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UNITED STATES DISTRICT COURT

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DISTRICT OF ARIZONA

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IN RE MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS (MERS)
LITIGATION

) **MDL 09-02119-PHX-JAT**
) **CV 10-630-PHX-JAT**
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THIS DOCUMENT RELATES TO:

) **ORDER Re SUPPLEMENTAL**
) **BRIEFING**
)

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Robinson v. GE Money Bank et al.,
CV 10-00630-PHX-JAT

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The Court will order supplemental briefing as specified below. Each brief may not exceed FIVE (5) pages. This five pages includes the caption and the signature and is inclusive of exhibits.

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Regarding the Robinson case, in the motion at Doc. 1923, pages 4-6, Defendant

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U.S. Bank makes the following argument:

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The Court should enter summary judgment in favor of U.S. Bank, as Trustee for SASCO Series 2006-GEL3, because the undisputed evidence of record establishes that it had no involvement in the foreclosure action or the documents the Robinsons attached to the CAC. U.S. Bank, as Trustee for SASCO Series 2006-GEL3, merely held the Robinsons' loan as trustee. SOF ¶¶ 5-6. U.S. Bank, as Trustee for SASCO Series 2006- GEL3, had no involvement in the foreclosure process: it did not service the loan or initiate the foreclosure proceedings, it did not execute or cause the recording of the documents at issue, it did not communicate with the foreclosure trustee about the documents or the foreclosure, and it never saw the challenged documents before they were recorded. *See id.* ¶¶ 6-7.

Defendant U.S. Bank (as Trustee) makes no argument about who did undertake the foreclosure of the Robinsons' house. Arizona agency law is as follows:

1 Arizona courts generally follow the Restatement of Agency. *Fidelity*
2 *& Deposit Co. of Md. v. Bondwriter of Sw., Inc.*, 228 Ariz. 84, 263 P.3d
3 633, 639 (Ariz. Ct. App.2011). The Restatement defines “agency” as “a
4 consensual and fiduciary relationship” that “creates a [fiduciary] duty upon
5 the agent to act in good faith and according to the terms of the agency
6 agreement.” *Maricopa P’ships, Inc. v. Petyak*, 163 Ariz. 624, 790 P.2d 279,
7 281 (Ariz.Ct.App.1989); *see* Restatement (Third) of Agency § 1.01 (2006)
8 (“Agency is the fiduciary relationship that arises when one person (a
9 ‘principal’) manifests assent to another person (an ‘agent’) that the agent
10 shall act on the principal’s behalf and subject to the principal’s control, and
11 the agent manifests assent or otherwise consents so to act.”).

12 *KnightBrook Ins. Co. v. Payless Car Rental Sys., Inc.*, 43 F. Supp. 3d 965, 978 (D. Ariz.
13 2014).

14 A principal is subject to liability to a third party harmed by an
15 agent’s conduct when the agent’s conduct is within the scope of the agent’s
16 actual authority or ratified by the principal; and

- 17 • (1) the agent’s conduct is tortious, or
- 18 • (2) the agent’s conduct, if that of the principal, would subject the principal
19 to tort liability.

20 Restatement (Third) Of Agency § 7.04 (2006).

21 This Court and other courts have held that MERS and the MERS system do not
22 per se violate Arizona law. *See e.g. Cervantes v. Countrywide Home Loans, Inc.*, 656
23 F.3d 1034, 1044 (9th Cir. 2011) (“Further, the notes and deeds are not irreparably split:
24 the split only renders the mortgage unenforceable if MERS or the trustee, as nominal
25 holders of the deeds, are not agents of the lenders. *See Landmark Nat’l Bank*, 216 P.3d at
167.”).

26 Thus, while Courts have held that MERS (or a servicer) is permitted to be the
27 agent of the lender, in any particular case, the lender could disavow that any such
28 relationship exists and that MERS (and/or the servicer) is a rogue actor. In this case, that
29 appears to be the only logical conclusion to U.S. Bank’s argument.

30 In other words, U.S. Bank argues that IT took no action. By implication, U.S.
31 Bank must also be arguing that it is not the principal of any agent (acting within its
32 authority) who took such action, otherwise, as principal, U.S. Bank would still be liable.

