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NO. 92081-8

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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'S RESPONSE TO THE BRIEFS OF AMICI CURIAE

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I. INTRODUCTION

The certified questions before the Court ask whether banks may contract for the power to enter a borrower's home, change the locks, board it up, and shut off the utilities, after the borrower either defaults on the mortgage or vacates the property. The briefs of all amici are directed solely at public policy implications of the questions before the Court. The public policy implications of this Court's answers to the certified questions are important. They are secondary, however, to the questions of whether: (1) the plain language of the lockout provision authorizes lender actions that interfere with a borrower's exclusive right of possession in violation of RCW 7.28.230; and (2) the lockout provision is inconsistent with Washington's comprehensive statutory receivership scheme. To the extent that the Court addresses public policy arguments, Ms. Jordan agrees with and urges the Court to adopt those of amicus curiae Northwest Consumer Law Center ("NWCLC").

Both the Federal Home Loan Mortgage Corporation ("Freddie Mac") and the City of Spokane, amici supporting Nationstar, offer policy arguments that are untethered from the record in this case. For example, Freddie Mac urges the Court to consider the Lockout Provision in light of its Single Family Seller/Servicing Guide. But the Guide is an agreement between lenders and Freddie Mac. The Guide is not part of a borrower's

deed of trust; it is not a part of the original loan transaction between the lender and borrower; it provides no recourse to a borrower when a lender fails to comply with the Guide; and it has no application to lenders that do not sell their loan to Freddie Mac. More importantly, the record demonstrates that Nationstar's policies are contrary to the Guide requirements that Freddie Mac highlights. The record also demonstrates that Nationstar failed to abide by the Guide's requirements in Ms. Jordan's case.

Similarly, the City of Spokane directs the Court to two cases where Spokane had to obtain a receiver in order to cure dangerous conditions at abandoned properties. In both cases, a lender's actions (or inactions) led to confusion over ownership of the property. In both cases, a lender had hired a property preservation company to maintain the property. In both cases, a lender and preservation company refused to take further action once the property's condition significantly deteriorated. If anything, the Spokane cases demonstrate that lenders take advantage of the Lockout Provision only when it serves their own interests, and without regard for the interests of local communities.

Importantly, amici supporting Nationstar assume that the Lockout Provision applies only to homes that have actually been *abandoned*. Neither Freddie Mac nor the City of Spokane advocate for the use of the

Lockout Provision when the borrower is merely in default or has vacated the property. Yet, the plain language of the Lockout Provision, and the admitted practices of Nationstar, are not limited to abandonment. Amici's arguments address neither the text of the Lockout Provision, nor Nationstar's practices under the Lockout Provision.

In response to the argument of amici that pre-foreclosure lockouts are not a real problem, Ms. Jordan respectfully submits a Memorandum from the Attorney General's Consumer Protection Office to Washington law enforcement officers providing suggested steps for managing the problems that may arise when lenders engage in self-help under provisions like the Lockout Provision.

The Lockout Provision is a form contract provision that runs afoul of the laws of this state. The Court should decline the invitation of Nationstar and its amici to ignore the plain language of the provision or read into the Lockout Provision limits that do not exist. The policy arguments offered by Nationstar's amici—like those offered by Nationstar itself—cannot save the Lockout Provision.

II. ARGUMENT

A. The Lockout Provision is a Uniform Covenant, but That Does Not Mean It Complies With Washington Law

The Lockout Provision is a uniform covenant included in Freddie Mac's uniform mortgage security instruments ("uniform instruments").

Freddie Mac defends the Lockout Provision by emphasizing: (1) the important role of Freddie Mac (and Fannie Mae) in increasing the availability of home loan financing to consumers; and (2) the view that many of the uniform covenants included in the uniform instruments are more favorable to consumers than those in other form consumer credit agreements. Freddie Mac Br. at 3, 5–6; *see also*, Julia Patterson Forrester, *Fannie Mae/Freddie Mac Unif. Mortg. Instruments: The Forgotten Benefit to Homeowners*, 72 Mo. L. Rev. 1077 (2007).

Ms. Jordan does not dispute either of those points. But they are of little aid in determining whether the Lockout Provision, a uniform covenant drafted by Freddie Mac and Fannie Mae, complies with Washington law. *See Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn.2d 560, 573 n.9, 276 P.3d 1277 (2012) (holding that form trustee’s deed recommended by Washington State Bar Association in Washington Real Property Deskbook did not comply with statute).

First, the present-day Lockout Provision is not one of the uniform covenants initially drafted in the early 1970’s with the input of consumer advocates like Ralph Nader. The initial form of the lock out provision was limited in its scope to repairs, did not provide for lock changes, and required prior notice to borrowers specifically stating the reason for any proposed inspection. *See* Gatens Decl., Ex. 1 (Raymond A. Jensen,

Mortgage Standardization: History of Interactions of Economic, Consumerism and Governmental Pressure, 7 Real Prop. Prob. & Tr. J. 397, 422 (Appendix A) (1972)):

7. **Protection of Lender's Security.** If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Lender's interest in the Property,...then Lender at Lender's option, upon notice to Borrower, may...take such actions as necessary to protect Lender's interests, including, but not limited to,...entry onto the property to make repairs.

8. **Inspection.** Lender may make or cause to be made reasonable entries upon and inspections of the Property, provided that Lender shall give Borrower notice prior to any such inspections specifying reasonable cause therefor related to Lender's interest in the Property.

The Lockout Provision vastly exceeds the original provision's limited scope and lacks the original provision's notice requirements. Nothing in the record suggests that the virtually unrestricted powers conferred to lenders by the Lockout Provision benefited from any input from consumer advocates or Congress like the original provision. Freddie Mac's reliance on the open discourse and consumer input that resulted in the original provision does not support its arguments relative to the present day Lockout Provision.

Second, the uniform instruments are not one-size-fits-all documents. Instead, they contain both uniform covenants “applicable in every state” and non-uniform covenants “that conform[] to the local law in each state. Forrester, *Unif. Mortg. Instruments*, 72 Mo. L. Rev. at 1083–84 (2007); *see also* Freddie Mac Authorized Changes for Security Instruments, *available* *at* <http://www.freddiemac.com/uniform/unifchanges.html>, click on “Authorized Changes to Uniform Instruments.” Among the “non-uniform covenants” are “provisions regarding acceleration, foreclosure, and the right of redemption, if any.” Forrester, *Unif. Mortg. Instruments*, 72 Mo. L. Rev. at 1084 n.45. If this Court finds the Lockout Provision unenforceable, nothing precludes Freddie Mac and Fannie Mae from adopting more limited “non-uniform covenants” for use in Washington. Freddie Mac did just that after this Court’s decision in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). *See, e.g.*, www.freddiemac.com/uniform/doc/2014news.pdf.

B. Freddie Mac’s Loan Servicing Guide Does Not Cabin the Broad Terms of the Lockout Provision

Like Nationstar, Freddie Mac distances itself from the plain language of the Lockout Provision. Freddie Mac argues that the

requirements of its Single-Family Seller/Servicer Guide¹ (“Guide”) “protect against” servicers barging in to owner-occupied homes. Freddie Mac Br. at 7–11. This argument should be rejected for at least two reasons. First, homeowners cannot hold mortgage servicers accountable for failure to comply with the Guide. Second, the record in this case demonstrates that Nationstar’s policies do not meet the requirements of the Guide.

If a servicer fails to comply with the Guide, there is nothing a homeowner can do about it. The Guide contains two identical sections entitled “Legal Effect of the Single-Family Seller/Servicer Guide.” Guide. They state: “The Guide governs the business relationship between a Seller/Servicer and Freddie Mac relating to the sale and Servicing of Mortgages.” Guide § 50.2(a)(1). The Guide is a contract between Freddie Mac and its loan servicers. Homeowners have no remedy for a servicer’s failure to comply with the Guide. *See, e.g., Deerman v. Fed. Home Loan Mortg. Corp.*, 955 F. Supp. 1393, 1404–05 (D. Ala. 1997) (“[T]he Guide is a contract between [Freddie Mac] and each entity that sells mortgages to or services mortgages for [Freddie Mac]. Guide §§ 1.2 and 50.2. It is not a contract to which any of the borrowers are parties, and no provision in

¹ Available at <http://www.freddiemac.com/singlefamily/guide/>. Click on “AllRegs” under the “Access the Guide” heading.

the Guide indicates any intent on the part of [Freddie Mac] that third parties have a right to enforce it.”); *Wells Fargo Bank, N.A. v. Sinott*, 2009 WL 3157380, at *6–7, 10–12 (D. Vt. 2009) (holding that homeowner could not enforce the Guide).

Relatedly, the Guide has no effect at all unless and until Freddie Mac purchases a particular mortgage, which it may or may not do. *See* Freddie Mac Br. at 3–4 (explaining the role of Freddie Mac and the servicers with which it contracts). The Lockout Provision is likely to appear in mortgages not purchased by Freddie Mac. *See, e.g.,* Forrester, *Unif. Mortg. Instruments*, 72 Mo. L. Rev. at 1077. The Guide provides absolutely no protection to those borrowers.

Nationstar does not comply with some of the basic Guide requirements that Freddie Mac highlights. Freddie Mac highlights a provision requiring servicers to “make every effort” to contact “the person actually responsible for repaying the loan—and ascertain whether the borrower has vacated or plans to vacate the property and explore foreclosure alternatives.” Freddie Mac Br. at 8 (citing Guide § 64.4). The Nationstar Vice President responsible for its Property Preservation Group signed a declaration filed in this case stating that: “[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.” ECF No. 3-8 at ¶ 20.

Freddie Mac also directs the Court to the Guide’s definition of abandoned property:

An abandoned property is:

1. A property to which the owner has voluntarily and intentionally relinquished ownership, claim and control, or
2. As otherwise defined under local laws. Factors evidencing abandonment include vacancy, waste, deterioration and lack of utilities.

Guide § 65.35; *see also* Freddie Mac Br. at 8 n.2. Under the Guide, “vacancy” is a one of a series of factors evidencing abandonment. Nationstar, however, takes action under the Lockout Provision solely upon a determination that a property is “vacant.” ECF No. 3-8 ¶¶ 5–11 (Nationstar’s Vice President explaining that its inspectors determine “occupancy status” and that a “vacant” designation triggers a lock change).

The property inspection report for Ms. Jordan’s home provided by Nationstar’s vendor shows that none of the other factors in the Guide’s definition of abandoned property (waste, deterioration or lack of utilities) were satisfied. The report found Ms. Jordan’s home “vacant secure,” described the property condition as “good,” and found that both the electricity and water were “on.” ECF No. 3-8, Ex. 13 at 1. Those

conclusions are confirmed by the three photographs included in the report, which show a well-maintained home with a clean doormat outside the front door. ECF No. 3-8, Ex. 13 at 2.

The Guide's definition also incorporates the definition of abandoned property under "local laws." In the foreclosure context, Washington law provides:

Lack of occupancy by, or by authority of, the mortgagor or his or her successor in interest for a continuous period of six months or more prior to the date of the decree of foreclosure, coupled with failure to make payment upon the mortgage obligation within the said six month period, will be prima facie evidence of abandonment.

RCW 61.12.093. A single exterior inspection indicating that a property is not occupied does not meet this standard.

Despite the definition of abandonment in the Guide, "Nationstar does not specifically instruct its vendors how to determine a property's occupancy status." ECF No. 3-8 at ¶ 7.

Freddie Mac also states that the Guide sets forth basic security and maintenance procedures that servicers may perform, such as "securing locks...." Freddie Mac Br. at 9. However, the Lockout Provision and Nationstar's standard practices are not limited to "securing" un-secured locks or doors. Rather, they expressly involve "changing locks" by forcibly removing the borrower's existing locks, and installing their own lock and lock box for the purpose of providing "future access" to the

borrower's home. ECF No. 3-8 at ¶11. These actions are wholly inconsistent with the Guide and Freddie Mac's arguments in support of the Guide.

In sum, Freddie Mac's assertion that a lender's actions under the Lockout Provision are cabined by its servicing Guide are contradicted by the record in this case, including the declaration of Nationstar's Vice President responsible for its Property Preservation Group.

C. The Spokane Cases Show that Lenders Shirk Their Responsibilities to Communities Despite Mortgage Instruments Granting Lenders the Power to Enter and Maintain Abandoned Properties

The City of Spokane argues that lenders need the powers granted to them under the Lockout Provision because otherwise local communities and tax payers bear the costs associated with abandoned properties. But the two cases discussed by Spokane demonstrate that when properties are truly abandoned and suffering waste, lenders refuse to take responsibility for them, despite broad powers under the relevant deed of trust.²

The first case Spokane discusses is the "Joseph Property." *See* Gatens Decl., Ex. 2 (*In Re the Real Property Located at: 1314 E. Joseph Ave., Spokane, WA 99207*, No. 15-2-03492-2 (Spokane Super. Ct.

² Ms. Jordan obtained copies of the relevant deeds of trust, both of which contained broad entry and possession provisions. *See* Gatens Decl., Exs. 3 and 5.

Aug. 27, 2015)) (“Joseph Petition”). That case is entirely distinguishable from Ms. Jordan’s. According to Spokane’s petition for appointment of receiver, CitiMortgage, Inc. foreclosed on the property after the owner died intestate in 2013. Joseph Petition at ¶ 3.2. Then, CitiMortgage simply failed to complete a sale and take ownership of the property for over two years despite multiple orders of sale permitting it to do so. *Id.*

Attached to Spokane’s petition for appointment of a receiver are copies of email exchanges between Spokane’s Code Enforcement office and CitiMortgage. Joseph Petition, Ex. C. CitiMortgage flatly refused to take action, apparently taking the position that the property was “occupied” because a squatter was living in the property. *Id.* In addition, Spokane’s Office of Neighborhood Services Code Enforcement found that the property had previously been boarded up by a property preservation company, whose stickers remained on the windows of the house. Joseph Petition, Ex. D (Notice of Summary Hearing, Finding L).

Key facts related to the “Belt Property” are similar. In that case, the lender wrongfully foreclosed on the property in violation of a bankruptcy stay. *See* Gatens Decl., Ex. 4 (*In Re the Real Property Located at 5018 N. Belt St., Spokane, WA 99205*, No. 15-2-03848-1 (Spokane Super. Ct. Sept. 16, 2015)) (“Belt Petition” ¶ 3.6). As a result, it became unclear who owned the property, and the property was abandoned

and allowed to deteriorate over a period of years. Belt Petition ¶¶ 3.6, 3.7, 4.2. Nonetheless, a bank reportedly hired a property preservation company to “perform work at the property.” Belt Petition ¶¶ 3.9–10. Both the preservation company and the bank, however, refused to assist the City in removing trespassers from the property or otherwise curing the dangerous conditions at the property. *Id.* ¶¶ 3.8–11.

Lenders took initial “preservation” measures at both the Joseph and Belt properties, but then allowed the properties to deteriorate to such an unsafe and unsanitary condition that the City was forced to step in. City of Spokane Br. at 4.

The factual scenarios surrounding the Joseph and Belt properties demonstrate the logical disconnect of Spokane’s arguments in favor of the Lockout Provision. Both the Joseph and Belt properties had provisions that purported to allow the lenders to take possession of those properties and in both cases the lender was on notice to attend to the properties, but refused to do so. *Id.*

It was not the absence of a provision like the Lockout Provision that caused the Joseph and Belt scenarios. It was the lender’s initiation of foreclosure and failure to timely conclude the foreclosure, coupled with a complete lack of responsiveness to the City, that created the circumstances underlying the Joseph and Belt properties. This pattern is what leads to

so-called “zombie properties,” not a lack of pre-foreclosure possession rights in favor of the lender. *See, e.g.,* Woodstock Inst., *Unresolved Foreclosures: Patterns of Zombie Properties in Cook Cnty.* (Jan. 2014), available at <http://www.woodstockinst.org/research/unresolved-foreclosures-patterns-zombie-properties-cook-county>.

Further, Spokane’s conclusion that invalidating the Lockout Provision will necessarily lead to more lenders abandoning properties in which they hold a beneficial interest is incorrect. If lenders lose the crutch currently provided by the Lockout Provision, they will likely take other steps to preserve their security. Those steps may include serious attempts to find solutions that allow borrowers in default to remain in their homes and continue making mortgage payments, or completing the non-judicial foreclosure process for truly abandoned properties.

Similarly, municipalities like Spokane might revise their ordinances to require lenders to obtain a receiver for abandoned properties on which a lender has initiated foreclosure and which are subject to waste and deterioration. Doing so would shift the burden associated with abandoned homes off of municipalities and onto the lenders in control of the foreclosure process.

As the Belt and Joseph properties show, allowing lenders unilateral access to homes prior to foreclosure does not prevent property

deterioration or blight. Lender accountability and timely prosecution of foreclosures once they are started prevent deterioration and blight.

D. The Amici Briefs are Limited to Properties that are Actually Abandoned

Both Freddie Mac and the City of Spokane focus exclusively on use of the Lockout Provision when homes have actually been *abandoned*. While amici are incorrect that abandonment gives lenders a right to possession prior to foreclosure (*see Western Loan & Bldg. Co. v. Mifflin*, 62 Wn. 33, 297 P. 743 (1931)), the Lockout Provision is not limited to abandoned homes. The plain language of the provision Freddie Mac drafted is much broader. The Lockout Provision expressly authorizes lenders to act when the borrower has defaulted, filed for bankruptcy protection, died, *or* abandoned the property. *See* ECF No. 72 at 5; ECF No. 3-56 at 61.

If, as Freddie Mac argues, it is only “reasonable and appropriate” for a lender to act under the Lockout Provision in the case of abandonment, then why is the provision written so much more broadly? Amici’s arguments do not match either the plain language of the Lockout Provision or Nationstar’s acknowledged standard practices.

E. Lender Actions Purportedly Authorized by the Lockout Provision Confuse Homeowners

Contrary to the arguments of Nationstar's amici, lender misuse of the Lockout Provision is a real problem. *Compare* NWCLC Br. at 5–8 (documenting the problems with pre-foreclosure lockouts) *with* City of Spokane Br. at 2 (arguing that Ms. Jordan asks the Court to address a problem that “does not exist”). Indeed, the Attorney General's Consumer Protection Division recently wrote a memorandum to Washington State Law Enforcement Officials (“Memorandum”) providing “background information and suggestions for best practices” for responding to calls from borrowers or their neighbors about lock changes and other servicer self-help during the foreclosure process. *See* Gatens Decl., Ex. 6. That the Attorney General's Office was prompted to write the Memorandum at all demonstrates that lender self-help does lead to problems on the ground and may “exacerbate” the difficulties borrowers face when they lose their homes. *Id.* at 1.

The Attorney General's Memorandum explains that mortgage documents may permit lenders to inspect a property in default, but that such inspections “should not involve the breaking or changing of locks, or the removal of personal property.” *Id.* at 2. It further explains that if the lender determines the property has been abandoned, a lender may take

certain measures to preserve the property. *Id.* Those measures should not include changing all of the locks or removing the homeowner's personal property. *Id.* The Attorney General's Memorandum also recognizes that "the lender (or its agent) may make a mistake in concluding that the property has been abandoned, and lock the homeowner out." *Id.* Finally, the Memorandum provides a list of suggested steps for officers called to a property, including:

If the foreclosure sale has *not* yet occurred, ask (a) to see the document giving the lender/agent the right to secure the property, (b) for the reasons the lender/agent concluded that the property is abandoned or vacated, (c) what efforts have been made to contact the borrower, (d) to confirm that personal property remaining in the house will not be removed or disposed of at that time, and (e) to confirm that the borrower will still have access (i.e., not all locks will be changed) in order to claim the personal property.

Id. at 3 (emphasis original).

The Attorney General's list of questions indicates that lenders do conclude that a property is abandoned or vacant when it is not, fail to contact the homeowner, remove personal property from homes prior to foreclosure, and lock out homeowners. Indeed, members of the certified class experienced all of those things. NWCLC Br. at 3, 5-6.

III. CONCLUSION

The Lockout Provision confers on lenders the ability to interfere with the borrower's exclusive right of possession prior to foreclosure. It is

unenforceable because it conflicts with RCW 7.28.230 and is an impermissible attempt to circumvent Washington's statutory receivership scheme. The policy arguments offered by amici Freddie Mac and the City of Spokane cannot and do not change that result. 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 7th day of
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of January, 2016.

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3 LAURA ZAMORA JORDAN, as her
4 separate estate, and on behalf of others
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7 vs.

8 NATIONSTAR MORTGAGE, LLC, a
9 Delaware Limited liability company,

10 Defendant.

) NO. 92081-8
)
) DECLARATION OF CLAY M. GATENS
) IN SUPPORT OF PLAINTIFF'S
) RESPONSE TO THE BRIEFS OF AMICI
) CURIAE
)
)
)

11 CLAY M. GATENS, pursuant to RCW 9A.72.085, declares:

12 1. I am one of the attorneys for the Plaintiff in the above matter and I base this
13 declaration upon my own personal knowledge and am competent to testify to the matters
14 asserted herein.

15 2. Attached hereto as Exhibit 1 is a true and correct copy of Raymond A.
16 Jensen, *Mortgage Standardization: History of Interactions of Economic, Consumerism and
Governmental Pressure*, 7 Real Prop. Prob. & Tr. J. 397 (1972).

DECLARATION OF CLAY M. GATENS
IN SUPPORT OF PLAINTIFF'S RESPONSE
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DECLARATION OF CLAY M. GATENS
IN SUPPORT OF AMICUS BRIEF OF NORTHWEST
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11 I certify under penalty of perjury of the laws of the State of Washington that the
12 foregoing is true and correct.

13 DATED this 7th day of January, 2016.

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22 DECLARATION OF CLAY M. GATENS
IN SUPPORT OF AMICUS BRIEF OF NORTHWEST
CONSUMER LAW CENTER

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495287

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Subject: No. 92081-8 Laura Zamora v. Nationstar Mortgage, LLC: Plaintiff's Response to the Briefs of Amici Curiae

Greetings,

Attached for filing with the Court are the following:

1. Plaintiff's Response to the Briefs of the Amici Curiae; and
2. Declaration Clay M. Gatens in Support Plaintiff's Response to the Briefs of Amici Curiae (without exhibits).

Due to the exhibits exceeding the Court's email filing limitations, the exhibits to Mr. Gatens' declaration will follow by U.S. mail.

Thank you for your attention.

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