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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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**AMENDED 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 thirteen cases<sup>2</sup> listed below that were transferred by the MDL Conditional Transfer Order (CTO-2) and Simultaneous Separation and Remand of Certain Claims (Doc. #107):

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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. #176). 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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<sup>2</sup> Twenty-one additional cases transferred by the transfer order have been addressed by a separate set of briefing.

	<u>First Plaintiff's Name</u>	<u>Arizona Case Number</u>	<u>Original Jurisdiction Case Number</u>
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2	<i>Duncan</i> <sup>3</sup>	CV 10-414-PHX-JAT	3:09-632 (Nevada)
3	<i>Sieben</i>	CV 10-416-PHX-JAT	3:09-642 (Nevada)
4	<i>Huck</i>	CV 10-417-PHX-JAT	3:09-643 (Nevada)
5	<i>Vo</i>	CV 10-425-PHX-JAT	3:09-654 (Nevada)
6	<i>Eastwood</i>	CV 10-426-PHX-JAT	3:09-656 (Nevada)
7	<i>Ellifritz</i>	CV 10-427-PHX-JAT	3:09-663 (Nevada)
8	<i>McConathy</i>	CV 10-428-PHX-JAT	3:09-665 (Nevada)
9	<i>Smith</i>	CV 10-429-PHX-JAT	3:09-666 (Nevada)
10	<i>Sage</i>	CV 10-456-PHX-JAT	3:09-689 (Nevada)
11	<i>Mason</i>	CV 10-457-PHX-JAT	3:09-734 (Nevada)
12	<i>Freeto</i>	CV 10-459-PHX-JAT	3:09-754 (Nevada)
13	<i>Fitzgerald</i>	CV 10-460-PHX-JAT	3:10-1 (Nevada)
14	<i>Dominguez</i>	CV 10-461-PHX-JAT	3:10-16 (Nevada)

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

16 In the initial transfer order, the Panel transferred to this Court all allegations within  
17 these actions that “the various participants in MERS formed a conspiracy to commit fraud  
18 and/or that security instruments are unenforceable or foreclosures are inappropriate due to  
19 MERS’s presence as a party” or that otherwise concern the “formation and operation” of  
20 MERS. (Doc. #1.) However, the Panel simultaneously remanded unrelated claims to their  
21 transferor courts, finding that “plaintiffs’ claims relating to loan origination and collection  
22 practices do not share sufficient questions of fact with claims regarding the formation and  
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25 <sup>3</sup> In four other cases briefed for this order, CV 10-401-PHX-JAT (*Huck*), CV 10-413-  
26 PHX-JAT (*Gillespie*), CV 10-415-PHX-JAT (*Caffee*), and CV 10-455-PHX-JAT (*Barlow*),  
27 Plaintiffs have moved for leave to file amended complaints. (Doc. ##525, 526, 564, 573.)  
28 The Court will wait until after it grants or denies those motions to determine which claims  
have been retained and which claims have been remanded in these four cases. An updated  
briefing schedule is set forth below.

1 operation” of MERS and their inclusion “would needlessly entangle the litigation in  
2 unrelated, fact-intensive issues.” *Id.*

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

8 Defendants Mortgage Electronic Registration Systems, Inc. and MERSCORP, Inc.  
9 (collectively, “Moving Defendants”) filed a Motion to Remand Claims. (Doc. #364.) Four  
10 responses were filed. Defendant OneWest Bank (“OneWest”) disagrees with Moving  
11 Defendants on six claims in one case. (Doc. #420.) Defendants Countrywide Home Loans,  
12 Inc., Countrywide Financial Corp., Countrywide Bank, F.S.B., Bank of America  
13 Corporation, N.A., ReconTrust Company, N.A., First Horizon Home Loans Corporation, and  
14 Wells Fargo Bank (collectively, “Responding Defendants”) disagree as to six types of claims  
15 in seven cases. (Doc. #428.) Two other responses were filed that do not dispute the Moving  
16 Defendants’ analysis. (Doc. ##415, 416.) MERS replied. (Doc. #433.)

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

18 Within these “tag-along” actions there are several types of claims over which the  
19 parties disagree. Where the parties agree as to the proper determination of a claim, the Court  
20 adopts the parties’ determination unless otherwise noted.

### 21 **A. Fraud in the Inducement**

22 The parties disagree about the status of claims for fraud in the inducement in *Duncan*  
23 (Fourteenth Claim), *Sieben* (Fourteenth Claim), *Huck* (Fourteenth Claim), and *Ellifritz*  
24 (Fourteenth Claim). Moving Defendants argue that all of these claims have been transferred  
25 to the MDL. Responding Defendants argue that the claims in *Duncan*, *Sieben*, and *Huck*  
26 have been split with part of each claim transferred to the MDL and part of each claim  
27 remanded to the respective transferor court. OneWest argues that the claim in *Ellifritz* has  
28 been remanded in its entirety.

1 Each of these claims contains the allegation that defendants “failed to disclose the  
2 material terms of the loans” and other allegations relating to the loan origination process.<sup>4</sup>  
3 But these claims also allege that defendants failed to disclose that they “had no lawful right  
4 to foreclose upon” the properties and that “[the plaintiffs’] obligations on the notes had been  
5 discharged.” These allegations relate to the operation of MERS.<sup>5</sup>

6 While either the MERS-related misrepresentations or the non-MERS-related  
7 misrepresentations could each be logically sufficient to establish liability, it may be that only  
8 all of the misrepresentations together were sufficient to induce the plaintiffs to enter the  
9 contract. Thus, these claims cannot be split and—as at least some of the allegations relate  
10 to the operation and formation of MERS—these claims have been transferred in their entirety  
11 to the MDL.

### 12 **B. Fraud Through Omission**

13 The Parties disagree about the status of claims for fraud through omission in *Duncan*  
14 (Sixth Claim), *Sieben* (Sixth Claim), *Huck* (Sixth Claim), and *Ellifritz* (Sixth Claim).  
15 Moving Defendants argue that these claims have been transferred to the MDL, while  
16 Responding Defendants and OneWest argue that these claims have been split with part of  
17 each claim transferred to the MDL and part of each claim remanded to the respective  
18 transferor court.

19 Each of these claims contains the allegation that defendants failed to disclose their  
20 “predatory, unethical and unsound lending and foreclosure practices” and the “predatory...  
21 practices of other major lenders, of which Defendants were aware per the MERS system.”<sup>6</sup>  
22 Thus, these claims involve both MERS-related omissions and non-MERS-related omissions  
23 which could serve as the basis for a finding of fraud. However, just as with the fraud in the  
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26 <sup>4</sup> See, e.g., CV 10-414-PHX-JAT (*Duncan*), Doc. #1-1 at 48-50

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

28 <sup>6</sup> See, e.g., CV 10-413-PHX-JAT (*Duncan*), Doc. #1-1 at 31.

1 inducement claims above, the fraud through omission claims cannot be severed. Therefore,  
2 these claims have been transferred in their entirety to the MDL.

### 3 **C. Racketeering**

4 Plaintiffs assert claims for racketeering activity under Nevada law in *Duncan*  
5 (Eleventh Claim), *Sieben* (Eleventh Claim), and *Huck* (Eleventh Claim). These claims allege  
6 vaguely that defendants have “engaged in racketeering” via the “predatory and abusive  
7 lending practices described herein.”<sup>7</sup> Responding Defendants argue that because these  
8 alleged underlying lending practices have been bifurcated, with some retained and some  
9 remanded, this racketeering claim must also have been split. Moving Defendants argue that  
10 because these claims are unclear as to which practices actually constitute the racketeering  
11 claim, they have been transferred to the MDL in its entirety.

12 The Court finds that these claims incorporate each and every other claim in their  
13 respective complaints. Thus, it would be feasible for either a pair of non-MERS-related  
14 violations to support a racketeering claim or a pair of MERS-related violations to support a  
15 racketeering claim. Therefore, these racketeering claims should be considered by both this  
16 Court and the transferor court. Accordingly, these claims have been bifurcated.<sup>8</sup>

### 17 **D. Civil Conspiracy**

18 Plaintiffs assert claims for civil conspiracy in, *Duncan* (Tenth Claim), *Sieben* (Tenth  
19 Claim), and *Huck* (Tenth Claim). These claims allege vaguely that defendants have “entered  
20 into a conspiracy with other members of MERS” in which they “failed to inform Nevada  
21 mortgagors of their rights,” continue to illegally “eject Nevadans” from their homes, and  
22 commit the violations alleged in the other claims of the complaint.<sup>9</sup> Responding Defendants  
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24 <sup>7</sup> See, e.g., CV 10-414-PHX-JAT (*Duncan*), Doc. #1-1 at 43.

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26 <sup>8</sup> The identical racketeering claims in *Vo* (Tenth Claim), *Eastwood* (Tenth Claim),  
27 *Ellifritz* (Tenth Claim), *McConathy* (Tenth Claim), *Smith* (Tenth Claim), *Sage* (Tenth Claim),  
*Freeto* (Tenth Claim), and *Dominguez* (Tenth Claim) are also bifurcated.

28 <sup>9</sup> See, e.g., CV 10-414-PHX-JAT (*Duncan*), Doc. #1-1 at 41-42.

1 argue that because these alleged underlying violations include claims that have been retained  
2 and claims that have been remanded, this conspiracy claim must also have been split.  
3 Moving Defendants argue that all of the allegations are fused with the alleged MERS  
4 conspiracy and have thus been transferred to the MDL.

5 The Court finds that these claims are cumulative of all other claims in their respective  
6 complaints. Thus, it would be feasible for either a pair of non-MERS-related violations to  
7 support a conspiracy claim or a pair of MERS-related violations to support a conspiracy  
8 claim. Therefore, these civil conspiracy claims should be considered by both this Court and  
9 the transferor court. Accordingly, these claims have been bifurcated.<sup>10</sup>

10 **E. Contractual Breach of Duty of Good Faith and Fair Dealing and Tortious**  
11 **Breach of the Implied Duty of Good Faith and Fair Dealing**

12 The parties disagree on these two types of claims in *Duncan* (Eighth and Ninth  
13 Claims), *Sieben* (Eighth and Ninth Claims), *Huck* (Eighth and Ninth Claims), and *Ellifritz*  
14 (Eighth and Ninth Claims). Moving Defendants argue that these claims have been  
15 transferred in full, Responding Defendants argue that these claims in *Duncan*, *Sieben*, and  
16 *Huck* have been severed with part transferred and part remanded, and OneWest argues that  
17 these claims in *Ellifritz* have been remanded in full.

18 Plaintiffs allege that defendants' participation in MERS created a duty of good faith  
19 and fair dealing which was breached in the loan origination process.<sup>11</sup> Thus, even though  
20 these claims involve loan origination, they raise questions of fact sufficiently related to  
21 operation of MERS. Thus, these claims have been transferred in their entirety to the MDL.

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25 <sup>10</sup> The identical civil conspiracy claims in *Vo* (Eleventh Claim), *Eastwood* (Eleventh  
26 Claim), *Ellifritz* (Eleventh Claim), *McConathy* (Eleventh Claim), *Smith* (Eleventh Claim),  
27 *Sage* (Eleventh Claim), *Freeto* (Eleventh Claim), and *Dominguez* (Eleventh Claim) are also  
28 bifurcated.

<sup>11</sup> See, e.g., CV 10-414-PHX-JAT (*Duncan*), Doc. #1-1 at 38-41.

1           **F. Wrongful Foreclosure**

2           Plaintiffs assert a claim for wrongful foreclosure in *Ellifritz* (Fifth Claim). Moving  
3 Defendants argue that the claim has been retained, while OneWest argues that this claim has  
4 been split. Specifically, OneWest argues that “Plaintiffs’ allegation that their obligations  
5 have been discharged because investors of mortgage-backed securities received federal  
6 bailout funds” deals with “collection of payments on the mortgage loan, and whether  
7 Plaintiffs’ payment obligation has been discharged” and has been remanded. (Doc. #420 at  
8 5-6.) Moving Defendants contend that because “the federal-bailout allegation concerns the  
9 role of [MERS], the ‘wrongful foreclosure’ claim was transferred to this Court in its  
10 entirety.” (Doc. #433 at 6.)

11           The Panel’s transfer order made clear that the actions transferred to this Court  
12 “possess a common factual core regarding allegations that... security instruments are  
13 unenforceable or foreclosures are inappropriate due to MERS’s presence as a party.” (Doc.  
14 #1 at 2.) Here the allegation is that defendants’ “foreclosures are inappropriate” due to the  
15 workings of the federal bailout. This allegation appears to share sufficient questions of fact  
16 with claims regarding the formation and operation of MERS that it is properly part of the  
17 MDL. Accordingly, the entirety of this claim for wrongful foreclosure has been retained.

18           **G. Conspiracy to Commit Fraud and Conversion**

19           Plaintiffs assert a claim for “conspiracy to commit fraud and conversion” in *Ellifritz*  
20 (Second Claim). Moving Defendants argue that this claim has been transferred to the MDL  
21 and OneWest argues that this claim has been remanded. The claim alleges that defendants  
22 conspired to defraud plaintiffs “by participating in [MERS]... which was the forming of an  
23 association to conspire to deprive Plaintiff(s) of their property through fraud and  
24 misrepresentation...”<sup>12</sup> This allegation relates to the formation and operation of MERS and,  
25 thus, the Court finds that this claim has been transferred.

26           Accordingly,

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28           <sup>12</sup> CV 10-437-PHX-JAT (*Ellifritz*), Doc. #1-1 at 41.

1           **IT IS ORDERED** that the Motion to Remand Certain Claims (Doc. #364) is  
2 **GRANTED IN PART** and **DENIED IN PART**.

3           **IT IS FURTHER ORDERED** that with respect to *Huck* (CV 10-401-PHX-JAT),  
4 *Gillespie* (CV 10-413-PHX-JAT), CV 10-415-PHX-JAT (*Caffee*), and CV 10-455-PHX-JAT  
5 (*Barlow*) the motion is denied without prejudice. Moving Defendants shall have ten days  
6 after the Court rules on the motions for leave to amend to file a motion to remand all claims  
7 that it asserts the panel remanded to the respective transferor courts in the transfer orders;  
8 Plaintiffs and the non-moving Defendants shall respond to this motion to remand within ten  
9 days and in the responses shall specify what claims they agree were remanded, what  
10 additional claims, if any, have been remanded, and what claims, if any, they assert were not  
11 remanded; Moving Defendants shall reply (in a consolidated reply) within ten days.

12           **IT IS FURTHER ORDERED** that with respect to *Duncan* (CV 10-414-PHX-JAT),  
13 *Sieben* (CV 10-416-PHX-JAT), *Huck* (CV 10-417-PHX-JAT), *Vo* (CV 10-425-PHX-JAT),  
14 *Ellifritz* (CV 10-427-PHX-JAT), *McConathy* (CV 10-428-PHX-JAT), *Smith* (CV 10-429-  
15 PHX-JAT), and *Sage* (CV 10-456-PHX-JAT) claims 2, 5-9, 13 and 14 and part of claims 3,  
16 4, 10, 11, and 12 remain with the undersigned as part of the MDL and claim 1 and part of  
17 claims 3, 4, 10, 11, and 12 have been remanded to their respective transferor courts. MERS  
18 shall file a copy of this Order with each transferor court within the next two business days.

19           **IT IS FURTHER ORDERED** that with respect to *Eastwood* (CV 10-426-PHX-JAT)  
20 claims 1-2, 5-9, 13 and 14 and part of claims 3, 4, 10, 11, and 12 remain with the undersigned  
21 as part of the MDL and part of claims 3, 4, 10, 11, and 12 have been remanded to the  
22 transferor court. MERS shall file a copy of this Order with the transferor court within the  
23 next two business days.

24           **IT IS FURTHER ORDERED** that with respect to *Mason* (CV 10-457-PHX-JAT)  
25 and *Fitzgerald* (CV 10-460-PHX-JAT) claims 1-4 and part of claim 6 (i.e., injunctive relief,  
26 declaratory relief, and quiet title) remain with the undersigned as part of the MDL and claim  
27 5 and part of claim 6 (i.e., injunctive relief, declaratory relief, and reformation) have been  
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1 remanded to their respective transferor courts. MERS shall file a copy of this Order with  
2 each transferor court within the next two business days.

3 **IT IS FURTHER ORDERED** that with respect to *Freeto* (CV 10-459-PHX-JAT)  
4 claims 2, 5-11, and 13 and part of claims 3 and 4 remain with the undersigned as part of the  
5 MDL and claims 1 and 12 and part of claims 3 and 4 have been remanded to the transferor  
6 court.<sup>13</sup> MERS shall file a copy of this Order with the transferor court within the next two  
7 business days.

8 **IT IS FURTHER ORDERED** that with respect to *Dominguez* (CV 10-461-PHX-  
9 JAT) claims 1-2, 5-11, 13 and 14 and part of claims 3, 4, and 12 remain with the undersigned  
10 as part of the MDL and part of claims 3, 4, and 12 have been remanded to the transferor  
11 court.<sup>14</sup> MERS shall file a copy of this Order with the transferor court within the next two  
12 business days.

13 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file a copy of this  
14 Order in each member case listed on page 2.

15 **IT IS FURTHER ORDERED** that with respect to any claims that are staying with  
16 this Court, Defendants shall answer or otherwise respond to those claims within the time  
17 limits set in the Initial Practice and Procedure Order (Doc. #25); with respect to any claims  
18 that have been remanded to the transferor courts, Defendants shall answer or otherwise  
19 respond to those claims within fifteen days of this Order, unless any order of the transferor  
20 court is inconsistent with this Order, in which case, the order of the transferor court shall  
21 control.

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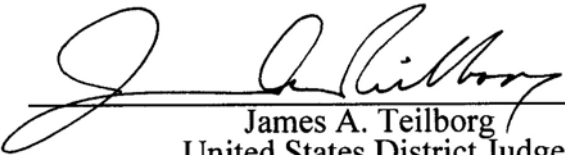
22  
23 <sup>13</sup> While these remanded claims do not appear to involve Defendants Litton Loan  
24 Servicing LP, Bank of New York Mellon as former trustee for the C-BASS Mortgage Loan  
25 Asset-Backed Certificates Series 2005-CB4, and JPMorgan Chase Bank, National  
26 Association, as former trustee for the C-BASS Mortgage Loan Asset-Backed Certificates  
27 Series 2005-CB4 (collectively, "Litton Loan Group"), this argument is better made in a  
28 motion to dismiss. Thus, the Court remands these claims even as they relate to the Litton  
Loan Group.

<sup>14</sup> The Court remands these claims even as they relate to Defendant Litton Loan  
Servicing LP.

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**IT IS FURTHER ORDERED** within 12 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 4<sup>th</sup> day of June, 2010.

  
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James A. Teilborg  
United States District Judge