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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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IN RE Mortgage Electronic Registration Systems (MERS) Litigation

MDL DOCKET NO. 09-2119-JAT

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**ORDER**

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In the transfer order establishing this consolidated multidistrict litigation (“MDL”), the Judicial Panel on Multidistrict Litigation (“Panel”) stated, “IT IS FURTHER ORDERED that claims unrelated to the formation and/or operation of the MERS system are simultaneously remanded to their respective transferor courts.” (Doc. #1.) The parties contest which claims in each of the various cases relate to the formation and/or operation of MERS.<sup>1</sup> This Order addresses the following cases (transferred by Doc. ##38, 58):

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<u>First Plaintiff’s Name</u>	<u>Arizona Case Number</u>	<u>Original Jurisdiction Case Number</u>
<i>Stoffels</i>	CV 10-0215-PHX-JAT	3:08-468 (Nevada)
<i>Hearne</i>	CV 10-0216-PHX-JAT	3:08-500 (Nevada)
<i>Huynh</i>	CV 10-0217-PHX-JAT	3:09-577 (Nevada)
<i>Mesi</i>	CV 10-0218-PHX-JAT	3:09-582 (Nevada)

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<sup>1</sup> The parties have fully briefed this issue pursuant to the Court’s Order on Practices and Procedures (Doc. #87). Although the parties sought “remand” of certain claims to the transferor court, under Section 1407(a), remands to a transferor court can only be effected by the Judicial Panel on Multidistrict Litigation. 28 U.S.C. § 1407; *see also* R.P.J.P.M.L. 7.6. The Court, thus, stresses that this order is solely a determination of which claims are pending before this Court and which claims remain in their respective transferor courts, pursuant to the Panel’s transfer orders.

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1 *Youngren* CV 10-0219-PHX-JAT 3:09-595 (Nevada)  
2 *Burke* CV 10-0220-PHX-JAT 3:09-653 (Nevada)  
3 *Dalby* CV 10-0221-PHX-JAT 3:09-659 (Nevada)  
4 *Lee* CV 10-0268-PHX-JAT 3:09-590 (Nevada)

5 **I. General Interpretation of the Transfer Order**

6 In the initial transfer order, the Panel transferred to this Court all allegations within  
7 these actions that “the various participants in MERS formed a conspiracy to commit fraud  
8 and/or that security instruments are unenforceable of foreclosures are inappropriate due to  
9 MERS’s presence as a party” or that otherwise concern “the formation and operation” of  
10 MERS. (Doc. #1.) However, the Panel simultaneously remanded unrelated claims to their  
11 transferor courts, finding that “plaintiffs’ claims relating to loan origination and collection  
12 practices do not share sufficient questions of fact with claims regarding the formation and  
13 operation” of MERS and their inclusion “would needlessly entangle the litigation in  
14 unrelated, fact-intensive issues.” *Id.*

15 Accordingly, this Court will not retain claims that, although naming MERS as a  
16 defendant, allege conduct primarily related to loan origination and collection practices, or  
17 otherwise stray from the common factual core of the MDL. Only causes of action that in  
18 essence turn on the formation or operation of MERS, no matter how framed, have been  
19 transferred to undersigned.

20 Defendants Mortgage Electronic Registration Systems, Inc. and MERSCORP, Inc.  
21 (collectively, “Moving Defendants”) filed a Motion to Remand Claims. (Doc. #135.) Two  
22 defendants, Citimortgage, Inc. and Litton Loan Servicing LP, each filed responses that  
23 expressed complete agreement with the manner in which Moving Defendants suggested the  
24 claims be disposed. (Doc. ##184, 197.) Several other defendants<sup>2</sup> (“Responding  
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27 <sup>2</sup>Countrywide Home Loans, Inc., BAC Home Loans Servicing LP f/k/a Countrywide  
28 Home Loans Servicing LP, ReconTrust Company, N.A., and Bank of America, N.A.

1 Defendants”) have responded with some different suggested classification of claims. (Doc.  
2 #198.) Plaintiffs did not respond. MERS replied. (Doc. #240.)

## 3 **II. Claims on Which the Parties Do Not Agree**

4 Within these eight “tag-along” actions there are three types of claims over which the  
5 parties disagree: unfair lending practices, fraud in the inducement, and unjust enrichment.  
6 Within these three categories some claims are contested while others with identical language  
7 are uncontested. To maintain consistency, the Court will dispose of like claims alike even  
8 where no party has urged that disposition in a particular case. The Court will dispose of  
9 Plaintiffs’ requests for injunctive relief and declaratory relief differently than the parties had  
10 agreed. Otherwise, as to types of claims for which the appropriate disposition is undisputed,  
11 the Court adopts the parties’ determinations and will not engage in detailed discussion.

### 12 **A. Unfair Lending Practices**

13 Plaintiffs assert claims for unfair lending practices in *Mesi* (Third Claim), *Huynh*  
14 (First Claim), *Lee* (First Claim), and *Youngren* (First Claim). In each of these claims,  
15 Plaintiffs allege that the loans made “were based upon stated income with no verification of  
16 the Plaintiffs’ ability to repay.”<sup>3</sup>

17 Responding Defendants argue that the unfair lending practices claim in *Mesi* has been  
18 remanded because it neither specifically mentions MERS nor explicitly relates to the  
19 formation or operation of MERS. (Doc. #198 at 2.) Acknowledging this, Moving  
20 Defendants theorize that Plaintiffs incorporated by reference allegations earlier in the  
21 complaint that MERS was used “to engage in predatory and unfair lending practices.” (CV  
22 10-218-PHX-JAT, Doc. #1, ¶ 21.) Thus, Moving Defendants contend, the claim should be  
23 retained.

24 The Court disagrees. The inquiry into how rigorously Defendants verified the income  
25 of potential borrowers before issuing a loan is one which would entangle this Court in the

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27 <sup>3</sup> CV 10-0218-PXH-JAT (*Mesi*), Doc. #1-2 at 32; CV 10-0217-PXH-JAT (*Huynh*),  
28 Doc. #1 at 15; CV 10-0268-PXH-JAT (*Lee*), Doc. #1-1, ¶ 42; CV 10-0219-PXH-JAT  
(*Youngren*), Doc. #1 at 48.

1 fact-intensive weeds unrelated to the common factual core of the MDL. Therefore, the unfair  
2 practices claim in *Mesi* (Third Claim) has been remanded to the transferor court. Consistent  
3 with this reasoning, the identical claims in *Huynh* (First Claim), *Lee* (First Claim), and  
4 *Youngren* (First Claim) have also been remanded.

5 **B. Fraud in the Inducement**

6 Plaintiffs assert identical claims for fraud in the inducement in *Hearne* (Second  
7 Claim), *Burke* (Second Claim), and *Dalby* (Second Claim). There are also similar claims for  
8 fraud in the inducement in *Huynh* (Twelfth Claim), *Mesi* (Thirteenth Claim), *Lee* (Fourteenth  
9 Claim), *Youngren* (Twelfth Claim) and *Stoffels* (Fifth Claim).

10 Responding Defendants argue that the fraud in the inducement claims in *Hearne* and  
11 *Dalby* should be split with a portion retained and a portion remanded. (Doc. #198 at 3.) The  
12 claims allege that Defendants failed to disclose material terms of the loans, concealed the  
13 risks of the transactions, and misrepresented the ability of Plaintiffs to qualify for their loans.<sup>4</sup>  
14 Such allegations relate to loan origination without any common core of fact to the operation  
15 of MERS. On the other hand, the claims also allege that Defendants failed to disclose that  
16 they “had no lawful right to foreclose upon” the properties, failed to notify Plaintiffs that  
17 their obligations on the notes had been discharged, and knew that Defendants were not  
18 holders in due course of the notes.<sup>5</sup> These allegations are based on alleged deficiencies in  
19 the notes created by the operation of MERS. As either set of allegations would be logically  
20 sufficient to establish a liability, this Court will split these claims. Remanded are the  
21 allegations that defendants “failed to disclose the material terms of the loans and incidental  
22 services to Plaintiff at the execution of the closing papers,” “concealed the true terms of the  
23 loans, and the risks of the transactions, including, but not limited to, negative amortization,  
24 prepayment penalty provisions, the risk of default and the risk of foreclosure from Plaintiff,”

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26 <sup>4</sup> *See, e.g.*, CV 10-0221-PHX-JAT (*Dalby*), Doc. #1 at 68-69.

28 <sup>5</sup> *Id.*

1 and “misrepresented the ability of Plaintiff to qualify for the loans.”<sup>6</sup> All other allegations  
2 of these claims have been transferred to the undersigned.

3 No responding brief addressed the similar claims in *Huynh* (Twelfth Claim), *Mesi*  
4 (Thirteenth Claim), *Lee* (Fourteenth Claim), or *Youngren* (Twelfth Claim), but the Court  
5 finds that the same reasoning applies. Therefore, the Court will split these claims as well.<sup>7</sup>  
6 All parties agree that the unique fraud in the inducement claim in *Stoffels* has been remanded  
7 and the Court concurs.

### 8 **C. Unjust Enrichment**

9 Plaintiffs assert practically identical claims for unjust enrichment in *Hearne* (Fifth  
10 Claim), *Burke* (Fifth Claim), and *Dalby* (Fifth Claim). Responding Defendants argue that  
11 the unjust enrichment claims in *Hearne* and *Dalby* should be split with a portion retained and  
12 a portion remanded. (Doc. #198 at 3-4.) Moving Defendants, in their reply, concede that this  
13 outcome would be consistent with this Court’s March 22nd Order. (Doc. #240 at 9.)

14 In *Hearne* and *Dalby* there are two distinguishable bases for a claim of unjust  
15 enrichment. In each claim two paragraphs contain allegations relating to the origination of  
16 the loans,<sup>8</sup> but the remainder of the allegations relate to the operation of MERS. Because  
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18 <sup>6</sup> CV 10-216-PHX-JAT (*Hearne*), Doc. #120 at 21, ¶¶ 77, 79-80; CV 10-221-PHX-  
19 JAT (*Dalby*), Doc. #1 at 68-69, ¶¶ 68, 70-71.

20 <sup>7</sup> CV 10-0219-PXH-JAT (*Youngren*), Doc. #1 at 69-70, ¶¶ 107-09; CV 10-0220-PHX-  
21 JAT (*Burke*), Doc. #1-1 at 22-23, ¶¶ 56, 58-59; CV 10-0218-PXH-JAT (*Mesi*), Doc. #1-2 at  
22 31-32, ¶¶ 113-15; CV 10-0268-PXH-JAT (*Lee*), Doc. # 1-1 at 52-53, ¶¶ 112-14; CV  
10-0217-PXH-JAT (*Huynh*), Doc. #1 at 65-66, ¶¶ 106-08.

23 <sup>8</sup> CV 10-216-PHX-JAT (*Hearne*), Doc. #120 at 39-40, ¶¶ 129, 131 (“Specifically,  
24 Plaintiffs have been injured in their property and lost their cash and personal investments and  
25 right to peaceful enjoyment of their primary residences in a variety of ways, including but  
26 not limited to: All borrowers who were targeted for and lured into the mortgages sold by  
27 Defendants were kept from knowing the true purpose of the securitization and the use of the  
28 funds of the investors. This constituted a misrepresentation that caused Plaintiffs to make  
their monthly payments from the cash that represented the equity in their home to the  
Defendants. Moreover, upon information and belief, the variety of additional and separate  
payments charged for services and other items tangential to the loan were prohibitive. The

1 either set of alleged facts would be logically sufficient to support a claim of unjust  
2 enrichment, this Court will bifurcate the unjust enrichment claims in *Hearne* and *Dalby*. In  
3 both cases, a claim for unjust enrichment on theories related to MERS will remain with the  
4 undersigned as part of the MDL and a claim for unjust enrichment based on loan origination  
5 issues has been remanded to the transferor court.

6 The claim for unjust enrichment in *Burke* (Fifth Claim) also contains an identical two  
7 paragraphs, so it too will be bifurcated, retained in part and remanded in part.<sup>9</sup>

8 The claims for unjust enrichment in *Huynh* (Tenth Claim), *Mesi* (Eleventh Claim), *Lee*  
9 (Twelfth Claim), *Youngren* (Tenth Claim) and *Stoffels* (Sixth Claim) do not contain any  
10 allegations unrelated to the common factual core of this MDL and are each retained in full.

#### 11 **D. Injunctive Relief and Declaratory Relief**

12 Injunctive relief is not a cause of action but a remedy. However, it has been  
13 separately listed as a claim in *Stoffels* (Eighth Claim), *Hearne* (Sixth Claim), *Huynh* (Third  
14 Claim), *Mesi* (Second Claim), *Lee* (Third Claim), and *Youngren* (Third Claim). There is no  
15 reason to foreclose the remedy of injunctive relief either in the proceedings before this Court  
16 or in the proceedings before the transferor courts. Therefore, each of these claims for relief  
17 will be retained in part, i.e., to the extent they are based on claims related to the formation  
18 and operation of MERS, and has been remanded in part.

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21 result is that Plaintiffs assumed financial burdens that they would not otherwise have  
22 assumed, and paid Defendants funds to which the Defendants were not entitled nor owed.

23 . . . .  
24 Plaintiffs have paid an inflated interest rate that, upon information and belief, would not have  
25 been agreed to but for the failure to understand the documents and otherwise disclose the true  
26 terms and costs of the loans, tangential services, and out-of-pocket costs and that the housing  
27 market would not, as represented by the Defendants and their agents, the “lenders” continue  
28 to increase in value but would, because of the acts of the Defendants, crash and cause  
catastrophic loss of value in the real estate market.); CV 10-221-PHX-JAT (*Dalby*), Doc. #1  
at 55-56, ¶¶ 120, 122 (same).

<sup>9</sup> CV 10-0220-PHX-JAT (*Burke*), Doc. #1-2 at 2-3, ¶¶ 108, 110.

1           The Declaratory Judgment Act “does not provide an independent cause of action.”  
2 *S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch., Inc.*, 24 F.3d 427, 431 (2d Cir.  
3 1994). Because of that fact, the appropriateness of remand depends on the underlying causes  
4 of action for which declaratory relief is sought. Plaintiffs request declaratory relief in *Stoffels*  
5 (Ninth Claim), *Hearne* (Seventh Claim), *Mesi* (First Claim), *Lee* (Fourth Claim), *Burke*  
6 (Sixth Claim), and *Dalby* (Sixth Claim). Each of those cases contain some substantive claims  
7 that are remanded and others that are retained, these claims for declaratory relief should be  
8 bifurcated. Therefore, each of these claims for relief has been retained in part and remanded  
9 in part.

10           Accordingly,

11           **IT IS ORDERED** that with respect to *Stoffels* (CV 10-215-PHX-JAT), claims 2-4,  
12 6, 7 and part of claims 8 and 9 remain with the undersigned as part of the MDL and claims  
13 1, 5 and part of claims 8 and 9 have been remanded to the transferor court. MERS shall file  
14 a copy of this Order with the transferor court within the next two business days.

15           **IT IS FURTHER ORDERED** that with respect to *Hearne* (CV 10-216-PHX-JAT)  
16 claims 1, 3, and 4 and part of claims 2, 5, 6 and 7 remain with the undersigned as part of the  
17 MDL and part of claims 2, 5, 6 and 7 have been remanded to the transferor court.

18           **IT IS FURTHER ORDERED** that with respect to *Huynh* (CV 10-217-PHX-JAT)  
19 claims 2 and 4-11 and part of claims 3 and 12 remain with the undersigned as part of the  
20 MDL and claim 1 and part of claims 3 and 12 have been remanded to the transferor court.  
21 MERS shall file a copy of this Order with the transferor court within the next two business  
22 days.

23           **IT IS FURTHER ORDERED** that with respect to *Mesi* (CV 10-218-PHX-JAT)  
24 claims 4-12 and part of claims 1, 2 and 13 remain with the undersigned as part of the MDL  
25 and claim 3 and part of claims 1, 2 and 13 have been remanded to the transferor court.  
26 MERS shall file a copy of this Order with the transferor court within the next two business  
27 days.

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1           **IT IS FURTHER ORDERED** that with respect to *Youngren* (CV 10-219-PHX-JAT)  
2 claims 2 and 4-11 and part of claims 3 and 12 remain with the undersigned as part of the  
3 MDL and claim 1 and part of claims 3 and 12 have been remanded to the transferor court.  
4 MERS shall file a copy of this Order with the transferor court within the next two business  
5 days.

6           **IT IS FURTHER ORDERED** that with respect to *Burke* (CV 10-220-PHX-JAT)  
7 claims 1, 3, and 4 and part of claims 2, 5 and 6 remain with the undersigned as part of the  
8 MDL and part of claims 2, 5 and 6 have been remanded to the transferor court.

9           **IT IS FURTHER ORDERED** that with respect to *Dalby* (CV 10-221-PHX-JAT)  
10 claims 1, 3, and 4 and part of claims 2, 5 and 6 remain with the undersigned as part of the  
11 MDL and part of claims 2, 5 and 6 have been remanded to the transferor court.

12           **IT IS FURTHER ORDERED** that with respect to *Lee* (CV 10-268-PHX-JAT)  
13 claims 2 and 5-13 and part of claims 3, 4 and 14 remain with the undersigned as part of the  
14 MDL and claim 1 and part of claims 3, 4 and 14 have been remanded to the transferor court.  
15 MERS shall file a copy of this Order with the transferor court within the next two business  
16 days.

17           **IT IS FURTHER ORDERED** that the Clerk of the Court shall file a copy of this  
18 Order in each member case listed on pages 1-2.

19           **IT IS FURTHER ORDERED** that with respect to any claims that are staying with  
20 this Court, Defendants shall answer or otherwise respond to those claims within the time  
21 limits set in the Practice and Procedure Order (Doc. #87); with respect to any claims that  
22 have been remanded to the transferor courts, Defendants shall answer or otherwise respond  
23 to those claims within fifteen days of this Order, unless any order of the transferor court is  
24 inconsistent with this Order, in which case, the order of the transferor court shall control.

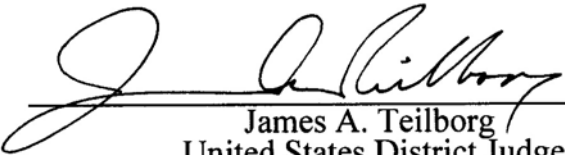
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**IT IS FURTHER ORDERED** within 5 days of this Order, MERS shall file all documents related to a case bifurcated herein into the record of the transferor court in that particular case. (Because this Court will not transfer the entire MDL file and docket to any individual transferor court, this will insure the Judge in the transferor court has a complete record for that specific case).

DATED this 23<sup>rd</sup> day of April, 2010.

  
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James A. Teilborg  
United States District Judge