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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Azadeh Famili,

10 Plaintiff,

11 v.

12 Wells Fargo Bank NA, et al.,

13 Defendants.  
14

No. CV-13-00702-PHX-DGC

**ORDER**

15 Defendants U.S. Bank National Association and BSI Financial Services, Inc. have  
16 filed a motion for summary judgment and a statement of facts in support of that motion.  
17 Docs. 24, 25. Plaintiff Famili, who is represented by counsel, has responded to the  
18 motion (Doc. 30) but has not filed a controverting statement of facts as required by Local  
19 Rule 56.1(b). Defendants have filed a reply. Doc. 31. Neither party has requested oral  
20 argument. For the reasons stated below, the Court will grant Defendants' motion.  
21 Plaintiff's requests for leave to file an Amended Complaint will be denied.

22 **I. Background.**

23 On April 27, 2007, Plaintiff signed a Deed of Trust securing a Promissory Note in  
24 the amount of \$412,000. The Deed was recorded on May 4, 2007 on property owned by  
25 Plaintiff at 409 E. Braeburn Drive in Phoenix, Arizona. Docs. 24 at 3, 30 at 2. In  
26 February 2012, Quality Loan Service Corporation ("Quality") was substituted as the  
27 successor trustee of the Deed pursuant to a Substitution of Trustee, and that substitution  
28 was recorded. *Id.* Quality recorded a Notice of Trustee's Sale on March 1, 2012 (Doc.

1 24 at 3), and mailed a Statement of Breach of Non-Performance and the Notice of  
2 Trustee's Sale to Plaintiff's mailing address at 254 Oakland Road, Glendora, California,  
3 91741, on March 16, 2012 (*id.* at 4, Doc. 30 at 3).<sup>1</sup>

4 On March 27, 2013, Plaintiff filed her complaint in Maricopa County Superior  
5 Court, alleging eight counts against Defendants. Doc. 1-1. Count one alleged that  
6 neither the Mortgage Electronic Registration Systems ("MERS") nor US Bank had  
7 standing or authority to non-judicially foreclose on the property, to enforce the note, or to  
8 appoint a successor. *Id.* at 11. Count two alleged breach of contract against US Bank for  
9 failure to provide a "Lost Note Affidavit." *Id.* at 14. Count three alleged breach of  
10 contract/lack of authority of MERS to assign the Deed of Trust to US Bank. *Id.* at 15.  
11 Count four alleged that neither Wells Fargo nor MERS lawfully transferred interest in the  
12 Note or Deed of Trust and therefore had no power to foreclose on the property. *Id.* at 17.  
13 Count five alleged breach of contract against US Bank for not having the authority to  
14 appoint Quality as the successor trustee. *Id.* at 21. Count six alleged that US Bank must  
15 be the true successor lender/beneficiary in order to foreclose on the property. *Id.* at 23.  
16 Count seven alleged that MERS was not a beneficiary and lacked authority to take any  
17 action on the note or Deed of Trust. *Id.* at 25. Count eight requested a Temporary  
18 Restraining Order to halt the trustee's sale of the property. *Id.* at 26.

19 Plaintiff's request for a TRO was granted on March 27, 2013, temporarily

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20 <sup>1</sup> Plaintiff asserts that the Statement was not mailed to her "residence address in  
21 Phoenix." Doc. 30 at 3. This assertion is not supported by an affidavit or declaration.  
22 Defendant provided the declaration of Bounlet Louvan, the Foreclosure Legal Liaison  
23 and former Trustee Sales Officer for Quality who was in charge of the sale of Plaintiff's  
24 property, stating that the documents "were mailed to the Property (the East Braeburn  
25 house in Phoenix) and 254 Oakland Road in Glendora, California 91741." Doc. 25 at 6.  
26 Whether or not the notice and statement were received by Plaintiff at the Braeburn  
27 property, there is no dispute that Defendant noticed Plaintiff at the address set forth in the  
28 Deed of Trust as required by A.R.S. § 33-809(b) ("The copy of the notice sent pursuant  
to this paragraph shall be addressed to the person whose interest appears of record *at the  
address set forth in the document.*") (emphasis added). Plaintiff's mailing address on the  
Deed of Trust is 254 Oakland Road, Glendora, California 91741. Maricopa County  
Records, Document No. 2007-0523012.

1 enjoining the trustee's sale. The case was removed to federal court on April 5, 2013.  
2 Doc. 1. Wells Fargo Bank NA was dismissed as a party on June 7, 2013. Doc. 23.  
3 Remaining Defendants filed this motion for summary judgment on August 23, 2013.  
4 Doc. 24. Plaintiff did not respond. On October 29, 2013 Plaintiff made an *ex parte*  
5 motion for leave to file a late response (Doc. 27), which this court granted on  
6 November 4, 2013 (Doc. 29).

## 7 **II. Legal Standard.**

8 A party seeking summary judgment "bears the initial responsibility of informing  
9 the district court of the basis for its motion, and identifying those portions of [the record]  
10 which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*  
11 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the  
12 evidence, viewed in the light most favorable to the nonmoving party, shows "that there is  
13 no genuine dispute as to any material fact and the movant is entitled to judgment as a  
14 matter of law." Fed. R. Civ. P. 56(a). Only disputes over facts that might affect the  
15 outcome of the suit will preclude the entry of summary judgment, and the disputed  
16 evidence must be "such that a reasonable jury could return a verdict for the nonmoving  
17 party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

18 The Court is not obligated to "scour the record in search of a genuine issue of  
19 triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citation omitted). If  
20 the nonmoving party's opposition fails to cite specifically to materials either in the  
21 Court's record or not in the record, the Court is not required to search the entire record  
22 for evidence establishing a genuine issue of material fact or obtain the missing materials.  
23 *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028-29 (9th Cir. 2001); *Forsberg*  
24 *v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409, 1417-18 (9th Cir. 1988); *Keenan*, 91 F.3d at  
25 1278-79 (noting that opposing papers, due to size and poor citation, "obfuscat[e] rather  
26 than promot[e] an understanding of the facts," and declining to scour papers or the rest  
27 of the record to determine if genuine issue of material fact existed). Rather, the Court  
28 relies on "the nonmoving party to identify with reasonable particularity the evidence that

1 precludes summary judgment.” *Keenan*, 91 F.3d at 1279. “As the Seventh Circuit  
2 observed in its now familiar maxim, ‘judges are not like pigs, hunting for truffles buried  
3 in briefs.’” *Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) (quoting  
4 *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)) (alteration omitted).

5 Any dispute raised must be genuine, that is, the evidence must be “such that a  
6 reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at  
7 248. Furthermore, the party opposing summary judgment “may not rest upon the mere  
8 allegations or denials of [the party’s] pleadings, but . . . must set forth specific facts  
9 showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith*  
10 *Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see* Fed. R. Civ. P. 56(e); *Brinson v. Linda*  
11 *Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995); *Taylor v. List*, 880 F.2d 1040,  
12 1045 (9th Cir. 1989); *see also* Rule 1.10(l)(1), Rules of Practice of the United States  
13 District Court for the District of Arizona (“Any party opposing a motion for summary  
14 judgment must . . . set[] forth the specific facts, which the opposing party asserts,  
15 including those facts which establish a genuine issue of material fact precluding summary  
16 judgment in favor of the moving party.”).

### 17 **III. Disputed Issues of Fact.**

18 Plaintiff claims that documents attached to Defendants motion contain false and  
19 fraudulent statements regarding the authority of signators to execute documents. Doc. 30  
20 at 5. Plaintiff appears to urge the Court to interpret her allegation that these are false  
21 statements as raising issues of fact that would preclude summary judgment.

22 Plaintiff identifies two statements in the Declaration of Louvan as false. First,  
23 Plaintiff says that the statement that Louvan “conducted the foreclosure of the real  
24 property in question” is false because the trustee’s sale has not yet taken place. Docs. 30  
25 at 13; 32. In response, Defendants filed a corrected Declaration clarifying that the sale  
26 has not, as Plaintiff alleges, occurred yet. Doc. 32. Not only is this fact no longer in  
27 dispute, but this statement is not material to any of Plaintiff’s claims of breach of contract  
28 or lack of authority to notice and conduct the trustee’s sale. Only disputes over facts that

1 might affect the outcome of the suit will preclude the entry of summary judgment.  
2 *Anderson*, 477 U.S. at 248.

3 Second, Plaintiff disputes the validity of the following statement in Louvan's  
4 Declaration: "the Statement of Breach was signed by Mauro Guzman and is a true and  
5 correct copy of the Statement of Breach that was mailed." Doc. 30 at 14. Plaintiff  
6 alleges that this is hearsay and that Louvan has no personal knowledge that Guzman  
7 obtained authority to mail the documents from an entity that had authority as holder of  
8 the note. Plaintiff's hearsay objection is unfounded. The Louvan declaration establishes  
9 that the Statement of Breach is a business record of Quality's under Federal Rule of  
10 Evidence 803(6), and the actual Statement of Breach is attached to the declaration. Doc.  
11 25 at 6, 9. In addition, whether Guzman had authority to sign and mail the document is a  
12 legal question, which the Court resolves here, and not a disputed fact.

13 Apart from these two statements, the Court cannot glean from Plaintiff's response  
14 any specific disputed issues of fact. Rather, the remainder of Plaintiff's response appears  
15 to focus on the legal argument that Defendant must show its authority to notice and  
16 conduct the trustee's sale. In addition, as noted above, Plaintiff has failed to file a  
17 contravening statement of facts as required by Local Rule 56.1(b). When a party fails to  
18 file such a statement, the Court may take the following actions: (1) give the party an  
19 opportunity to properly do so; (2) consider the fact undisputed for purposes of the  
20 motion; (3) grant summary judgment if the motion and supporting materials show that the  
21 movant is so entitled; or (4) issue any other appropriate order. Fed. R. Civ. P. 56(c), (e).  
22 Because Plaintiff's counsel had more than two months to file a controverting statement of  
23 facts and did not do so, the Court will not grant additional time to respond. The Court  
24 finds that summary judgment is appropriate.

25 **III. Analysis.**

26 All counts alleged in Plaintiff's complaint center on her assertion that whenever  
27 the promissory note was transferred or a change was made to the beneficiary of the Deed  
28 of Trust, the holder or beneficiary was required to demonstrate authority for the transfer

1 or substitution. Each claim of breach of contract and lack of authority by Plaintiff is an  
2 iteration of the “show-me-the-note” argument resolved by the Arizona Supreme Court in  
3 *Hogan v. Wash. Mut. Bank, N.A.*, 277 P.3d 781, 782 (Ariz. 2012), as amended (July 11,  
4 2012). As a matter of Arizona law, the Court finds Plaintiff’s argument without merit.

5 **A. Authority to conduct trustee’s sale.**

6 Plaintiff asserts that Defendant had no standing or authority to conduct a non-  
7 judicial trustee’s sale because Plaintiff was presented with no evidence of ownership of  
8 the note and therefore Defendant had no authority to enforce the note. Doc. 1-1 at 13  
9 (Count One: “there is a significant unexplained five-year GAP in the ‘chain of  
10 custody”); at 14 (Count Two: “Failure to Provide the ‘Lost Note Affidavit’ Required  
11 under” Arizona law precludes Defendant’s right to foreclose); at 15 (Count Three: MERS  
12 had no authority to assign the Deed of Trust to US Bank); at 17 (Count Four: without  
13 evidence of the transfer of interest, Quality Loan Services had no power to foreclose); at  
14 21 (Count Five: US Bank had no authority to appoint Quality as a successor with power  
15 to foreclose); at 23 (Count Six: US Bank must have authority to appoint a successor); at  
16 25 (Count Seven: MERS lacked authority to take any action).

17 “Arizona’s non-judicial foreclosure statutes do not require the beneficiary to prove  
18 its authority or ‘show the note’ before the trustee may commence a non-judicial  
19 foreclosure.” *Hogan*, 277 P.3d at 782. Rather, “the only proof of authority the trustee’s  
20 sales statutes require is a statement indicating the basis for the trustee’s authority.”  
21 *Hogan*, 230 277 P.3d at 783; *see* A.R.S. § 33-808(C)(5) (requiring the notice to set forth  
22 “the basis for the trustee’s qualification pursuant to § 33–803, subsection A”); *see also*  
23 A.R.S. § 33-807(A) (granting the trustee the “power of sale”). Where a sale is “noticed  
24 by a trustee who had recorded an instrument demonstrating that it was a successor in  
25 interest to the original trustee,” a party has complied with the statutes. *Id.*

26 The notice of sale in this case was filed by Quality. Doc. 1-1 at 116. The notice  
27 contains a statement asserting that “the successor trustee qualifies to act as a trustee under  
28 A.R.S. § 33-803(A)(1).” *Id.* Defendant provides evidence that Quality had “recorded an

1 instrument demonstrating that it was a successor in interest,” by providing the notice of  
2 the recorded substitution of February 15, 2012, at Document 2012-0151818. *See also*  
3 Doc. 1-1 at 112.

4 Plaintiff’s argument and claims seek to require clarification of the chain of title,  
5 and assert that she was entitled to notification of and authority for the transfer of the note  
6 and any substitution of trustees at each link in that chain. But there is no basis for this  
7 argument under Arizona law. *Hogan* clearly eliminated any obligation on the part of  
8 trustees to “show the note” prior to a sale. To the extent the Court can decipher  
9 Plaintiff’s legal citations, it appears she relies on law from New York, Kansas, Oregon,  
10 and Idaho, and a law review article. These authorities clearly are not controlling.

11 Additionally, courts repeatedly have held that MERS has authority to act as a  
12 lender’s agent and take action on its behalf, and have rejected the premise that MERS is a  
13 “sham beneficiary.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th  
14 Cir. 2011) (rejecting argument that MERS is a sham beneficiary where MERS did not  
15 initiate foreclosure). *See also In re Mortgage Elec. Registration Sys. (MERS) Litig.*,  
16 MDL 09-2119-PHX-JAT, 2012 WL 1912133 (D. Ariz. May 25, 2012) (rejecting  
17 argument that MERS cannot act as a lender’s agent); *Bean v. BAC Home Loans*  
18 *Servicing, L.P.*, No CV 11-553-PHX-GMS, 2012 WL 171435, at \* 1-2 (D. Ariz. Jan. 20,  
19 2012) (same).

20 **B. Applicability of the UCC and Pooling Services Agreement.**

21 Plaintiff argues that the notice of trustee sale violated provisions of the Uniform  
22 Commercial Code (“UCC”) and a Pooling Services Agreement (“PSA”). Doc. 30 at 7.  
23 These arguments also lack merit.

24 *Hogan* resolved any question that non-judicial sales of real property had to comply  
25 with the UCC. 277 P.3d at 783 (“The trust deed statutes do not require compliance with  
26 the UCC before a trustee commences a non-judicial foreclosure.”). Additionally, it is  
27 well established that mortgagees generally cannot cite violations of PSAs, or defects in  
28 the securitization process, to support a wrongful foreclosure claim because mortgagees

1 are not parties to the agreements and have no standing to claim noncompliance with the  
2 agreements. *See, e.g., In re Cook*, 457 F.3d 561, 567-68 (6th Cir. 2006) (ruling that the  
3 failure to record an assignment of a mortgage as required by contract impacted the  
4 relationship of the parties to the contract, but did not impede the ability to enforce the  
5 mortgage against third parties); *In re Correia*, 452 B.R. 319, 324 (1st Cir. B.A.P. 2011)  
6 (“[T]he Debtors lacked standing to challenge the mortgage’s chain of title under the  
7 PSA . . . . The Debtors cannot show they were a party to the contract . . . .”); *Bittinger v.*  
8 *Wells Fargo Bank N.A.*, 744 F. Supp. 2d 619, 625-26 (S.D. Tex 2010) (rejecting  
9 mortgagor’s claim of wrongful foreclosure because mortgagor was not a party or  
10 beneficiary under the PSA and thus had “no ability under Texas law to sue for breach of  
11 contract.”); *In re Washington v. Deutsche Bank Nat’l. Trust Co.*, 2011 WL 6010247, at  
12 \*5 (Bankr. W.D. Mo. 2011).

13 Even if Plaintiff did have standing to challenge Defendants’ actions under the  
14 PSA, Plaintiff has not made a colorable claim that the requirements of the PSA were  
15 breached, or that such a breach impacted Defendants’ right to conduct a trustee’s sale.

16 **C. Request for leave to amend Complaint.**

17 In the event summary judgment is granted, Plaintiff requests that she be permitted  
18 to file an amended complaint “based upon rapidly evolving foreclosure law in Arizona  
19 and elsewhere.” Doc. 30 at 2. This request is denied. Leave to amend is appropriate  
20 “unless the court determines that the pleading could not possibly be cured by the  
21 allegations of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting  
22 *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Plaintiff’s claims depend on  
23 legal theories that have repeatedly been rejected by this Court and others, and her  
24 assertion that this area of foreclosure law is rapidly evolving is without merit.

25 **IT IS ORDERED:**

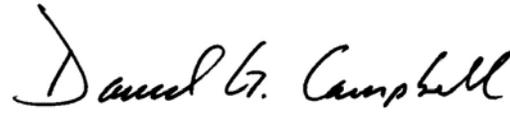
- 26 1. Defendants’ motion for summary judgment (Docs. 24) is **granted**.  
27 2. Plaintiff’s request for leave to file an amended complaint is **denied**.  
28 3. Defendant’s motion for summary adjudication (Doc. 26) is **denied**, and its

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motion to correct the Louvan declaration (Doc. 32) is **granted**.

4. The Clerk shall terminate this action.

Dated this 19th day of December, 2013.



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David G. Campbell  
United States District Judge