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SUPREME COURT
OF THE STATE OF WASHINGTON

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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.

**DEFENDANT NATIONSTAR MORTGAGE LLC'S
ANSWERING BRIEF**

John A. Knox, WSBA #12707
WILLIAMS, KASTNER & GIBBS, PLLC
601 Union Street
Suite 4100
Seattle, WA 98101-2380
Telephone: (206) 628-6600
Facsimile: (206) 628-6611

Jan T. Chilton (*pro hac vice*)
Mary Kate Sullivan (*pro hac vice*)
Erik Kemp (*pro hac vice pending*)
Andrew W. Noble (*pro hac vice*)
SEVERSON & WERSON, PC
One Embarcadero Center,
Suite 2600
San Francisco, CA 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439

Attorneys for Defendant Nationstar Mortgage LLC

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I.

INTRODUCTION

The district court certified, and this Court accepted, two questions concerning a standard deed of trust's "Entry Provisions" which permit the lender to enter, maintain, and secure a defaulted borrower's apparently vacated property.

The first certified question asks whether such a pre-default agreement allowing a lender to "enter, maintain, and secure" a defaulted borrower's apparently vacant property is enforceable under Washington law. That question must be answered in the affirmative.

Under Washington law, contracts are enforceable unless they conflict with a clear contrary statute or public policy. No statute or public policy forbids a pre-default agreement allowing a lender to enter, maintain, and secure a defaulted borrower's apparently vacant property.

RCW 7.28.230, the statute on which Jordan stakes her contrary argument, merely codifies Washington's lien theory of mortgages. It bars a lender from taking "possession" before foreclosure, but does not forbid consensual entries by the lender for limited purposes that are not inconsistent with the borrower's continued exercise of exclusive possession. Limited, temporary consensual entries are not "possession" within RCW 7.28.230's meaning.

Decisions from other states have uniformly enforced the Entry Provisions even though many other states, like Washington, adhere to a lien theory of mortgages similar to the rule codified in RCW 7.28.230.

Far from prohibiting the Entry Provisions, public policy strongly supports their enforcement as the property preservation measures the provisions authorize are essential to protect lenders, borrowers, neighbors, and the public welfare from the ills that vacant housing causes.

Jordan does not and cannot challenge these points. So instead of answering the first certified question, she creates and then destroys a strawman, claiming that contrary to the district court's interpretation, the Entry Provisions are really a "lock-out" clause allowing the lender to lock the borrower out of the house immediately upon default.

Jordan's strawman argument is irrelevant. The district court did not ask and this Court did not agree to answer whether a "lock-out" clause was enforceable. Jordan's argument is also based on an incorrect interpretation of her deed of trust that conflicts not only with the district court's construction of that agreement, but also with the undisputed facts regarding Nationstar's normal practices in securing and maintaining properties and its actions with respect to Jordan in particular. Those undisputed facts and the contract as construed by the district court provide the context for this Court's review, not Jordan's contrary hypothetical universe.

The district court's second question is whether Washington's receivership statute, RCW ch. 7.60, provides the exclusive remedy for a lender to obtain access to an apparently vacant property before foreclosure absent the borrower's post-default consent.

That question should be answered in the negative. The statute expressly provides that a receivership is an additional remedy to be employed only if the court determines "other available remedies" are inadequate. RCW 7.60.025(1). A receivership is a remedy of last resort, not the first and only option.

At most, Jordan shows that in consolidating existing statutes and case law into a single chapter, the legislature intended RCW ch. 7.60 to be the exclusive means of obtaining a receiver. Neither the language of the statute nor any other source of legislative intent supports Jordan's argument that the legislature had the far more radical goal of making RCW ch. 7.60 the exclusive means by which a lender may enter a defaulted borrower's property before foreclosure.

Appointment of a receiver is also not a practical alternative to enforcement of the Entry Provisions since, as Jordan emphasizes, neither lenders like Nationstar nor their vendors may be appointed as receivers for any of the thousands of apparently vacant properties across the state. Also, if a lender cannot set foot on an abandoned property without a

receiver, many problems visible only from a property's interior, such as plumbing requiring winterization, will be left undetected. Jordan suggests no reason why the legislature would have required lenders to resort to the expensive, time-consuming and inadequate remedy of appointing a receiver to achieve a result that may be readily obtained simply by enforcing lenders and borrowers' existing contractual agreements.

For these reasons and others detailed below, the Court should answer the district court's first certified question in the affirmative, and the second question in the negative.

II.

CERTIFIED QUESTIONS

The district court certified the following questions of law:

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?

ECF No. 72 at 9.

III.

STATEMENT OF THE CASE

A. **Nationstar's Policies and Procedures in Entering, Securing, and Maintaining Encumbered Properties**

Most borrowers' home loans are secured by deeds of trust that contain the Entry Provisions or similar provisions allowing the lender to enter, maintain, and secure the property after the borrower defaults and apparently vacates the property.¹

Following Fannie Mae, Freddie Mac and other investor guidelines, Nationstar normally hires a vendor to visually inspect the property securing a loan that is at least 45 days delinquent. ECF No. 3-8 at ¶3. A delinquency of 45 days or more without a loan repayment plan or other measure in place to bring the loan current often signifies that the borrower has vacated the property, putting it at increased risk of damage or maintenance problems affecting its value. *Id.* at ¶5. The inspection is external only. The vendor does not attempt to enter the property unless it is obviously not secured. *Id.* at ¶4.

If Nationstar's vendor determines that a property is occupied, Nationstar takes no further steps other than ordering additional external in-

¹ ECF No. 3-3 at ¶8; *see also* HUD Handbook 4155.2 (Mar. 24, 2011), p. 12-A-5; https://www.fanniemae.com/content/legal_form/3048w.doc.

spections to confirm that the property is still occupied if the loan remains in default. *Id.* at ¶9. However, if the inspection reveals the property is vacant, Nationstar hires a vendor to enter, rekey, and inspect the property. *Id.* at ¶¶10, 11. Whenever possible, the vendor enters and rekeys a rear or side door, installing a lockbox for the lender's future access, while allowing the borrower access through the untouched front entry. *Id.* at ¶13. Even in unusual cases where the vendor is unable to rekey a secondary door and rekeys the front door instead, the key to the rekeyed front door is made available to the borrower or her representative so she can re-enter the property.

Once a property is determined to be vacant, Nationstar's vendors perform maintenance and yard care as needed to protect the property. ECF No. 3-8 at ¶17.

B. Facts Underlying Jordan's Claim

In 2007, Jordan purchased a home in Wenatchee, Washington, obtaining a home loan from Homecomings Financial LLC. ECF No. 3-5 at Ex. 19. To secure the loan, Jordan signed a deed of trust encumbering the property. *Id.* The deed of trust provides that if the borrower abandons the property, the lender or its agents may do "whatever is reasonable and appropriate to protect Lender's interest in the [encumbered] Property ... including ... securing ... the Property [which includes] 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.” *Id.*

Homecomings sold Jordan’s loan to Fannie Mae. In December 2008, Fannie Mae hired Nationstar to service the loan. ECF No. 3-3 at ¶3 & Ex. 51 at p. N 0541. Jordan made her last loan payment on the loan in December 2010. *Id.* at ¶7. Jordan has been in default since January 2011. *Id.*

In March 2011, a vendor, hired by Nationstar, performed an exterior inspection of Jordan’s property and determined that it was vacant. ECF No. 3-8 at ¶10 & Ex. 13. Shortly thereafter, Nationstar hired another vendor to enter Jordan’s property, change the lock on one door and post a sign, visible from outside, stating the reason for the lock change and giving the owner a telephone number to call to regain access through the rekeyed door. *Id.* at ¶¶11, 12, 16. Jordan’s property only had two doors: the front door and a sliding glass door in the backyard. The lock on the sliding glass door could not be rekeyed, so the vendor entered through the front door and rekeyed that door instead. ECF No. 3-5, Ex. C [46:18-47:11], ECF No. 3-8 at ¶13.

Jordan called the number on the sign posted on her door, obtained the key, and re-entered the house. ECF No. 3-5 at Ex. A (Jordan Depo.,

88:3-12, 104:13-15). Later, Jordan removed her possessions from the house and moved out. *Id.* at 105:10-23. Since then, Nationstar's vendors have winterized the property and maintained its lawn. ECF No. 3-8 at ¶18.

C. Pertinent Procedural History

Jordan filed this case in Chelan County Superior Court. After the Superior Court certified a class (*see* ECF No. 5-12), Nationstar removed the case to federal court.

Nationstar moved for partial summary judgment before the district court. ECF No. 45. Jordan filed written opposition (*see* ECF No. 57), and Nationstar replied. ECF No. 60.

Jordan then filed her own motion for partial summary judgment. ECF No. 61. Nationstar filed written opposition (*see* ECF No. 66), and Jordan replied. ECF No. 68.

After a hearing on both motions, the district court entered an order granting Nationstar's motion in part. ECF No. 71. The district court deferred consideration of the remainder of the cross-motions pending this Court's decision on the two certified issues stated above. ECF No. 72.

IV.

STANDARD OF REVIEW

“Certified questions are matters of law we review de novo.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 420, 334 P.3d 529, 533 (2014). “We consider the legal issues not in the abstract but based on the certified record provided by the federal court.” *Gray v. Suttell & Associates*, 181 Wn.2d 329, 337, 334 P.3d 14, 18 (2014).

V.

A PRE-DEFAULT CLAUSE PERMITTING A LENDER TO ENTER, MAINTAIN, AND SECURE AN APPARENTLY VACANT PROPERTY BEFORE FORECLOSURE IS ENFORCEABLE

Washington recognizes the principle of freedom of contract. Contracts are enforceable as written unless prohibited by statute, condemned by judicial decision, or contrary to the public morals. *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 662, 999 P.2d 29, 30 (2000); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139, 1142 (1984). A standard deed of trust’s Entry Provisions do not conflict with any statute, judicial decision, or public policy and hence are enforceable.

RCW 7.28.230 only prohibits a lender from taking “possession” of a property before foreclosure. Possession means physical occupation of land to the exclusion of *all* others. The Entry Provisions do not permit “possession,” but rather only entry for the limited purpose of maintaining

and securing the property after the borrower has defaulted and apparently left the property vacant. Hence, the Entry Provisions are fully enforceable under Washington law.

A. Background on Washington's Lien Theory

To understand the context in which the first certified question is presented, some background on Washington's lien theory of mortgages is necessary.

In some states, like Massachusetts, a mortgage or deed of trust is held to convey title in the property to the mortgagee or trustee. *See Murphy v. Charlestown Sav. Bank*, 380 Mass. 738, 747, 405 N.E.2d 954, 959 (1980); Rest.3d Property: Mortgages, §4.1, cmt. a. In a title-theory state, the mortgagee or trustee may recover possession of the premises after default and before foreclosure. *See Joyner v. Lenox Sav. Bank*, 322 Mass. 46, 52, 76 N.E.2d 169, 173 (1947); Rest.3d Property: Mortgages, § 4.1, cmt. a, p. 186.

By contrast, Washington and many other states adhere to the lien theory of mortgages under which a mortgage or deed of trust is held to create a lien only. *Western Loan & Bldg. Co. v. Mifflin*, 62 Wash. 33, 39, 42, 297 P. 743, 746-47 (1931). In lien-theory states, the mortgagee or beneficiary may obtain possession of the property only after completing a foreclosure. *Id.*; Rest.3d Property: Mortgages, § 4.1, cmt. b.

RCW 7.28.230(1) codifies Washington’s lien-theory rule, stating: “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 ...” This statute “ ‘gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure.’ ” *Western Loan & Bldg.*, 62 Wash. at 41, 297 P. at 747, *quoting Teal v. Walker*, 111 U.S. 242, 241 (1884). A borrower retains the right to possession even after she abandons the property. *Howard v. Edgren*, 62 Wn.2d 884, 885, 385 P.2d 41, 42 (1963).

The borrower’s right to possession of the property through foreclosure cannot be overcome by a contrary provision in the mortgage or deed of trust. Such a provision is deemed unenforceable as against public policy. *Western Loan & Bldg.*, 62 Wash. at 42, 297 P. at 747; *Teal*, 111 U.S. at 252.

B. Possession Means Exclusive Use or Occupancy

The parties agree that Washington law prohibits a secured lender from recovering “possession” of the encumbered property before comple-

tion of foreclosure. *See* POB 12; ECF No. 45 at 7; ECF No. 57 at 2. But they disagree entirely about what “possession” means for these purposes.²

The proper definition for purposes of RCW 7.28.230 and Washington’s lien theory of deeds of trust is the real property law definition: Physical control over land and improvements to the exclusion of all others. *See* Rest. Property, § 7. RCW 7.28.230 and the lien theory are intended to protect borrowers from being involuntarily ousted from the use and occupancy of their properties until completion of foreclosure. *Western Loan & Bldg. Co.*, 62 Wash. at 40-44; Rest.3d Property: Mortgages, § 4.1, cmt. 2. That is, the lender may not seize physical control of the property and exclude the borrower before completing foreclosure.

Adverse possession cases provide a useful analogy and a similar definition of “possession.” “Possession ... is established only if it is of such a character as a true owner would make considering the nature and location of the land in question.” *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 759, 774 P.2d 6, 9 (1989). The essence of possession is dominion over the property to the exclusion of others. *Wood v. Nelson*, 57 Wn.2d

² “The word ‘possession’ has several radically different meanings.” *State v. Strutt*, 4 Conn. Cir. Ct. 501, 505, 236 A.2d 357, 360 (1967); *accord Nevin v. Louisville Trust Co.*, 258 Ky. 187, 79 S.W.2d 688, 688 (1935) (“possession” “is susceptible of different meanings”); Black’s Law Dict. (10th ed. 2014) “possession.”

539, 540, 358 P.2d 312, 313 (1961). Shared use or occupancy is not “possession.” *ITT Rayonier, Inc.*, 112 Wn.2d at 758, 774 P.2d at 9. Merely cutting grass or weeds, running livestock on the property, or paying property taxes does not suffice. *Wood*, 57 Wn.2d at 540, 358 P.2d at 313; *Murray v. Bousquet*, 154 Wash. 42, 50-51, 280 P. 935, 938 (1929); *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 474, 244 P.2d 273, 277 (1952).

Since possession requires control over property to the exclusion of all others, entry alone does not suffice. License cases are analogous and demonstrate that aspect of the rule. An owner may retain exclusive possession of his or her property while licensing another to enter the property for one or more specific purposes.

“A license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass.” Unlike an easement, a license ... does not exclude possession by the owner of the servient estate.

Showalter v. City of Cheney, 118 Wn. App. 543, 548, 76 P.3d 782, 784-85 (2003) (quoting *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949)).

Familiar examples of short-term licenses include an admission ticket to an amusement park or other public attraction, or the right to use a

golf course for which a green fee is paid. *See, e.g., In re Premier Golf Props., LP*, 477 B.R. 767, 775-76 (9th Cir. BAP 2012); *Meisner v. Detroit, B.I. & W. Ferry Co.*, 154 Mich. 545, 548-49, 118 N.W. 14, 15 (1908). Timber sale contracts typically entail a longer term license to enter the property to cut and remove trees. *See, e.g., Kalnoski v. Carlisle Lumber Co.*, 17 Wn.2d 662, 666, 137 P.2d 109, 111 (1943). But a license can authorize entry onto the licensor's property "to do any of an almost infinite variety of [other] things" as well. 3 Tiffany on Real Property, § 829 (3d ed. 2013); James W. Ely, Jr. & Jon W. Bruce, *The Law of Easements & Licenses in Land*, § 11:1 (2014).

Though the Entry Provisions may differ in some respects from licenses traditionally permitted under Washington law,³ license law shows

³ Jordan argued before the district court that the Entry Provisions could not constitute a license in favor of Nationstar because licenses are not assignable. ECF No. 61, at 8-10. While Jordan may be correct that a "bare" license is revocable and non-assignable, a license coupled with an interest is assignable. *See, e.g., Richardson v. Franc*, 233 Cal. App. 4th 744, 752, 182 Cal. Rptr. 3d 853, 859 (2015); *Dalliance Real Estate, Inc. v. Covert*, 1 N.E.3d 850, 856 (Ohio App. 2013); *Blackburn v. Lefebvre*, 976 So. 2d 482, 492-95 (Ala. Civ. App. 2007); *In re Hoskins*, 405 B.R. 576, 582 (Bankr. N.D.W. Va. 2009); *Tatum v. Dance*, 605 So. 2d 110, 112 (Fla. App. 1992) approved, 629 So. 2d 127 (Fla. 1993). Even were Jordan's contrary argument correct, it is immaterial whether the Entry Provisions fall within the technical definition of a license since licenses are merely an illustration of the fact that a property owner may grant limited permission to others to enter the property for specific purposes without surrendering possession or ownership.

that granting someone limited permission to enter land is not inconsistent with the owner's exclusive possession. In Washington, as elsewhere, there is a well-recognized distinction between entry and possession.

In accord with these rules, Washington law plainly allows a borrower to consent to others' entry onto property to maintain and secure it. Otherwise, yard maintenance personnel, plumbers, and locksmiths would be legally unable to cross the property line. Moreover, consent to such entries may be given in advance, as by an absent owner to a property manager or regular yard maintenance service. Each of these agreements is plainly enforceable. There is no reason why an agreement permitting the lender to perform the same functions in a defaulted borrower's absence should be unenforceable.

Changing course from her argument before the district court, Jordan now agrees the Court should look to the real property definition of possession for purposes of this case. *See* POB 16-17, citing Rest. Property, § 7. But she insists that entering a property temporarily for a limited purpose deprives the borrower of her right to possession. *See id.*

Jordan is wrong. Her contrary authorities are easily distinguished. *Aldrich v. Olson*, 12 Wn. App. 665, 667, 531 P.2d 825, 827 (1975) held a landlord deprived a tenant of his right to possession by changing the locks and preventing him from re-entering the property. As shown above (*see*,

supra, at pp. 6-7), Nationstar does not exclude the borrower from the property when it changes the lock to one door. It always makes the key to the rekeyed door available to the borrower. It never ousts the borrower from possession of the property, but instead only secures the property to protect it from entry by unauthorized persons. The borrower remains free to re-enter the property and exercise her right to possession unless and until the property is foreclosed.

Coleman v. Hoffman, 115 Wn. App. 853, 64 P.3d 65 (2003) is even further afield. As Jordan herself acknowledges (*see* POB 19-21), *Coleman* defined “possession” in a completely different context—to decide whether, after the borrower’s default, the lender had assumed sufficient control over the encumbered premises to be held liable *in tort* for injuries a third party sustained there. *See Coleman*, 115 Wn. App. at 859, 64 P.3d at 68.

Coleman and its definition of “possession” are inapposite to this case involving property, not tort law. Indeed, *Coleman*, itself, emphasized this point, rejecting the lender’s defense under RCW 7.28.230 and the lien theory of deeds of trust. *Coleman*, 115 Wn. App. at 863-65, 64 P.3d at 70-71. Moreover, the public policy at stake in *Coleman*—keeping dwellings in good repair—favors entry and property preservation by the lender, not Jordan’s contrary contention.

Coleman is also inconsistent with Jordan's own admissions about the actions a lender may undertake without assuming possession. Reversing the position she advanced before the district court (*see* ECF No. 57 at 7:4-8), Jordan now concedes that the "sections [of the Entry Provisions] 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 borrower's exclusive right of possession and are enforceable." POB 12.

But as Jordan herself emphasizes (*see* POB 20-21), *Coleman* suggests the lender's payment of utility bills was supportive evidence that the lender had assumed possession of the premises for purposes of tort liability. *Coleman*, 115 Wn. App. at 862.⁴ As Jordan now agrees that payment of utility bills is not sufficient under the real property definition of possession, *Coleman* and its tort law definition of possession are inapplicable for this reason, too.

In short, for purposes of this case concerning real property law, possession means to control property to the exclusion of others. Entry

⁴ In finding a triable issue of fact had been raised, *Coleman* relied primarily on a letter from the lender's lawyer admitting that the lender had "for all practical purposes *taken over control of* [the premises]" because it could not locate or communicate with the borrower. *Id.*, 115 Wn. App. at 860, 64 P.3d at 68.

alone does not mean possession. A lender may “enter, maintain, and secure” apparently abandoned property prior to foreclosure without taking “possession” of it in violation of Washington’s lien-theory rule.

C. Other States’ Courts Have Unanimously Enforced the Entry Provisions

Decisions from other American jurisdictions have uniformly enforced the lender’s right to enter, maintain, and secure seemingly vacant properties pursuant to Entry Provisions similar to those in Jordan’s deed of trust.

Illustrative of those decisions is *Fireman’s Fund Mortgage Corp. v. Zollicoffer*, 719 F. Supp. 650, 657-59 (N.D. Ill. 1989). There, the servicer of an FHA-insured loan entered and secured the borrower’s seemingly abandoned home. Though Illinois, like Washington, is a lien-theory state, *see Harms v. Sprague*, 105 Ill.2d 215, 222-24, 473 N.E.2d 930, 933-34 (1984); *Kelley/Lehr & Assoc., Inc. v. O’Brien*, 194 Ill.App.3d 380, 385-87, 551 N.E.2d 419, 423-24 (1990), the court held the loan servicer’s entry was not actionable even though the house was, in fact, not vacant at the time.

FFMC’s entry onto the Premises was peace[able] and limited to the purpose intended-securing the home. It did not amount to taking possession. The court will not interpret HUD regulations to require FFMC to initiate a foreclosure proceeding and be

awarded possession of the Premises before it can perform its obligations under 24 C.F.R. ch. 11, § 203.377. Such an interpretation would prevent the fast action to prevent depletion of security which § 203.377 requires. There is absolutely no indication that FFMC secured the Premises as part of a strategy to coerce the Zollicoffers to perform their obligations under the Note and Mortgage. The court will not impose liability on FFMC, under any of the theories offered by the Zollicoffers, under these facts, where FFMC has acted reasonably and in good faith in performing its obligations under HUD regulations and is mistaken, through no fault of its own, that the Premises were abandoned.

Fireman's Fund Mortg. Corp., 719 F. Supp. at 658-59.

Similarly, in *Tacon v. Equity One, Inc.*, 280 Ga. App. 183, 188-89, 633 S.E.2d 599, 604 (2006), the court affirmed a summary judgment against the borrower's trespass claims, observing:

The common law right to the exclusive use and possession of property may be modified by agreement, in which the landowner grants permission to enter his property under certain circumstances. The trial court found in this case that the deed to secure debt gave Equity One the right to enter the property under certain circumstances. The deed provides that if Tacon defaulted, Equity One "may do and pay for whatever is necessary to protect the value of the Property," and that these actions "may include" ... entering the property to make repairs.... [E]ntering the property to secure it is similar to the enumerated action of entering the property to repair it and thus is allowed under the deed.

Many other decisions have upheld lenders' entries into apparently abandoned properties pursuant to Entry Provisions in mortgages or deeds of trust. *See, e.g., Cocroft v. HSBC Bank USA, N.A.*, No. 10 C 3408, 2014 WL 700495, at *7 (N.D. Ill. Feb. 24, 2014); *Ash v. Bank of America, N.A.*, No. 2:10-cv-02821, 2014 WL 301027, at *5 (E.D. Cal. Jan. 28, 2014); *Case v. St. Mary's Bank*, 164 N.H. 649, 658-59, 63 A.3d 1209, 1216 (2013); *Knight v. Wells Fargo*, No. 12-cv-12129, 2013 WL 396142, at *7-8 (E.D. Mich. Jan. 8, 2013); *McCray v. Specialized Loan Servicing*, No. RDB-12-02200, 2013 WL 1316341, at *4-5 (D. Md. Mar. 28, 2013); *Paatalo v. J.P. Morgan Chase Bank, N.A.*, No. CV 10-119, 2012 WL 2505742, at *10-11 (D. Mont. June 28, 2012); *Tauwab v. Huntington Bank*, No. 96996, 2012 WL 760563, at *3 (Ohio App. Mar. 8, 2012); *Dickinson v. Countrywide Home Loans, Inc.*, No. 1:10-cv-688, 2012 WL 163883, at *5-6 (W.D. Mich. Jan. 19, 2012); *Burks v. Washington Mut. Bank, F.A.*, No. 07-13693, 2008 WL 4966656, at *6 (E.D. Mich. Nov. 17, 2008); *Mfrs. & Traders Trust Co. v. Maier*, 280 A.D.2d 835, 837, 720 N.Y.S.2d 604, 606 (N.Y. A.D. 2001).

This Court should follow this unanimous line of authority and hold that the Entry Provisions are enforceable under Washington law.

D. Public Policy Supports Enforcement of the Entry Provisions

Public policy also strongly supports enforcing the Entry Provisions. Even Jordan “agrees with many of the sound public policy arguments that support a lender’s ability and obligation to preserve and protect property that is actually suffering waste or damage.” ECF No. 57 at 17:22-25.

When a home loan is seriously delinquent and the loan servicer is unable to contact the borrower by telephone or mail, there is a substantial risk that the borrower has vacated the property. *See* ECF No. 3-8 at ¶5.

Vacant houses may deteriorate quickly from lack of needed maintenance, vandalism, theft, fire and other hazards. *Id.* Physical deterioration brings rapid declines in resale value harming the lender by diminishing its recovery on foreclosure. As explained above, for that reason, Fannie Mae and Freddie Mac, the country’s largest owners of home loans, mandate that loan servicers inspect delinquent properties for vacancy and direct servicers to act promptly to enter, secure, maintain and winterize the houses that appear to be vacant.⁵

⁵ *See* Fannie Mae Single Family 2012 Servicing Guide, Pt. III, §§ 301-303 (Mar. 14, 2012); Freddie Mac Single-Family Seller/ Servicer Guide, §§ 65.30, 65.33, 65.34, 67.27, 67.28 (2014); 24 C.F.R. § 203.377 (FHA-insured loans); HUD Handbook 4330.1 REV-5, § 9-9 (Sept. 29, 1994) (same); 38 C.F.R. §36.4350(i) (VA-insured loans); *Walker v.*

Lower recovery upon foreclosure harms the borrower as well. Even if not subject to a deficiency judgment, *see* RCW 61.24.100(1), a borrower incurs increased income tax liability for forgiveness of debt due to the diminished value of the premises. *See* IRS, Publication 4681: Canceled Debts, Foreclosures, Repossessions and Abandonments (for Individuals), pp. 4, 11, 12.

Lenders and borrowers are not the only ones harmed. Neighbors suffer as well. Their neighborhoods deteriorate. They may be subjected to criminal activities occurring on or criminals harbored in otherwise vacant houses. Their property values decline. Declining property values, in turn, can trigger other defaults, leading to vicious cycles of neighborhood decay. *See, e.g.,* Woodstock Inst., *Unresolved Foreclosures: Patterns of Zombie Properties in Cook County* (Feb. 2014).

That is why the City of Spokane enacted an ordinance requiring lenders to register houses against which foreclosure has been commenced, inspect those houses regularly, and maintain those that are found to be vacant. Spokane, Wa., Municipal Code §17F.070.520. The purpose of the Spokane ordinance is to “protect the community from becoming blighted

Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158, 1166-67, 1176, 121 Cal.Rptr.2d 79, 84, 91-92 (2002).

as a result of abandoned properties that are not properly secured and maintained.” *Id.* at §17F.070.520(A).

Numerous other cities around the country have enacted similar legislation. *See, e.g.*, Allentown, PA Codified Ordinances, § 1731.01 et seq.; Boston, MA Mun. Code, § 16-52.1 et seq.; Cincinnati, OH Mun. Code, § 1123-1 et seq.; Ft. Lauderdale, FL Code of Ordinances, § 18-12.1 et seq.; Gwinnet County, GA Code of Ordinance, § 14-400 et seq.; Kansas City, MO Code of Ordinances, § 56-571 et seq.; Los Angeles, CA Mun. Code, § 164.00 et seq.; Oakland, CA Mun. Code, § 8.54.010 et seq.; Springfield, MA Mun. Code, § 285-8 et seq.; *see* Dan Immergluck, Yun Sang Lee & Patrick Terranova, *Local Vacant Property Registration Ordinances in the U.S.: An Analysis of Growth, Regional Trends, and Some Key Characteristics* (Aug. 12, 2012), publicly available at <http://ssrn.com/abstract=2130775>.

Lender, borrower and the public in general all gain when loan servicers enter, secure and maintain properties that delinquent borrowers have left vacant. Public policy strongly supports enforcement of the Entry Provisions which allow loan servicers to take those steps for the benefit of all concerned. Indeed, as just shown, in many communities, local ordinances compel loan servicers to take those steps.

No judicial or other authority supports Jordan's contrary contention that public policy supports invalidating the Entry Provisions. See POB 34-36. Even were Jordan's arguments correct (and they are not), they would not support her effort to hold the Entry Provisions unenforceable. Jordan does not and cannot identify any policy of sufficient clarity or importance to overcome the presumption of contract enforceability.

Washington recognizes the principle of freedom to contract. Courts will enforce a contract, as written, unless it contravenes a statute or public policy. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945, 948 (2004). “[C]ourts do not have the power ... to rewrite contracts the parties have deliberately made for themselves [and] may not ... substitute their judgment for that of the parties to rewrite the contract” *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891-92, 167 P.3d 610, 619 (2007). It is only when a contract *contravenes* public policy that a court may refuse to enforce it. *Keystone Land & Dev. Co.*, 152 Wn.2d at 176.

Jordan does not even attempt to show that public policy is *contravened* by enforcement of the Entry Provisions as they are written. So her policy arguments do not support her contention that the Entry Provisions are unenforceable even if they were otherwise accurate. See *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d at 483, 687 P.2d at 1143 (“We shall

not invoke public policy to override an otherwise proper contract even though its terms may be harsh and its necessity doubtful.”).

Moreover, Jordan’s public policy arguments are wrong. Rekeying one door of abandoned properties to secure them does not displace struggling families or inhibit their ability to offer their homes for sale. POB 34-35. As already stated, Nationstar always allows the owner or her agent to re-enter after a door is rekeyed. Jordan’s contrary argument simply ignores the undisputed facts on the cross-motions for summary judgment. *See, supra*, at pp. 6-7.

Jordan also cites an FHA audit and a complaint filed by a prosecutor in Illinois in an effort to show that *other* loan servicers may have not had adequate quality controls in place to make sure that property inspections or property preservation activities were properly carried out. *See* POB 35-36; ECF No. 61, pp. 18-19. Even if those unproven, hearsay allegations were taken as gospel truth, they would not empower the courts to craft a solution by engrafting on the parties’ contract terms to which they did not agree. The very sources Jordan cites show that regulators are perfectly capable of policing any bad actors in this area as they are in others. So is the Legislature. It is not the courts’ proper role to usurp these functions of the executive or legislative branches.

E. Jordan’s Contractual Interpretation Argument Is Both Irrelevant and Wrong

Jordan does and cannot contest the points just made. So Jordan dodges the district court’s first question entirely. She does not address whether a lender may “enter, maintain, and secure” property before foreclosure without taking possession of a property—the issue the parties briefed on their cross-motions for summary judgment and which the district court certified to this Court. Instead, she answers a different question—asserting a lender may not “lockout” a borrower before foreclosure. *See* POB 16-24. She asserts that the Entry Provisions permit the lender to enter, change all the locks, turn off utilities and board up the house the moment the borrower is a day late in paying the loan. *See* POB 11-13; ECF No. 57 at 4:10-15.

Jordan’s change of course is best exemplified by her change in nomenclature. Since the case’s inception, Jordan dubbed the challenged provisions in her deed of trust the “Entry Provisions,” and argued they impermissibly permitted a lender to enter encumbered property before foreclosure. Now she rechristens the provisions as the “Lockout Provisions,” and argues they impermissibly permit lenders to lockout borrowers before foreclosure.

Jordan offers no satisfactory explanation for ducking the first certified question. Her only excuse, tersely stated in her summation of the questions presented, is the proposition that this Court does not answer abstract questions. POB 4. That may be true, but the district court did not certify any abstract question. It asked a concrete question based on its interpretation of the deed of trust, a task it is just as competent to perform as this Court. The question Jordan answers is based on her contrary interpretation of the contract, which the district court correctly rejected as it violates basic rules of contractual interpretation.

The Court should decline Jordan's invitation to reconsider the district court's interpretation of the contract. The district court's certified question does not ask this Court to interpret the contract. This Court did not agree to interpret the contract. The district court already interpreted the deed of trust to allow the lender only to "enter, maintain and secure" the property. In answering the district court's first certified question, the Court should determine only whether such an agreement runs afoul of Washington's lien-theory rule. It need not and should not answer Jordan's proposed question about whether a different, hypothetical agreement would violate Washington law.

Even were Jordan's argument relevant to the certified issue, it is meritless. The district court's interpretation was clearly correct and con-

sistent with several well-established Washington canons of contract construction.

First, in interpreting a contract, “every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible” *Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221 P.2d 832, 835 (1950); *Davis v. Dept. of Transp.*, 138 Wn. App. 811, 818, 159 P.3d 427, 431 (2007) (“[W]e ascertain [the parties’] intent from reading the contract as a whole”).

The Entry Provisions only permit the lender to do “whatever is *reasonable or appropriate* to protect Lender’s interest in the Property and rights under this Security Instrument.” See ECF No. 57 at 3:4-13 (emphasis added). Jordan pointedly ignores that qualification. The district court rightly did not. Boarding up the house the moment a borrower defaults is neither reasonable nor appropriate to protect the Lender’s interest. So the district court correctly held the Entry Provisions do not authorize those actions.

Second, a court must “interpret contract provisions to render them enforceable whenever possible.” *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 266, 259 P.3d 129, 131 (2011); accord *German Sav., Bldg. & Loan Ass’n v. Leavens*, 89 Wash. 78, 82–83, 153 P. 1092 (1916) (“where the contract is susceptible of two constructions, the one lawful

and the other unlawful, the former will be adopted”); *Crawford v. Seattle, R. & S. Ry. Co.*, 86 Wash. 628, 637-39, 150 P. 1155, 1158 (1915).

As the district court found, that is easily done here. The Entry Provisions’ words are readily susceptible to an interpretation that renders them enforceable—i.e., that they authorize entry for limited purposes not inconsistent with the borrower’s continued possession. The district court correctly construed the Entry Provisions’ words to authorize reasonable and appropriate entries to protect the property but not to dispossess the borrower, thus upholding the Entry Provisions’ validity and legality.⁶ *See Burks*, 2008 WL 4966656, at *6 (upholding Entry Provisions against similar challenge).

Third, Washington’s “context” rule permitted the district court, in “ ‘viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the contract, the subsequent conduct of the parties and the reasonableness of the parties’ respective interpretations.’ ” *Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 274, 279 P.3d 943, 948 (2012); *see also Washington State*

⁶ The same conclusion is compelled by the related rule that “[t]he contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction ... that renders the contract nonsensical or ineffective.” *Washington Pub. Util. Districts’ Utilities Sys. v. Pub. Util. Dist. No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701, 707 (1989).

Republican Party v. Washington State Grange, 676 F.3d 784, 796 (9th Cir. 2012).

Here, Nationstar's proposed interpretation of the Entry Provisions is clearly more reasonable than Jordan's. As shown above (*see, supra*, at pp. 13-15), there is nothing unusual in giving a nonowner limited permission to enter property for specific purposes such as maintenance and repair, particularly in the owner's absence. Licenses are just one example.

Similar to licenses, the Entry Provisions authorized the lender to take specific actions upon the borrower's abandonment, including "entering the Property to make repairs, change locks ... drain water from pipes ... and have utilities turned off." The lender may enter the property, but not stay, or prevent the borrower from staying, in the house. In granting the lender limited rights to enter the property temporarily under specified circumstances, the Entry Provisions do not purport to oust the borrower from possession or to grant the Lender possession of the premises. *See Case*, 164 N.H. at 657, 63 A.3d at 1215 (lender's inspection of burst water pipe and later securing of premises did not make it a mortgagee in possession).

Nationstar's interpretation is also consistent with the Fannie Mae/Freddie Mac guidelines interpreting the deed of trust. Fannie Mae and

Freddie Mac drafted the Uniform Security Instrument which contains the Entry Provisions. ECF No. 57 at 3. Fannie Mae and Freddie Mac know best what those Provisions were intended to authorize. So the Court may consider the guidelines in interpreting the contract. *See, e.g., Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1110 (11th Cir. 2014) (considering FEMA guidelines regarding replacement cost in interpreting security instrument); *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 450-52 (1st Cir. en banc 2013) (same).

The guidelines show that the Entry Provisions were not intended to authorize a defaulted borrower's dispossession, but rather to allow the lender to enter and preserve the property when the defaulted borrower has vacated the property, leaving it subject to damage by decay, weather, or vandals. *See* ECF No. 47-4 [Ex. B-3 at 45-52], ECF No. 47-5 [Ex. C at 107-111, Ex. D at 170-178].⁷ The district court correctly interpreted the Entry Provisions in accord with those guidelines, not Jordan's unsupported assertion that the borrower may be locked out of her home the moment she misses a single payment.

⁷ Freddie Mac's guidelines, for example, require servicers to protect abandoned properties "from waste, damage and vandalism, and ensure the continuation of utilities where necessary." ECF No. 47-5 [Ex. C at 111].

The district court's interpretation is consistent not only with the foregoing principles of contractual interpretation, but also the undisputed evidence of Nationstar's practices and procedures in exercising its remedies under the Entry Provisions.

Nationstar enters properties to protect and secure them, not to oust owners from possession. *See* ECF No. 46 at 2:4-3:8; ECF No. 59 at 2:4-10. Whenever possible, Nationstar rekeys only a secondary door, allowing the borrower to enter with his or her own key through the front door. Through a lockbox and posted sign, Nationstar also allows the borrower entry through the rekeyed door.

Even in unusual cases, like Jordan's, where Nationstar is unable to rekey a secondary door and rekeys the front door instead, Nationstar does not exclude the borrower from access her to property. Instead, the key to the rekeyed front door is made available to the borrower or her representative so she can re-enter the property. Jordan, herself, was still able to enter the property after contacting Nationstar for the lockbox's access code.⁸

⁸ Jordan adduced no competent contrary evidence before the district court. Jordan did submit declarations from other borrowers averring that Nationstar changed the locks on their properties before foreclosure. ECF No. 63-2. However, in none of those carefully worded declarations does any borrower say that Nationstar refused to provide the key to the rekeyed door or otherwise prevented the borrower from re-entering the property before foreclosure. All of these borrowers could have re-entered

Hence, in entering the property and changing the lock to one door, Nationstar does not exclude the borrower from re-entering or maintaining possession of the property before foreclosure.

Contrary to Jordan's argument (*see* POB 17-18), the notice Nationstar's vendors post on the property does not evince any intent to control the property to the exclusion of borrowers. The notice states only that "unauthorized persons" other than the owner will be denied entry.⁹ Because the notice specifically states that the new key will be made available to the owner or his or her representative, Nationstar does not thereby exercise exclusive control over the premises—but instead merely protects it against damage from vagrants or other unauthorized persons other than the owner.

Changing one lock is also a necessary step in entering a house to inspect, winterize, repair, or preserve it. If a house is vacant but the door is locked, entry can be gained only by drilling the lock. To secure the

their properties by entering through the door that was not re-keyed or by contacting Nationstar for the access code to the lockbox, just as Jordan did.

⁹ The notice states: "In protection of the interest of the owner as well as the mortgagee ... the property has been secured against entry by unauthorized persons to prevent possible damage. The key will be available to the owner of the property or their representative only." ECF No. 63-1, pp. 6, 9.

house after entry, a new lock must be installed to replace the old one. Many significant problems affecting abandoned properties, such as plumbing requiring winterization, are not visible from the property's exterior. So if lenders were barred from changing locks in all circumstances, as Jordan proposes, many properties would deteriorate rapidly after they are abandoned, particularly during the cold winters in Eastern Washington where Jordan resides.

For all of these reasons, the district court correctly interpreted the Entry Provisions to permit only entry to maintain and secure properties. Another judge in the Western District of Washington recently reached the same conclusion in dismissing a similar putative class action brought by Jordan's counsel. *See Bess v. Ocwen Loan Servicing, LLC*, No. C15-5020, 2015 WL 1188634, at *3 (W.D. Wash. March 16, 2015).¹⁰

All extant decisions uphold the lender's right to conduct reasonable inspections and enter an abandoned property to conduct necessary property preservation activities. The Entry Provisions authorize those

¹⁰ In another similar case Jordan's counsel pursued in the Eastern District, the Court noted that "[t]he general rule is that once a borrower breaches the deed of trust, the lender is authorized to secure and winterize the property." *Elsmore v. Bank of America, N.A.*, No. 2:14-cv-00241-JLQ, 2014 WL 7404130, at *4 (E.D. Wash. Dec. 30, 2014). The Court nonetheless denied the lender's motion to dismiss because the borrower and lender had also entered into a deed in lieu of foreclosure bearing different terms.

reasonable measures and nothing more. Since the Entry Provisions do not purport to diminish the borrower's pre-foreclosure right to possession, they do not run afoul of Washington's lien-theory rule. They are perfectly legal, in accord with all relevant public policy, and fully enforceable in Washington as elsewhere.

VI.

RCW 7.60.025 DOES NOT PROVIDE THE LENDER'S EXCLUSIVE REMEDY FOR ENTERING AN ENCUMBERED PROPERTY BEFORE FORECLOSURE

The second certified question should be answered in the negative. There is no merit to Jordan's argument that unless the borrower consents to entry after default, the lender's exclusive remedy for gaining entry onto the property is through court appointment of a receiver under RCW 7.60.025. *See* POB 25-34; ECF No. 61, pp. 10-15.

Jordan's argument fails at the outset as the exclusive statutory remedies doctrine on which she relies concerns statutory preclusion of claims allowed at common law, not of contractual remedies to which the parties have voluntarily agreed.

Assuming the exclusive remedies doctrine were applicable, there are several other obvious and fatal flaws in Jordan's argument that RCW ch. 7.60 provides an exclusive remedy, displacing all others, for a lender's entry onto encumbered property after the borrower's abandonment.

A. The Legislature Did Not Intend for RCW 7.60.025 to Be an Exclusive Remedy

Jordan cannot meet her heavy burden of showing the legislature enacted RCW ch. 7.60 with the intent to preempt all other common law or contractual remedies a lender may have to enter borrowers' properties for limited purposes before foreclosure.

The exclusive remedy doctrine on which Jordan relies is inapplicable as it concerns the displacement of common law remedies, not preexisting contractual rights. *See, e.g., Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008) (statute not exclusive remedy precluding common law claim for conversion); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 62, 821 P.2d 18, 25 (1991) (statute not exclusive remedy precluding common law tort claim for wrongful discharge of employee). Jordan cites no authority holding a statute provides an exclusive remedy preempting the parties' otherwise available contractual remedies. The district court's second certified question should be answered in the negative for that reason alone.

Even were the doctrine applicable, Jordan's argument is meritless. The legislature did not intend in enacting RCW ch. 7.60 to preempt all preexisting common law or contractual remedies.

“[W]e are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature’s intent to deviate from the common law. ‘It is a well-established principle of statutory construction that “[t]he common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.’ ” *Potter*, 165 Wn.2d at 76-77 (citation omitted). A statute will be deemed to abrogate the common law only when its provisions “are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force” *State v. Kurtz*, 178 Wn.2d 466, 473, 309 P.3d 472, 476 (2013) (citation omitted).

This Court’s analysis of whether a statute provides an exclusive remedy begins with the language of the statute itself. *Potter*, 165 Wn.2d at 79. “The first consideration in determining the exclusivity of a statute is whether the statute contains an exclusivity clause.” *Id.* at 80.

As Jordan concedes (POB 30), RCW ch. 7.60 contains no exclusivity clause. If the legislature had intended RCW ch. 7.60 to be the exclusive means of obtaining entry before foreclosure, “it could have explicitly stated its intent.” *Potter*, 165 Wn.2d at 80-81; *see also Wilmot*, 118 Wn.2d at 62. It did not. The legislature knows how to provide an ex-

clusive remedy when it intends to so.¹¹ It consciously chose not to provide one in RCW ch. 7.60.

Far from providing an exclusive remedy, RCW 7.60.025's plain language shows that the appointment of a receiver is never intended to be an exclusive remedy. Absent certain exceptions not pertinent here, the statute provides that "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.*" RCW 7.60.025(1) (emphasis added).

The legislature thus codified the longstanding rule that appointment of a receiver is an additional remedy, "which should always be exercised with caution," and should not be employed "if there is any other adequate remedy." *Norris v. Anderson*, 134 Wash. 403, 409, 235 P. 966, 968 (1925); *Bergman Clay Mfg. Co. v. Bergman*, 73 Wash. 144, 147, 131 P. 485 (1913); *King Cnty. Dep't of Cmty. & Human Servs. v. Nw. Defenders*

¹¹ As *Potter*, 165 Wn.2d at 80-81 explains, the code is replete with examples of statutes in which the legislature stated expressly that a statute was designed to provide an exclusive remedy. *See id.* citing RCW 7.71.030(1) ("[t]his section shall provide the exclusive remedy for any action taken by a professional peer review body of health care providers"); RCW 51.04.010 (providing a remedy for injured workers "to the exclusion of every other remedy, proceeding or compensation" and expressly abolishing all "civil causes of action for such personal injuries"); RCW 77.36.040(1) ("[t]hese damages shall comprise the exclusive remedy for claims against the state for damages caused by wildlife").

Ass'n, 118 Wn. App. 117, 126, 75 P.3d 583, 588 (2003). The appointment of a receiver under RCW 7.60.025 is never an exclusive remedy, but rather a last resort.

Jordan would invert this rule and require appointment of a receiver as the first and only option even when other, less expensive, time-consuming and intrusive remedies are available. Jordan ignores the statute's plain language and focuses instead on the supposedly comprehensive nature of the receivership remedy. *See* POB 31-33. "However, the fact the legislature provided a statutory remedy does not necessarily evidence a clear intent to create an *exclusive* remedy." *Potter*, 165 Wn.2d at 85 (citation omitted); *see also Wilmot*, 118 Wn.2d at 61; *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 125, 279 P.3d 487, 495 (2012).

While RCW ch. 7.60 may provide a comprehensive statutory scheme for the appointment of receivers, it touches on the rights and remedies of a secured lender only incidentally by stating when such a lender may obtain a receiver. *See* RCW 7.60.025(b). A receiver may be appointed in connection with nonjudicial foreclosure on non-rental properties only upon a showing that the property "is in danger of being lost or materially injured or impaired." RCW 7.60.025(b)(i); *see also Clise v. Burns*, 175 Wash. 133, 138, 26 P.2d 627, 629 (1933) opinion corrected on denial of reh'g, 175 Wash. 133, 29 P.2d 1119 (1934).

Nothing in RCW 7.60.025 suggests a receivership is the only means by which a lender may enter a property pre-foreclosure when the property is in danger, let alone that it is the only means by which the lender may enter the property at all.

Other provisions of the statutory scheme reinforce this interpretation. Appointment of a receiver is not an exclusive remedy in other situations in which RCW ch. 7.60 permits their appointment. For example, a receiver may be appointed “[a]fter judgment, in order to give effect to the judgment.” RCW 7.60.025(c). But appointment of a receiver is by no means the judgment creditor’s exclusive remedy for enforcement of a judgment. *See* RCW chs. 6.17, 6.21, 6.28, 6.32. In the same way, RCW ch. 7.60 may specify the exclusive means by which a secured lender may obtain a receiver, but it does not create an exclusive remedy for the lender on the borrower’s abandonment of the property.

Jordan tries to overcome that obvious defect in her argument by contending that the Entry Provisions “purportedly permits Nationstar to ‘take charge’ of plaintiffs’ homes”—powers that she says are “exclusively enjoyed by a custodial receiver.” *See* POB 32-33, 25-26, 29; ECF No. 61 at 15:1-6. Jordan is wrong. The Entry Provisions do not allow the lender to “take charge” of encumbered properties. As shown above (*see, supra*, at pp. 13-15), the district court correctly interpreted the Entry Provisions

to grant the lender only consent to “enter, maintain, and secure” abandoned properties in limited circumstances. The Entry Provisions do not grant the lender the many additional powers that a receiver may exercise under Washington law. *See* RCW 7.60.005(10), 7.60.060.

Jordan also argues that the Entry Provisions contravene Washington law because they allow the lender to exercise the limited powers they confer even though RCW 7.60.035(2) prohibits the appointment of a creditor as a receiver. *See* POB 29; ECF No. 61 at 15:7-17. That statutory limitation does not apply to the Entry Provisions. The statute regulates who may serve as an adjunct of the court, exercising the power of the state. It does not limit the lender’s ability to preserve the property, exercising private rights voluntarily conferred by contract.

Equally meritless is Jordan’s argument that the statute’s legislative history demonstrates the legislature intended to create an exclusive remedy. POB 31-32. As Jordan herself concedes, the legislative history for RCW ch. 7.60 shows the statute was “not intended to be a radical change from how receiverships [were] operating under [pre-2004] law ...,” but instead a “codification of case law.” H.R. Rep. S.S.B. 6189 (Mar. 5, 2004). The legislature intended to consolidate the rules governing receiverships into a single chapter and repeal duplicative or inconsistent statutes. Final Bill Report, S.S.B, 6189.

That unremarkable goal in no way suggests the legislature intended the dramatic result Jordan attributes to it—to preempt all contractual remedies a lender may otherwise have to enter a property before foreclosure. Allowing lenders to pursue their preexisting contractual remedies to enter and secure abandoned properties does not defeat RCW ch. 7.60’s goal of streamlining and clarifying the law governing receiverships. *See, e.g., Potter*, 165 Wn.2d at 87-88 (legislative history did not demonstrate unambiguous intent to create exclusive remedy); *Wilmot*, 118 Wn.2d at 63-65 (rejecting argument that legislative history demonstrated legislature intended exclusive remedy).

Finally, Jordan’s argument that the origin of the statutory right shows the legislature intended to create an exclusive remedy is also meritless. POB 32. “Where the common law remedy predates the statutory remedy, the court infers the statutory remedy is cumulative, not exclusive.” *Potter*, 165 Wn.2d at 88. Here, the remedy Jordan seeks to preempt—the contractual right to enter a defaulted borrower’s property for limited purposes—predates the enactment of RCW ch. 7.60 in 2004. So, if anything, the proper inference is that the statutory remedy is cumulative, not exclusive. *See Potter*, 165 Wn.2d at 88; *Tacoma Auto Mall, Inc.*, 169 Wn. App. at 127.

B. Appointment of a Receiver Is Not a Practical Alternative

In determining whether a statute creates an exclusive remedy, the Court may also consider whether the statute provides a practical, adequate alternative to the common law remedy. *Wilmot*, 118 Wn.2d at 56; *Wilson v. City of Monroe*, 88 Wn. App. 113, 125-26, 943 P.2d 1134, 1140 (1997).

Appointment of a receiver is not a practical alternative to enforcement of the Entry Provisions. A receiver may only be appointed after the lender has filed a notice of default to commence non-judicial foreclosure proceedings, served a complaint and summons, commencing a civil action in which the receiver may be appointed, served seven days' notice of the application for a receiver, and proved that the property "is in danger of being lost or materially injured or impaired." RCW 7.60.025(b)(i); 27 Wash. Prac., Creditors' Remedies – Debtors' Relief § 3.72. In addition, the receiver must post a bond before assuming that office. RCW 7.60.045.

Considerable expense is entailed in seeking a receiver. There is a \$240 filing fee for the complaint. Attorney fees will be incurred in drafting the complaint and preparing the motion for a receiver. Serving the complaint and summons will cost yet more. Significant delay is also entailed. If the lender can find and serve the borrower, he or she will have

20 days to respond to the complaint and at least 7 days' notice of the motion for appointment of a receiver.

Ultimately, borrowers would be liable for the substantial costs of the receiver pursuant to the terms of their notes and deeds of trust. ECF No. 3-5 at Ex. 19, ¶9. It does not benefit an already financially strapped, defaulted borrower who has already consented to the lender's entry to preserve the property to saddle her with additional debt to pay for a receiver.

Moreover, if the lender cannot set foot on the premises before a receiver is appointed, the lender will be able to prove that the property is in danger of being "materially injured or impaired" only when the risk of injury or impairment is visible from the street. Many risks of injury—such as the danger posed by unwinterized plumbing—would go undetected. As a receiver could not be appointed to protect against that undetected risk, the lender would be powerless to prevent harm to the property and a resulting loss of security for the repayment of the defaulted loan.

A receiver is also impractical since, as Jordan herself emphasizes (POB 29), one cannot act as a receiver if he is a party or the agent of a party to the action. *See* RCW 7.60.035(2). Hence, neither Nationstar nor any of its property preservation vendors could act as a receiver. Jordan does not say who could possibly act as receivers in the thousands of cases

across the state where lenders or servicers must enter abandoned properties before foreclosure to secure them or effect repairs.

Jordan suggests no reason why the legislature would have required lenders to resort to such an expensive, time-consuming and uncertain remedy to achieve a result that, as Jordan concedes, serves important public policies as well as the private interests of lender and borrower alike. Nor can Jordan cite a single decision from any court in the country that supports her contention—despite the fact that many states follow the lien theory of mortgages or deeds of trust, just as Washington does.

In short, the legislature enacted RCW ch. 7.60 to streamline existing case law holding receiverships are a remedy of last resort. Nothing in RCW ch. 7.60 comes anywhere close to establishing the legislature intended to preempt all preexisting contractual or common law remedies lenders have to enter apparently abandoned properties. Jordan's contrary argument is belied by the statute's express language and leads to a result that is impractical and contrary to public policy. The district court's second certified question should be answered in the negative.

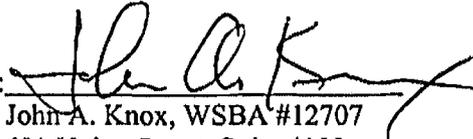
VII.

CONCLUSION

For the reasons stated, the Court should answer the first question in the affirmative and the second question in the negative.

RESPECTFULLY SUBMITTED AND DATED this 27th day of
October, 2015.

WILLIAMS, KASTNER & GIBBS PLLC

By: 
John A. Knox, WSBA #12707
601 Union Street, Suite 4100
Seattle, WA 98101-2380
(206) 628-6600

Jan T. Chilton (*pro hac vice*)
Mary Kate Sullivan (*pro hac vice*)
Erik Kemp (*pro hac vice pending*)
Andrew W. Noble (*pro hac vice*)
SEVERSON & WERSON, PC
One Embarcadero Center,
Suite 2600
San Francisco, CA 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439

*Attorneys for Defendant
Nationstar Mortgage LLC*

NO. 92081-8

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.

**DEFENDANT NATIONSTAR MORTGAGE LLC'S
CERTIFICATE OF SERVICE**

John A. Knox, WSBA #12707
WILLIAMS, KASTNER & GIBBS, PLLC
601 Union Street
Suite 4100
Seattle, WA 98101-2380
Telephone: (206) 628-6600
Facsimile: (206) 628-6611

Jan T. Chilton (*pro hac vice*)
Mary Kate Sullivan (*pro hac vice*)
Erik Kemp (*pro hac vice* pending)
Andrew W. Noble (*pro hac vice*)
SEVERSON & WERSON, PC
One Embarcadero Center,
Suite 2600
San Francisco, CA 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439

Attorneys for Defendant Nationstar Mortgage LLC

CERTIFICATE OF SERVICE

I, John A. Knox, certify that on October 27, 2015, I caused to be sent a true and correct copy of **DEFENDANT NATIONSTAR MORTGAGE LLC'S ANSWERING BRIEF** via electronic mail and via U.S. first class mail, postage prepaid from Seattle, Washington to the counsel listed below:

Clay M. Gatens
H. Lee Lewis
Jeffers, Danielson, Sonn &
Aylward, P.S.
P.O. Box 1688
Wenatchee, WA 98807
Telephone: (509) 662-3685
Facsimile: (509) 662-2452
clayg@jdsalaw.com
leel@jdsalaw.com

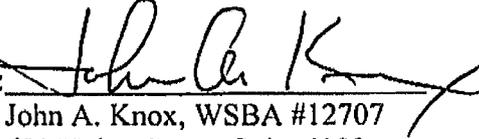
Beth E. Terrell
Blythe H. Chandler
Terrell Marshall Daudt & Willie
PLLC
936 North 34th Street, Suite 300
Seattle, WA 98103
Telephone: (206) 816-6603
Facsimile: (206) 350-3528
bterrell@tmdwlaw.com
bhandler@tmdwlaw.com

Michael D. Daudt
Daudt Law PLLC
200 W. Thomas Street, Suite 420
Seattle, WA 98119
Telephone: (206) 445-7733
Facsimile: (206) 445-7399
mike@daudtlaw.com

I certify under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

DATED this 27th day of October, 2015.

WILLIAMS, KASTNER & GIBBS PLLC

By: 
John A. Knox, WSBA #12707
601 Union Street, Suite 4100
Seattle, WA 98101-2380
(206) 628-6600

*Attorneys for Defendant
Nationstar Mortgage LLC*

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Supreme Court Clerk's Office

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Dear Clerk of Court,

Attached for filing in PDF format are the following documents in Laura Zamora Jordan v. Nationstar Mortgage LLC, Supreme Court Cause No. 92081-8.

DEFENDANT NATIONSTAR MORTGAGE LLC'S ANSWERING BRIEF; and CERTIFICATE OF SERVICE.

The attorney filing this Answering Brief is John A. Knox, WSBA No. 12707; Telephone: (206) 628-6600;
Email: jknox@williamskastner.com.

Respectfully Submitted,

Kathi Milner
Williams Kastner | Legal Assistant to John Knox
601 Union Street, Suite 4100
Seattle, WA 98101-2380
P: 206.233.2978 | F: 206.628.6611
www.williamskastner.com

SEATTLE PORTLAND