. Local communities have adopted ordinances to address this lender-created “limbo,” which, as discussed above, exacerbates the risk that properties will suffer damage and remain unproductive.

Nationstar champions the Lockout Provision because it provides a more convenient and less expensive remedy than currently contemplated by Washington statutes. The Lockout Provision substitutes a lender’s definitions of ‘streamlined’ and ‘cost-efficient’ for the Legislature’s.

The Lockout Provision provides other advantages to lenders as well. As shown by the Woodstock Report, lenders may have economic incentives to delay foreclosure. Market conditions change. Neighborhoods go through booms and busts. Earnings reports vary.

The Lockout Provision is not just a tool for lenders, it is also a crutch. The Lockout Provision decreases the lender’s need to move through the foreclosure process efficiently, which can be done in as little as 190 days. *See* RCW ch. 61.24, *et. seq.* If a lender can obtain most of the incidences of possession through the use of the Lockout Provision,

then the only motivation to complete the foreclosure is to, at some point, convey title. This is why the Lockout Provision results in foreclosures that are not completed in a manner of months, but drag out for years as in the case of Ms. Jordan and others. During this protracted delay, the lender takes charge of the borrower's property without liability for taxes, insurance, homeowner association assessments, or—according to Nationstar—premises liability for the homes.

The Lockout Provision permits lenders to frustrate nearly every important public policy consideration presented by existing foreclosure and receivership statutes and pass the costs on to the borrowers. The sole policy furthered by the Lockout Provision is lenders' economic policy, at great cost to Washington borrowers and their communities and in violation of Washington law. Public policy strongly disfavors enforcement of the Lockout Provision.

III. CONCLUSION

For all of the foregoing reasons, Ms. Jordan respectfully requests that the Court answer no to the first certified question and yes to the second certified question.

RESPECTFULLY SUBMITTED AND DATED this 20th day of
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