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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 twenty-one cases<sup>2</sup> transferred by the MDL Conditional Transfer Order (CTO-2) and Simultaneous Separation and Remand of Certain Claims. (Doc. #107.)

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| <u>First Plaintiff’s Name</u> | <u>Arizona Case Number</u> | <u>Original Jurisdiction Case Number</u> |
|-------------------------------|----------------------------|--|
| <i>Shieban</i>                | CV 10-470-PHX-JAT          | 2:09-1939 (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. #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> The additional seventeen cases transferred by the transfer order will be addressed by a separate set of briefing.

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| 1  | <i>Villa</i>     | CV 10-472-PHX-JAT | 2:09-2161 (Nevada) |
| 2  | <i>Hall</i>      | CV 10-473-PHX-JAT | 2:09-2233 (Nevada) |
| 3  | <i>Velasquez</i> | CV 10-475-PHX-JAT | 2:09-2265 (Nevada) |
| 4  | <i>Hora</i>      | CV 10-476-PHX-JAT | 2:09-2267 (Nevada) |
| 5  | <i>Lalatag</i>   | CV 10-477-PHX-JAT | 2:09-2268 (Nevada) |
| 6  | <i>Whalen</i>    | CV 10-471-PHX-JAT | 2:09-2081 (Nevada) |
| 7  | <i>Saniel</i>    | CV 10-483-PHX-JAT | 2:09-2290 (Nevada) |
| 8  | <i>Kwok</i>      | CV 10-484-PHX-JAT | 2:09-2298 (Nevada) |
| 9  | <i>Berilo</i>    | CV 10-485-PHX-JAT | 2:09-2353 (Nevada) |
| 10 | <i>Yateman</i>   | CV 10-486-PHX-JAT | 2:09-2376 (Nevada) |
| 11 | <i>Fitzwater</i> | CV 10-487-PHX-JAT | 2:09-2400 (Nevada) |
| 12 | <i>Evans</i>     | CV 10-488-PHX-JAT | 2:09-2401 (Nevada) |
| 13 | <i>Kartman</i>   | CV 10-489-PHX-JAT | 2:09-2404 (Nevada) |
| 14 | <i>Bricker</i>   | CV 10-492-PHX-JAT | 2:09-2449 (Nevada) |
| 15 | <i>Boyd</i>      | CV 10-493-PHX-JAT | 2:09-2456 (Nevada) |
| 16 | <i>Golding</i>   | CV 10-494-PHX-JAT | 2:10-1 (Nevada)    |
| 17 | <i>Kahalehoe</i> | CV 10-491-PHX-JAT | 2:09-2414 (Nevada) |
| 18 | <i>Ene</i>       | CV 10-469-PHX-JAT | 2:08-1550 (Nevada) |
| 19 | <i>Greene</i>    | CV 10-474-PHX-JAT | 2:09-2246 (Nevada) |
| 20 | <i>Greene</i>    | CV 10-482-PHX-JAT | 2:09-2273 (Nevada) |

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

22           In the initial transfer order, the Panel transferred to this Court all allegations within  
23 these actions that “the various participants in MERS formed a conspiracy to commit fraud  
24 and/or that security instruments are unenforceable of foreclosures are inappropriate due to  
25 MERS’s presence as a party” or that otherwise concern “the formation and operation” of  
26 MERS. (Doc. #1.) However, the Panel simultaneously remanded unrelated claims to their  
27 transferor courts, finding that “plaintiffs’ claims relating to loan origination and collection  
28 practices do not share sufficient questions of fact with claims regarding the formation and

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 undersigned.

8 Defendants Mortgage Electronic Registration Systems, Inc. and MERSCORP, Inc.  
9 (collectively, “Moving Defendants”) filed a Motion to Remand Claims. (Doc. #230.) Eight  
10 responses were filed. Four plaintiffs responded expressing complete agreement with the  
11 manner in which Moving Defendants suggested the claims be disposed. (Doc. ##372-75.)  
12 Defendants Federal National Mortgage Association (“Fannie Mae”) and Federal Housing  
13 Finance Agency (“FHFA”) responded in apparent agreement with Moving Defendants.  
14 (Doc. ##363, 371.) One response by defendants HSBC Mortgage Services and Housekey  
15 Financial Corporation (collectively, “HSBC”) disagrees as to one claim in one case. (Doc.  
16 #366.) Several other defendants<sup>3</sup> (“Responding Defendants”) have responded with some  
17 different suggested classification of claims. (Doc. #367.) MERS replied. (Doc. #407.)

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

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

### 22 **A. Unjust Enrichment and Civil Conspiracy**

23 Plaintiffs assert claims for “unfair enrichment and civil conspiracy” in *Velasquez*  
24 (Sixth Claim), *Villa* (Sixth Claim), *Hall* (Fifth Claim), *Hora* (Sixth Claim), *Shieban* (Sixth  
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26 <sup>3</sup> Countrywide Home Loans; ReconTrust Co., N.A.; ReconTrust Co.; BAC Home  
27 Loans Bankruptcy Risk Litigation Management Division; Bank of America; BAC Home  
28 Loans Servicing; America's Servicing Co.; and Wells Fargo Bank.

1 Claim), and *Lalatag* (Fifth Claim). Responding Defendants argue that the claims in  
2 *Velasquez, Villa, Hall, and Hora* should be split, with a part retained and a part remanded.  
3 Each claim alleges that defendants defrauded plaintiffs by “charging a higher interest rate”  
4 and accepting “kickbacks, profits... and gains and fee unrelated to the settlement services  
5 provided at closing” and agreed to engage in a conspiracy to do so.<sup>4</sup>

6 Moving Defendants argue that these claims were transferred to this Court as the Panel  
7 explicitly countenanced that “allegations that the various participants in MERS formed a  
8 conspiracy to commit fraud” (Doc. #1 at 2) should be centralized in the MDL. However, the  
9 accompanying allegations of higher charges and accepting kickbacks are separable and do  
10 not relate to the formation or operation of MERS. Therefore, the claims for unfair  
11 enrichment and civil conspiracy in *Velasquez, Villa, Hall, and Hora* will be separated. The  
12 allegations of conspiracy have been transferred to the MDL and the allegations of the  
13 underlying “unfair enrichment” have been remanded to the transferor courts. To maintain  
14 consistency, the Court will also separate the identically worded claims for unfair enrichment  
15 and civil conspiracy in *Shieban* and *Lalatag*, with a part retained and a part remanded.

### 16 **B. Unjust Enrichment**

17 Moving Defendants and Responding Defendants disagree about the status of the  
18 unjust enrichment claims in *Fitzwater* (Sixth Claim), *Boyd* (Sixth Claim), and *Berilo* (Sixth  
19 Claim). Each of these claims arises from defendants’ “deceptive scheme” to withhold “the  
20 true purpose of the securitization” from borrowers.<sup>5</sup> Thus, while these claims mention loan  
21 origination, they share sufficient questions of fact with claims regarding the formation and  
22 operation of MERS. Therefore, these claims have been transferred to the MDL.

### 23 **C. Fraud in the Inducement**

24 Moving Defendants and Responding Defendants disagree about the status of claims  
25 for fraud in the inducement in *Greene* (Ninth Claim), *Berilo* (Third Claim), *Boyd* (Third

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27 <sup>4</sup> See, e.g., CV 10-475-PHX-JAT (*Velasquez*), Doc. #1-2 at 17.

28 <sup>5</sup> See, e.g., CV 10-487-PHX-JAT (*Fitzwater*), Doc. #1-1 at 40-41.

1 Claim), *Bricker* (Second Claim), and *Fitzwater* (Third Claim). Moving Defendants argue  
2 that these claims have been transferred to the MDL, while Responding Defendants argue that  
3 these claims have been split with part of each claim transferred to the MDL and part of each  
4 claim remanded to the transferor courts.

5 Each of these claims contains the allegation that defendants “misrepresented the  
6 ability of Plaintiffs to qualify for the loans” and other allegations relating to the loan  
7 origination process.<sup>6</sup> But these claims also allege that Defendants failed to disclose that they  
8 “had no lawful right to foreclose upon” the properties, failed to notify Plaintiffs that “their  
9 obligations on the notes had been discharged,” and other allegations related to the operation  
10 of MERS.<sup>7</sup>

11 Moving Defendants are correct that this claim cannot be split. While the MERS-  
12 related misrepresentations or the non-MERS-related misrepresentations could each be  
13 logically sufficient to establish liability, it may be that only all of the misrepresentations  
14 together were sufficient to induce the plaintiffs to enter the contract. As these claims cannot  
15 be split, they have been transferred in their entirety to the MDL.

#### 16 **D. Emotional Distress**

17 Plaintiffs assert a claim for emotional distress in *Greene* (Seventh Claim). Moving  
18 Defendants argue that this claim has been transferred in full, while Responding Defendants  
19 argue that this claim should be severed with part transferred and part remanded. As this  
20 claim is premised on the illegal actions alleged in all the other claims in the complaint, there  
21 is no reason that both this Court and the transferor court ought not consider this claim.  
22 Therefore, the claim for emotion distress has been transferred in part and remanded in part.

#### 23 **E. Claims in *Kwok* and *Saniel***

24 Responding Defendants argue that plaintiffs’ claims in *Kwok* and *Saniel* for  
25 “misrepresentation and fraud by omission,” “contractual breach of duty of good faith and fair

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27 <sup>6</sup> *See, e.g.*, CV 10-487-PHX-JAT (*Fitzwater*), Doc. #1-1 at 26-27.

28 <sup>7</sup> *Id.*

1 dealing,” and “fraud by obtaining signature by false pretenses” have all been remanded and  
2 that plaintiffs’ claim for “civil RICO and racketeering” in *Saniel* (Sixth Claim) should be  
3 split. Both Moving Defendants and the plaintiffs, in their response, argue that all of these  
4 claims have been transferred in their entirety to the MDL.

5 These claims are vague. Responding Defendants are correct that these claims could  
6 easily be construed to involve loan origination issues that should be remanded. However, the  
7 Court will give additional weight to plaintiffs own construction of their claims. Plaintiffs,  
8 in their responses, adopted Moving Defendants suggestion that these claims have been  
9 transferred to the MDL in their entirety. (Doc. ##374-75.) Therefore, the Court finds that  
10 these several claims in *Kwok* and *Saniel* relate to the formation and operation of MERS and  
11 will be remain with the undersigned.

12 Accordingly,

13 **IT IS ORDERED** that with respect to *Shieban* (CV 10-470-PHX-JAT), claims 1, 2,  
14 and 8 and part of claim 6 remain with the undersigned as part of the MDL and claims 3-5 and  
15 part of claim 6 have been remanded to the transferor court.<sup>8</sup> MERS shall file a copy of this  
16 Order with the transferor court within the next two business days.

17 **IT IS FURTHER ORDERED** that with respect to *Villa* (CV 10-472-PHX-JAT)  
18 claims 1, 2, and 8 and part of claim 6 remain with the undersigned as part of the MDL and  
19 claims 3-5 and part of claim 6 have been remanded to the transferor court.<sup>9</sup> MERS shall file  
20 a copy of this Order with the transferor court within the next two business days.

21 **IT IS FURTHER ORDERED** that with respect to *Hall* (CV 10-473-PHX-JAT)  
22 claims 1, 2, 6, and 7 and part of claim 5 remain with the undersigned as part of the MDL and  
23 claims 3 and 4 and part of claim 5 have been remanded to the transferor court. MERS shall  
24 file a copy of this Order with the transferor court within the next two business days.

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27 <sup>8</sup> The Complaint in *Shieban* does not contain a Seventh Claim.

28 <sup>9</sup> The Complaint in *Villa* does not contain a Seventh Claim.

1           **IT IS FURTHER ORDERED** that with respect to *Velasquez* (CV 10-475-PHX-JAT)  
2 claims 1, 2, and 8 and part of claim 6 remain with the undersigned as part of the MDL and  
3 claims 3-5 and part of claim 6 have been remanded to the transferor court.<sup>10</sup> MERS shall file  
4 a copy of this Order with the transferor court within the next two business days.

5           **IT IS FURTHER ORDERED** that with respect to *Hora* (CV 10-476-PHX-JAT)  
6 claims 1, 2, 8, and 9 and part of claim 6 remain with the undersigned as part of the MDL and  
7 claims 3-5 and part of claim 6 have been remanded to the transferor court.<sup>11</sup> MERS shall file  
8 a copy of this Order with the transferor court within the next two business days.

9           **IT IS FURTHER ORDERED** that with respect to *Lalatag* (CV 10-477-PHX-JAT)  
10 claims 1, 2, 6, and 7 and part of claim 5 remain with the undersigned as part of the MDL and  
11 claims 3 and 4 and part of claim 5 have been remanded to the transferor court. MERS shall  
12 file a copy of this Order with the transferor court within the next two business days.

13           **IT IS FURTHER ORDERED** that with respect to *Whalen* (CV 10-471-PHX-JAT)  
14 the entire case remains with the undersigned as part of the MDL.

15           **IT IS FURTHER ORDERED** that with respect to *Saniel* (CV 10-483-PHX-JAT)  
16 claims 1-3 and 5-9 remain with the undersigned as part of the MDL and claim 4 has been  
17 remanded to the transferor court. MERS shall file a copy of this Order with the transferor  
18 court within the next two business days.

19           **IT IS FURTHER ORDERED** that with respect to *Kwok* (CV 10-484-PHX-JAT)  
20 claims 1-3 and 5-9 remain with the undersigned as part of the MDL and claim 4 has been  
21 remanded to the transferor court. MERS shall file a copy of this Order with the transferor  
22 court within the next two business days.

23           **IT IS FURTHER ORDERED** that with respect to *Berilo* (CV 10-485-PHX-JAT)  
24 claims 2-6, 12, and 13 and part of claims 10 and 11 remain with the undersigned as part of  
25 the MDL and claims 1, 7-9, and part of claims 10 and 11 have been remanded to the  
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27           <sup>10</sup> The Complaint in *Velasquez* does not contain a Seventh Claim.

28           <sup>11</sup> The Complaint in *Hora* does not contain a Seventh Claim.

1 transferor court. MERS shall file a copy of this Order with the transferor court within the  
2 next two business days.

3 **IT IS FURTHER ORDERED** that with respect to *Yateman* (CV 10-486-PHX-JAT)  
4 claims 1-5 and part of claims 13 and 14 remain with the undersigned as part of the MDL and  
5 claims 6-12 and part of claims 13 and 14 have been remanded to the transferor court. MERS  
6 shall file a copy of this Order with the transferor court within the next two business days.

7 **IT IS FURTHER ORDERED** that with respect to *Fitzwater* (CV 10-487-PHX-JAT)  
8 claims 2-6 and part of claims 12 and 13 remain with the undersigned as part of the MDL and  
9 claims 1, 7-11 and part of claims 12 and 13 have been remanded to the transferor court.  
10 MERS shall file a copy of this Order with the transferor court within the next two business  
11 days.

12 **IT IS FURTHER ORDERED** that with respect to *Evans* (CV 10-488-PHX-JAT)  
13 claims 2-6 and part of claims 12 and 13 remain with the undersigned as part of the MDL and  
14 claims 1, 7-11 and part of claims 12 and 13 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 with respect to *Kartman* (CV 10-489-PHX-JAT)  
18 claims 2-6, 10, and 11 and part of claims 8 and 9 remain with the undersigned as part of the  
19 MDL and claims 1 and 7 and part of claims 8 and 9 have been remanded to the transferor  
20 court. MERS shall file a copy of this Order with the transferor court within the next two  
21 business days.

22 **IT IS FURTHER ORDERED** that with respect to *Bricker* (CV 10-492-PHX-JAT)  
23 the entire case remains with the undersigned as part of the MDL.

24 **IT IS FURTHER ORDERED** that with respect to *Boyd* (CV 10-493-PHX-JAT)  
25 claims 2-6, 14, and 15 and part of claims 12 and 13 remain with the undersigned as part of  
26 the MDL and claims 1, 7-11 and part of claims 12 and 13 have been remanded to the  
27 transferor court. MERS shall file a copy of this Order with the transferor court within the  
28 next two business days.



1           **IT IS FURTHER ORDERED** that with respect to *Golding* (CV 10-494-PHX-JAT)  
2 claims 2-6, and 8 and part of claim 7 remain with the undersigned as part of the MDL and  
3 claim 1 and part of claim 7 have been remanded to the transferor court. MERS shall file a  
4 copy of this Order with the transferor court within the next two business days.

5           **IT IS FURTHER ORDERED** that with respect to *Kahalehoe* (CV 10-491-PHX-  
6 JAT) claims 5-8 and part of claims 1 and 2 remain with the undersigned as part of the MDL  
7 and claims 3, 4, and 9 and part of claims 1 and 2 have been remanded to the transferor court.  
8 MERS shall file a copy of this Order with the transferor court within the next two business  
9 days.

10           **IT IS FURTHER ORDERED** that with respect to *Ene* (CV 10-469-PHX-JAT)  
11 claims 6 and 9 and part of claims 7, 8, and 10 remain with the undersigned as part of the  
12 MDL and claims 1-5, 11, and 12 and part of claims 7, 8, and 10 have been remanded to the  
13 transferor court. MERS shall file a copy of this Order with the transferor court within the  
14 next two business days.

15           **IT IS FURTHER ORDERED** that with respect to *Greene* (CV 10-474-PHX-JAT,  
16 CV 10-482-PHX-JAT) claims 4-6, 8, and 9 and part of claims 7 and 10 remain with the  
17 undersigned as part of the MDL and claims 1-3 and part of claims 7 and 10 have been  
18 remanded to the transferor court. MERS shall file a copy of this Order with the transferor  
19 court within the next two business days.

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

22           **IT IS FURTHER ORDERED** that Defendant Fidelity National Title Insurance  
23 Company's Motion to Dismiss (Doc. #402) is **DENIED** without prejudice to refile a  
24 motion addressing only the claims retained in the MDL.

25           **IT IS FURTHER ORDERED** that Defendant Chicago Title's Motion to Dismiss  
26 (Doc. #403) is **DENIED** without prejudice to refile a motion addressing only the claims  
27 retained in the MDL.

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