

1 Robert R. Hager, NV State Bar No. 1482
2 Treva J. Hearne, NV State Bar No. 4450
3 HAGER & HEARNE
4 245 E. Liberty - Suite 110
5 Reno, Nevada 89501
6 Tel: (775) 329-5811
7 Fax: (775) 329-5819

FILED 5/22/2009

8 William A. Nebeker, AZ State Bar No. 004919
9 Valerie R. Edwards, AZ State Bar No. 017217
10 KOELLER, NEBEKER, CARLSON & HALUCK, L.L.P.
11 3200 North Central Avenue, Suite 2300
12 Phoenix, AZ 85012
13 Tel: (602) 256-0000
14 Fax: (602) 256-2488

15 Emmanuel Edem, OK State Bar No.
16 L. Mark Bonner, OK State Bar No.
17 Norman & Edem, P.L.L.C.
18 Renaissance Centre East
19 127 Northwest 10th Street
20 Oklahoma City, Oklahoma 73103-4927
21 Tel: (405) 272-0200
22 Fax: (405) 235-2949
23 *Counsel for Plaintiffs*

24 **UNITED STATES DISTRICT COURT**
25 **DISTRICT OF NEVADA**

16 JOSEFA S. LOPEZ, JOSE TRINIDAD
17 CASAS, MARIA C. CASAS, LYNDON
18 B.GRAVES, TYRONE EVENSON,
19 MICHELLINA EVENSON, BRYAN
20 GRAY, HELEN GRAY, PATRICK
21 FRANKOSKI, and CHRISTOPHER
22 PETERNELL, individually and on behalf of
23 a class of similarly situated individuals,

24 Plaintiffs,

25 vs.

26 EXECUTIVE TRUSTEE SERVICES, LLC.;
27 COUNTRYWIDE HOME LOANS, INC., a
28 New York corporation; MERSCORP, INC., a
29 Virginia corporation; MORTGAGE
30 ELECTRONIC REGISTRATION
31 SYSTEMS, INC., a subsidiary of
32 MERSCORP, Inc., a Delaware corporation;

Case No.: 3:09-cv-180-ECR-VPC

**MOTION FOR CLASS
CERTIFICATION**

ORAL ARGUMENT REQUESTED

1 RECONTRUST, SAXON MORTGAGE
2 SERVICES, INC., T.D. SERVICE
3 COMPANY, SECURITY UNION TITLE
4 INSURANCE COMPANY, CHEVY
5 CHASE BANK, NATIONAL DEFAULT
6 SERVICING CORPORATION, FEDERAL
7 HOME LOAN MORTGAGE
8 CORPORATION, a Virginia corporation;
9 FEDERAL NATIONAL MORTGAGE
10 ASSOCIATION, a District of Columbia
11 corporation; GMAC MORTGAGE, L.L.C., a
12 Delaware corporation; NATIONAL CITY
13 MORTGAGE, a foreign company and a
14 division of NATIONAL CITY BANK, a
15 subsidiary of National City Corporation;
16 NATIONAL CITY CORPORATION, a
17 Delaware corporation and a subsidiary of
18 PNC Financial Services, Inc.; PNC
19 FINANCIAL SERVICES, INC., a
20 Pennsylvania corporation; J.P. MORGAN
21 CHASE BANK, N.A., a New York
22 corporation; CITIMORTGAGE, INC., a New
23 York corporation; HSBC MORTGAGE
24 CORPORATION, U.S.A., a Delaware
25 corporation; AIG UNITED GUARANTY
CORPORATION, a foreign corporation;
WELLS FARGO BANK, N.A., a California
corporation, dba WELLS FARGO HOME
EQUITY and dba WELLS FARGO HOME
MORTGAGE, a division of WELLS
FARGO BANK, N.A., a California
corporation; BANK OF AMERICA, N.A., a
Delaware corporation, and GE MONEY
BANK, an Ohio corporation; JOHN AND
JANE DOES I-X; BLACK AND WHITE
PARTNERSHIP I-X; AND ABC
CORPORATION I-X,

Defendants.

1 Plaintiffs, pursuant to Fed. R. Civ. P. 23, move for class certification on the
2 injunctive and declaratory relief issues presented in Counts IX and X of the Amended
3 Complaint. Specifically, Plaintiffs seek to certify this matter as a class consisting of
4 residential homeowners in Nevada, Arizona, and California and in other states in the
5 United States wherein non-judicial foreclosure procedures exist (listed on Exhibit 1 filed
6 herewith) who obtained residential mortgages secured by a deed of trust listing MERS,
7 Mortgage Electronic Registration Systems, or MERSCORP as the purported beneficiary
8 between the years 2004 and 2008. This motion is supported by the attached Memorandum
9 of Points and Authorities.
10
11

12 DATED this 22nd day of May, 2009.

13 HAGER & HEARNE

14
15 By: ss Treva J. Hearne

16 Robert R. Hager

17 Treva J. Hearne

18 and

19 William A. Nebeker

20 Valerie R. Edwards

21 KOELLER, NEBEKER,

22 CARLSON & HALUCK, L.L.P.

23 3200 North Central Avenue, Suite

24 2300

25 Phoenix, Arizona 85012

and

Emmanuel Edem

L. Mark Bonner

NORMAN & EDEM, P.L.L.C.

Renaissance Centre East

127 Northwest 10th Street

Oklahoma City, OK 73103-4927

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Historic Facts

By definition, a deed of trust is a document which secures a loan. Without a valid deed of trust, there is no legal basis to foreclose upon a property. Defendants in the case at bar have foreclosed or have threatened to foreclose upon Plaintiffs and upon similarly situated borrowers based upon invalid and unenforceable deeds of trust which name Defendant MERS not as a true beneficiary, but as the “nominee for the lender.” See, e.g., Exhibit 2, Deeds of Trust for Plaintiffs Casas, Frankoski, Gray, Lopez and Peternell. A “nominee” has no power to foreclose on an invalid deed of trust. The deeds of trust upon which Defendants have sought or will seek to foreclose have been severed from the notes. The deeds of trust, therefore, are invalid.

The scope of home foreclosures is immense. The harm which occurs when a family loses its home is devastating. One out of 56 homes in Las Vegas entered foreclosure last month. Exhibit 3, Fannie Mae, Mortgage Fraud Program, Fraud Findings Statistics. One out of 68 homes in Nevada entered foreclosure last month. Exhibit 3, Fannie Mae, Mortgage Fraud Program, Fraud Findings Statistics. For subprime adjustable rate home loans, more than 8% of loans were placed in foreclosure during the 4th quarter of 2008. Exhibit 3, Fannie Mae, Mortgage Fraud Program, Fraud Findings Statistics.

1 The lenders who utilize MERS have among the largest market share of all home
2 lenders.¹ Tens of thousands of deeds of trust were foreclosed and more are forecast to be
3 foreclosed by MERS and its members in the state of Nevada. Yet, the foreclosure crisis
4 extends beyond Nevada's borders. MERS operates and forecloses properties on a national
5 basis. MERS has even developed its own national foreclosure manual with instructions
6 about how to foreclose properties which are registered with MERS.²

8 **B. Impact on Class Members**

9 The financial firms that have securitized home loans discovered a way to turn loan
10 papers into gold by changing them into derivative financial instruments. The parlance in
11 the mortgage industry is to say that during the transformation into derivative financial
12 instruments, the deeds of trust and promissory notes were "sliced and diced" by the
13 financial firms.³ The resulting derivative paper was sold to investors worldwide at
14 tremendous profit. The changes made to create the derivative financial paper cannot be
15 reversed. The derivative process destroyed the integrity of the deeds of trust and the
16 promissory notes.
17
18

19 Defendants also engaged in unlawful acts to originate the loans. When the bubble
20 in housing prices was developing, from about 2005 through 2007, homeowners were
21 contacted by MERS members offering to refinance and or assist them in purchasing a
22 home. Many of the Plaintiffs were literally given loans over the phone. Defendants in this
23

24 ¹See Exhibit 4, Top 30 Single Family Residential Lenders, Mortgage Bankers Association; *cf.*,
25 Exhibit 5, MERS Shareholders List.

² Exhibit 6, Website: www.mersinc.org/Foreclosures/index.aspx, retrieved January 14, 2009.

1 case conspired to create a system of making profits from the origination and securitization
2 of residential mortgages without regard for the ability of the borrower to repay the loan, as
3 alleged more particularly in the First Amended Complaint (Doc. No. 35).

4
5 **C. Widespread, Unlawful Loan Origination**

6 MERS is a national electronic registration system created in 1993 by a consortium
7 of mortgage lenders, brokers, and industry participants with the purported objective of
8 “eliminating the need to prepare and record assignments when trading residential and
9 commercial mortgage loans.” Members of MERS register their loans on the MERS
10 system with such instruments naming MERS as the beneficiary and nominee for the lender
11 on deeds of trust and mortgages recorded in the county records. MERS was purportedly
12 created as a method of increasing the speed and volume of mortgage lending to support the
13 efficient securitization of mortgage loans in the secondary markets, that is, to facilitate the
14 process of turning loan documents into financial derivative instruments. All of the MERS
15 members had to agree to certain rules to use the MERS system. MERS members were
16 agreeable to MERS’s rules because the MERS system was a gateway to profits for them.

17
18
19 MERS informs all of its member lenders who originate loans via use of the MERS
20 system that: (1) MERS would never own or acquire any actual beneficial interest in any
21 loan in which it was named as the “beneficiary” under the deed of trust, and (2) that MERS
22 could still be named as the “beneficiary” for purposes of public notice and notice to the
23
24
25

³ See Affidavit of Neil Franklin Garfield attached as Exhibit 7.

1 borrower, and would agree to act in that capacity if so designated by the lender who
2 originated the loan.⁴

3 The Defendants, through their creation, funding, and ownership of MERS, sought
4 to hide and insulate themselves from the mortgage brokers and originators of predatory
5 toxic loans in order to avoid detection and consequent liability. MERS and the Defendant
6 co-conspirators specifically understood that:
7

8 TERMS AND CONDITIONS

9 2. The Member, at its own expense, shall promptly, or as soon thereafter as
10 practicable, cause MERS to appear in the appropriate public records as the
11 mortgagee of record with respect to each mortgage loan that the Member
12 registers on the MERS System. MERS shall serve as mortgagee of record
13 with respect to all such mortgage loans solely as a nominee, in an
14 administrative capacity, for the beneficial owner or owners thereof from time
15 to time. MERS shall have no rights whatsoever to any payments made on
16 account of such mortgage loans, to any servicing rights related to such
17 mortgage loans, or to any mortgaged properties securing such mortgage
18 loans. MERS agrees not to assert any rights (other than rights specified in
19 the Governing Documents) with respect to such mortgage loans or
20 mortgaged properties. References herein to “mortgages(s)” and “mortgagee
21 of record” shall include deed(s) of trust and beneficiary under a deed of trust
22 and any other form of security instrument under applicable state law. . . .

17 6. MERS and the Member agree that: (i) the MERS System is not a
18 vehicle for creating or transferring beneficial interests in mortgage loans, (ii)
19 transfers of servicing interests reflected on the MERS system are subject to
20 the consent of the beneficial owner of the mortgage loans, and (iii)
21 membership in MERS or use of the MERS System shall not modify or
22 supersede any agreement between or among the Members having interests in
23 mortgage loans registered on the MERS System.⁵

22 The inconsistent Terms and Conditions disclaim any beneficial interest in any
23 mortgage, loan, and collateral by MERS. At the same time, every Member of MERS is
24

25 ⁴See Affidavit of Marcy Larson attached as Exhibit 8 and attachments thereto; and see specifically
MERS Terms and Conditions document (LARSON 0003), ¶¶ 2 and 6.

1 specifically required, “to cause MERS to appear in the appropriate public record [as]
2 beneficiary under each mortgage loan.” The Defendants intentionally misrepresented to
3 the public and borrowers that MERS was the beneficiary even though MERS members
4 know that MERS is not truly a beneficiary.
5

6 MERS is a fiction under which Defendants could exploit innocent borrowers and
7 disappear before their wrongdoing was discovered. Further, these Defendants have preyed
8 upon Plaintiffs and others in Nevada and the United States who are elderly, disabled, or
9 who have a protected minority or gender status under law or who were and are unable to
10 understand the terms of the loan documents and foreclosure documents which were
11 generated by Defendants and their co-conspirators in order to make money.
12

13 This practice and policy of these Defendants reflects the intentional exploitation of
14 the inability of the borrowers to reach anyone to stop the foreclosure on their homes. This
15 conduct by Defendant MERS in transferring the beneficial rights after appointing some
16 unknown third party as the Trustee was an intentional act to insulate the true beneficiary
17 from contact by the borrower. This deceit and cloaking of the true owner of the beneficial
18 interest and the failure to provide documents and communication regarding the foreclosure
19 and the default is contrary to the standards of certainty in the transfer of interests in real
20 estate that has been adopted by the legislatures and judiciary in the United States for
21 centuries, and is contrary to the decency in contract relations that one is entitled to in a
22 civilized society.
23
24
25

⁵ Exhibit 8, Affidavit of Marcy Larson, and MERS Terms and Conditions attached thereto.

1 What is now happening in Nevada and across the United States is that homeowners
2 are being foreclosed on and forced from their homes through foreclosures advanced by the
3 Defendants in this case. This devastation of the American homeowner and entirely
4 fraudulent scheme is predicated upon the active participation of MERS, and the Defendant
5 co-conspirators are fully aware that MERS lacks any authority to designate any substitute
6 beneficiary or trustee to advance any foreclosure, so the Defendant co-conspirators have
7 created subsidiaries in an effort to support deniability and to distance themselves from
8 public awareness of the devastating effects of their ongoing actions, i.e. Countrywide
9 forecloses under ReconTrust, Wells Fargo under Default Servicing Co., GMAC under
10 Executive Trustee Services, etc.
11
12

13 Plaintiffs and similarly situated homeowners were encouraged and induced by the
14 various Defendants to take out loans based solely on what is referred to in the industry as
15 “stated income” although no income is stated and no lender verifies any income of the
16 borrower. The Defendants did not verify if the Plaintiffs and similarly situated borrowers
17 were employed at the time of the loan or if their incomes would support the payments
18 when the loans adjusted to expanded payments that either included increased interest or
19 included increased interest and principal.
20

21 The Defendant lenders originated these loans despite the fact that none of the loan
22 documents reflected any ability of the Plaintiffs and similarly situated homeowners to
23 repay the loans. Each of the Defendants herein created an unprecedented and maliciously
24
25

1 predatory system of making profits from the origination, purchase, securitization, servicing
2 and foreclosure of residential loans like Plaintiffs' loans.⁶

3 Defendants are determined to go forward with the foreclosures with full knowledge,
4 or careless disregard, of the fact that the loans were predatory and that the loans had no
5 market value based upon the lack of any documentation reflecting the ability of the
6 Plaintiffs and similarly situated borrowers to repay the loans. Further, Defendants ignore
7 the fact that the deeds of trust are void due to the fact that MERS was named not as a true
8 beneficiary, but instead was named solely as a nominee for the lender under the deeds of
9 trust. Plaintiffs will adopt and incorporate by reference their First Amended Complaint
10 (Doc. 35) for a more complete statement of the unlawful activity of the Defendants. In
11 short, the origination of the loans was unlawful and any foreclosure of the loans is
12 unlawful. There was never a lawful beneficiary as is required for a deed of trust to be
13 valid. The loans were originated in violation of federal lending laws for the purpose of
14 generating profits from the origination, securitization and foreclosure of the loans.⁷

15
16
17
18 Recent court rulings, particularly by the United States Bankruptcy Court for the
19 District of Nevada, have held that MERS lacked standing to foreclose on a deed of trust
20
21
22
23

24 ⁶ See Exhibit 8, Affidavit of Neil Franklin Garfield.

25 ⁷ See Exhibit 7, Affidavit of Neil Franklin Garfield.

1 simply by being named the beneficiary and nominee on a deed of trust.⁸ In *Hawkins*, the
2 court stated:

3 Simply being a beneficiary or having an assignment of a deed of trust is not
4 enough to be entitled to foreclose on a deed of trust. For there to be a valid
5 assignment for purposes of foreclosure both the note and the deed of trust
6 must be assigned. A mortgage loan consists of a promissory note and a
7 security instrument, typically a mortgage or a deed of trust. When the note is
8 split from the deed of trust, “the note becomes, as a practical matter,
9 unsecured.” Restatement (Third) of Property (Mortgages) § 5.4 cmt. a
(1997). A person holding only a note lacks the power to foreclose because it
lacks the security, and a person holding only a deed of trust suffers no default
because only the holder of the note is entitled to payment on it.⁹

10 The court concluded that, in order to foreclose, MERS must “establish there has
11 been a sufficient transfer of both the note and the deed of trust, or that it has authority
12 under state law to act for the note’s holder.” *Id.* Because MERS was unable to meet that
13 burden, its motions to lift stay to pursue foreclosure proceedings were denied. *Id.* at *6.
14 Accordingly, the assignee’s appointment of a trustee and foreclosing the deed of trust is
15 ineffective in all instances of default and foreclosure against the class. The court found
16

17 _____
18 ⁸ *In re Hawkins*, 2009 WL 901766 (Bankr. D. Nev. 2009). *See also In re Vargas*, 396 B.R. 511,
19 517 (Bankr. C. D. Cal. 2008) (stating that “an assignment of the note carries the mortgage with it,
20 while an assignment of the latter alone is a nullity (citation omitted)”); *In re Jacobson*, 2009 WL
21 567188 (Bankr. W. D. Wash. 2009) at n. 9 (recognizing the identification of MERS “solely as
22 nominee” as the beneficiary on the deed of trust to be problematic, considering that the beneficiary
23 under a deed of trust is defined as the holder of the instrument or document evidencing the
24 obligations secured by the deed of trust under the Revised Code of Washington); *see also*
25 *Mortgage Registration System, Inc. v. Southwest Homes of Arkansas*, 2009 WL 723182 (Ark.
2009) (holding that MERS, listed on the deed of trust as the “Beneficiary” acting “solely as
nominee for Lender” and “Lender’s successors and assigns,” was not conveyed title under the
deed of trust.) In that matter, the court found that MERS was not the beneficiary under the deed,
although MERS was so designated in the deed. Rather, the individual named as trustee on the
deed of trust was the trustee, and the lender, who received the payments on the debt, was the
beneficiary. Therefore, the court found that MERS held no authority to act as an agent and held no
property interest in the mortgaged land subject to the deed.

⁹ *In re Hawkins*, 2009 WL 901766 at *4.

1 that a mortgage loan consists of both a promissory note and a security instrument (typically
2 a mortgage or a deed of trust) and that an entity holding *only* the note lacked the power to
3 foreclose because that entity lacks the security.¹⁰

4
5 Conversely, the entity holding only the deed of trust, and not the note, suffers no
6 default because that entity is not entitled to payment (only the holder of the note is entitled
7 to payment).¹¹ Therefore, the separation of the note from the deed of trust (i.e. security
8 instrument), as MERS has done repeatedly, renders the note unsecured.¹²

9 **II. ARGUMENT**

10
11 **A. THIS COURT SHOULD GRANT CLASS CERTIFICATION ON**
12 **COUNTS IX AND X OF THE AMENDED COMPLAINT BECAUSE**
13 **MERS HAS NO STANDING TO FORECLOSE ON MORTGAGES OF**
14 **THE CLASS.**

15 **1. PROPOSED CLASS**

16 The proposed class consists of residential homeowners in Nevada, Arizona, and
17 California and in other states in the United States wherein nonjudicial foreclosure
18 procedures exist (listed on Exhibit 1 filed herewith) who obtained residential mortgages
19 secured by a deed of trust listing MERS, Mortgage Electronic Registration Systems, or
20 MERSCORP as the purported beneficiary between the years 2004 and 2008. The
21 proposed class is narrower than the class alleged in the First Amended Complaint, but it is
22 included within the alleged class and it is appropriate for certification as to Counts IX and
23

24 ¹⁰ *Id.*

25 ¹¹ *Id.*; see also Affidavit of Neil Garfield attached as Exhibit 7.

¹² *Hawkins* at *4 ; Exhibit 7, Affidavit of Neil Garfield.

1 X of the First Amended Complaint, which are Plaintiffs' claims for injunctive and
2 declaratory relief.

3 Certification of a multi-state class is both sensible and permissible. Specifically, 28
4 U.S.C. § 1332(d) permits certification of classes where most of the members reside outside
5 of the forum state. This federal statute allows the application of diversity jurisdiction in
6 federal courts in multistate class action cases.¹³ Defendants' unlawful conduct, and the
7 illicit profits derived therefrom, are susceptible of common proof. Accordingly, common
8 factual and legal issues predominate on Plaintiffs' conspiracy claim related to the MERS
9 system.
10

11
12 Plaintiffs seek a preliminary injunction on behalf of all individuals who are
13 similarly situated to stop MERS and anyone associated with MERS from initiating and
14 advancing any nonjudicial foreclosures on properties where MERS is identified as the
15 purported beneficiary on the original deed of trust. Plaintiffs, on behalf of the class, also
16 seek a preliminary injunction to prevent MERS and anyone associated with MERS from
17 transferring any purported beneficial interest and/or any rights in any deeds of trust that
18 name MERS as the purported beneficiary pending the outcome of this matter. A class-
19 wide injunction is critically necessary to avoid irreparable harm to the class members.
20

21 **B. ALL OF THE PREREQUISITES FOR CLASS**
22 **CERTIFICATION UNDER RULE 23 ARE SATISFIED.**

23 ¹³ See *General Motors Corp. v. Bryant*, 374 Ark. 38, ___ S.W.3d ___, 2008 WL 2447477 (Ark.
24 2008), *cert. denied*, January 12, 2009 (upholding certification of national class); *Illinois v. Harper*
25 *Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969) (certifying national class of antitrust
claimants); *Grace v. Perception Technology Corp.*, 128 F.R.D. 165, 171 (D. Mass. 1989)
(certifying common law fraud and negligent misrepresentation claims of national class); *In re*
Pizza Time Theatre Sec. Litig., 112 F.R.D. 15, 20 (N.D. Cal. 1986) (certifying nationwide class
under California law).

1
2 Fed. R. Civ. P. R. 23(a) permits class certification where (1) the class is so
3 numerous that joinder of all members is impracticable, (2) there are questions of law
4 or fact common to the class, (3) the claims or defenses of the representative parties
5 are typical of the claims or defenses of the class, and (4) the representative parties
6 will fairly and adequately protect the interests of the class. As will be shown
7 below, all the elements of Rule 23(a) are satisfied here.
8

9 Class actions are designed to streamline litigation by avoiding duplicative proofs
10 and creating efficient use of court and legal resources where common issues amongst class
11 members exist. *See Jenkins v. Raymark Industries*, 782 F.2d 468, 471 (5th Cir. 1986). Use
12 of the class action mechanism has been increasingly acknowledged as necessary and
13 proper in a variety of circumstances. *See, e.g.*, cases cited in n. 13, *supra*.
14

15 1. NUMEROSITY

16 Rule 23(a)(1) of the Federal Rules of Civil Procedure requires that the class be
17 sufficiently “numerous that joinder of all members is impracticable.” Several factors are
18 relevant to this inquiry, “the most obvious of which is, of course, the number of persons in
19 the proposed class.” *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 559 (8th Cir. 1982), *cert.*
20 *denied*, 460 U.S. 1083, 103 S.Ct. 1772 (1983). “In addition to the size of the class, the
21 court may also consider the nature of the action, the size of the individual claims, the
22 inconvenience of trying individual suits, and any other factor relevant to the practicability
23 of joining all the putative class members.” *Id.* at 559-560; *see also Coleman v. General*
24 *Motors Acceptance Corp.*, 220 F.R.D. 64, 69-70 (M.D. Tenn. 2004) (certifying national
25

1 class estimated at over 100,000 members, noting that case circumstances, “not a strict
2 numerical test” applied to determine numerosity (citation omitted)). Plaintiffs are not
3 required to “specify an exact number or prove the identity of each class member,” but must
4 only “show a reasonable estimate of the number of class members.” *Morgan v. United*
5 *Parcel Serv. of America, Inc.*, 169 F.R.D. 349, 355 (E.D. Mo. 1996).
6

7 Here, the potential class consists of thousands of persons, including those who have
8 not yet been identified.¹⁴ Thus, “joinder of unknown persons is impracticable.”
9 *Ranschburg*, 540 F. Supp. 745, 747 (W.D. Mo. 1982). Plaintiffs’ “lack of knowledge of
10 the exact number of persons,” in the class is not a bar to certification. *In re NASDAQ*
11 *Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 509 (S.D.N.Y. 1996). “Plaintiffs may rely
12 on reasonable inferences drawn from the available facts in order to estimate the size of the
13 class.” *Id.* To meet this requirement, the class representatives need show only that it is
14 difficult or inconvenient to join all members of the class.
15

16 In this matter, based on the RealtyTrac U.S. Foreclosure Market Data for April,
17 2009,¹⁵ the estimated size of the class based on the foreclosures for that month alone is
18 16,266 Nevada members, 16,245 Arizona members, 96,560 California members, and
19 84,457 additional members for the other non-judicial foreclosure states listed on Exhibit
20

21 1.¹⁶ There can be no dispute that the joinder of all class members as parties would be
22

23 ¹⁴ See Fannie Mae, Mortgage Fraud Program, Fraud Findings Statistics attached as Exhibit 3.

24 ¹⁵ See RealtyTrac® article, “Foreclosure Activity Remains at Record Levels in April According to
25 RealtyTrac® U.S. Foreclosure Market Report,” attached as Exhibit 9.

¹⁶ The totals are based on the total per-state numbers of notices of default and notices of trustee’s
sale shown in the RealtyTrac® report.

1 impracticable in this case. Thus, the numerosity requirement of Rule 23 is satisfied. *See*
2 3B Moore's Federal Practice, ¶23.05[1] at 23-151 through 23-155 (2d ed. 1980).

3 2. COMMON QUESTIONS OF LAW AND FACT

4 Rule 23(a)(2) requires that there be, "questions of law or fact common to the class."
5 The threshold for satisfying the commonality prerequisite is "not high." *Jenkins v.*
6 *Raymark Industries*, 782 F.2d 468, 472 (5th Cir. 1986). The rule does not require that all
7 questions of law and fact be common to the class, but only that some questions of law or
8 fact be present, and that such questions of law or fact are shared by the members of the
9 prospective class. *Id.*; *see also DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir.
10 1995), *cert. denied sub nom., Crehan v. DeBoer*, 517 U.S. 1156, 116 S.Ct. 1544 (1996)
11 (noting that differences in mortgage forms as to individual members, and members having
12 RESPA or contract claims of differing strengths, did not impact on the commonality of the
13 class). In general, the element is satisfied whenever "there is at least one issue, the
14 resolution of which will affect all or a significant number of the putative class members."¹⁷
15 The commonality requirement may be satisfied "where the question of law linking the
16 class members is substantially related to the resolution of the litigation even though the
17 individuals are not identically situated." *Paxton*, 688 F.2d at 561 (*quoting American*
18 *Finance Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974)).

19 ¹⁷ *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 625 (5th Cir. 1999), *cert. denied*, 528 U.S.
20 1159, 120 S.Ct. 1169 (2000); *National Cash, Inc. v. Loveless*, 205 S.W.3d 127 (Ark. 2005)
21 (certifying a class of borrowers over defendant lender's argument that different defenses would
22 apply to different class members); *Lightbourn v. County of El Paso*, 118 F.3d 421,426 (5th Cir.
23 1997), *cert. denied*, 522 U.S. 1052, 118 S.Ct. 700 (1998); *Ojalvo v. Board of Trustees of Ohio*
24 *State University*, 466 N.E.2d 875, 876 (Ohio 1984) (noting that dissimilarity in remedies is not a
25 basis for denial of class certification).

1 Here, the question of law linking the class members is the condition of their deeds
2 of trust. All class members have deeds of trust naming MERS as the purported
3 beneficiary. All of the class members are seeking protection from unlawful foreclosure
4 and unlawful transfer of interests and/or rights in their deeds of trust by MERS. The
5 question as to the validity of the deeds of trust as they support a right to foreclosure is
6 substantially related to the resolution of the litigation, regardless of the underlying
7 circumstances surrounding how each loan was originated or who originated it. For all of
8 these reasons, the requirements of Rule 23(a)(2) are met in this case.
9

10 3. TYPICALITY

11 Rule 23(a)(3) requires that the claims of the class representatives be typical of the
12 class claims. Like the test for commonality, the test for typicality is “not demanding.”¹⁸
13 This requirement is satisfied “if the claims or defenses of the representatives and the
14 members of the class stem from a single event or are based on the same legal or remedial
15 theory.”¹⁹ Plaintiffs must demonstrate “that there are other members of the class who have
16 the same or similar grievances.”²⁰
17
18
19
20

21 ¹⁸ *Forbush v. J.C. Penny*, 994 F.2d 1101, 1106 (5th Cir. 1993) (citing *Shipes v. Trinity Industries*,
22 987 F.2d 311, 316 (5th Cir. 1993), *reh’g denied*, 996 F.2d 309, *cert. denied*, 510 U.S. 991, 114
S.Ct. 548 (1993)); *see also Mullen*, 186 F.3d at 625.

23 ¹⁹ *Paxton*, 688 F.2d at 561-62 (citing Wright & Miller, Federal Practice and Procedure, § 1764,
n.21.1 (Supp. 1982)).

24 ²⁰ *Id.* at 562; *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) (same)
25 (citing *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir.), *cert. denied*, 434 U.S. 856, 98
S.Ct. 177, 54 L.Ed.2d 128 (1977)); *Klein v. O’Neal, Inc.*, 222 F.R.D 564, 567 (N.D. Tex. 2004)
(noting that “[i]ndividual variations among class members’ claims with respect to individual
causation, medical history, general health, extent of injury, or damages, do not defeat typicality,

1 This prerequisite is intended to assure that the interests of the representatives are not
2 antagonistic and to eliminate the risk of conflict among class members. It does not require
3 that the claims of class representatives be co-extensive with, or identical to, the claims of
4 other class members. All that is required is that “there are substantial questions either of
5 law or fact common to all.” *Siegel v. Chicken Delight, Inc.*, 271 F.Supp. 722, 726-27
6 (N.D. Cal. 1967), *aff’d sub nom., Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir.
7 1969). If the harm alleged is the same, the typicality requirement is met.²¹ The
8 representatives’ claims must “stem from the same event, practice, or course of conduct” as
9 the class claims, and seek the same relief.²²
10

11
12 In this case, the claims of the named Plaintiffs and the class are based on the same
13 “legal or remedial theory,” i.e., that the deeds of trust are invalid, based on a theory to
14 conspire to commit fraud and conversion, and that any foreclosures and/or transfers of
15 those deeds of trust should not proceed. All class members have the same grievances as
16 the plaintiffs, i.e., they have loans secured by invalid deeds of trust and they are subject to
17 the loss of their homes. The course of conduct of the defendants and MERS related to the
18 policy of naming MERS as the beneficiary on the deeds of trust was the same for every
19 class member. The typicality requirement of Rule 23(a)(3) is therefore satisfied.
20

21
22 provided that the claims arise from the same events or course of conduct and are based on the
23 same legal theories”).

24 ²¹ *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665, 675 (D. Kan. 1989).

25 ²² *Transamerican Refining Corp. v. Dravo Corp.*, 130 F.R.D. 70, 73 (S.D. Tex. 1990) (*citing* 7A
Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1764 at 228 (1986)).

1 **4. ADEQUATE REPRESENTATION**

2 Rule 23(a)(4) requires that the class representatives “fairly and adequately protect
3 the interests of the class.” Adequate representation depends on two factors: (a) the
4 plaintiff’s attorney must be qualified, experienced, and generally able to conduct the
5 proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the
6 class.²³ Where the named plaintiffs’ interests are identical to the interests of the absent
7 class members and experienced counsel represent the class, courts routinely find that the
8 adequacy requirement is fulfilled.²⁴

9
10 Both prerequisites of adequacy of representation are met in this case. Class counsel
11 has significant experience in class action matters and sufficient resources to support this
12 litigation.²⁵ The named plaintiffs’ interests are not antagonistic to those of the class. The
13 named plaintiffs have already sought legal rulings on the legality of the MERS deeds of
14 trust through the preliminary injunction motion filed to stop foreclosures on their
15 individual homes. (See, e.g., Doc. 36.) However, every defendant in this matter subject to
16 the motion stipulated to the relief requested, averting a battle on the merits.²⁶ Accordingly,
17
18

19
20

²³ *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968); *Jenkins*, 782 F.2d at 472.

21 ²⁴ *Mullen*, 186 F.3d at 625-26; *see also Morgan*, 169 F.R.D. at 357 (noting that “[i]n the absence
22 of proof to the contrary, courts presume that class counsel is competent and sufficiently
experienced to vigorously prosecute the class action.”).

23 ²⁵ See Declaration of Robert R. Hager attached as Exhibit 10; Declaration of Treva J. Hearne
24 attached as Exhibit 11; Declaration of William A. Nebeker attached as Exhibit 12, Declaration of
Valerie R. Edwards attached as Exhibit 13; Declaration of Emmanuel Edem attached as Exhibit
25 14; Declaration of L. Mark Bonner attached as Exhibit 15.

²⁶ See Stipulations and Orders filed herein as Document Nos. 59-62, incorporated herein by this
reference. Notably, Countrywide stipulated to an order not to foreclose as to Peternell even
though there was no temporary restraining order issued, and the notice of default had already been

1 the named Plaintiffs and their counsel will fairly and adequately protect the interests of the
2 class in this action.

3 **5. RULE 23(b)(2) REQUIREMENTS**

4
5 In order to certify a class, the court must determine that the requirements of Rule
6 23(a) are met and that at least one of the provisions of Rule 23(b) is met. Plaintiffs' First
7 Amended Complaint meets the requirements for a Rule 23(b)(1) certification because
8 prosecuting separate actions creates a risk of inconsistent adjudications that would
9 establish incompatible standards of conduct for MERS and its members and that would
10 impair others' ability to protect their interests. Plaintiffs' First Amended Complaint also
11 meets the requirements for a Rule 23(b)(3) certification because common questions of law
12 or fact predominate and a class action is superior to other methods of adjudicating the
13 controversy involving MERS. However, Rule 23(b)(2) provides the most appropriate
14 vehicle for class certification to address the current foreclosure issues confronting the court
15 and counsel.
16

17
18 Rule 23(b)(2) has two basic requirements for maintenance of class actions. First,
19 the party opposing the class must have acted or failed to act on grounds applicable to all
20 class members. Second, injunctive and final declaratory relief settling the legality of the
21 behavior with respect to the class as a whole must be appropriate.²⁷ Plaintiffs are seeking
22

23
24 rescinded. In *Stoffels v. GRP Financial Services*, also pending before this court, Case No. 3:08-cv-
25 458-ECR-RAM, the defendants actually litigated the issue and lost.

²⁷Notably, Rule 23(b)(2) class actions are generally limited to those cases which seek primarily declaratory and injunctive relief. Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. at 69, 102.

1 limited class certification for the purpose of seeking injunctive and declaratory relief as
2 described herein. In such a case, certification under Rule 23(b)(2) is appropriate.

3 Both elements required under Rule 23(b)(2) are met in this case. The parties
4 opposing the class, MERS and its principals, have taken the litigation position that only the
5 named Plaintiffs are entitled to injunctive relief, but only when forced with litigating the
6 issue.²⁸ Defendants' actions in foreclosing prior to the stipulations are definitely within the
7 scope of Rule 23(b)(2). Moreover, the Defendants in this case, by their opposition to
8 Plaintiffs' request for relief under Counts IX and X, have acted on grounds applicable to all
9 class members in denying that all class members have a right to be free from foreclosure
10 actions brought in the name of MERS.
11
12

13 The second element, that injunctive and corresponding declaratory relief will settle
14 the legality of the Defendants' behavior with respect to the class as a whole, is also
15 satisfied. As previously indicated, Plaintiffs, on behalf of the proposed class, are filing for
16 a preliminary injunction concurrently with the filing of this motion. Resolution of Counts
17 IX and X of the First Amended Complaint through this court's power to issue a declaratory
18 judgment in this case will settle for all class members whether or not they have the right to
19 be free from foreclosure actions brought in the name of MERS and any MERS assignee.
20

21 **C. IT IS WITHIN THIS COURT'S DISCRETION TO CERTIFY A**
22 **CLASS ON COUNTS IX AND X ONLY**

23 Under Fed. R. Civ. P. 23(c)(4), the court has discretion to fashion its order to ensure
24 that the conduct of the class action case is appropriate for the relief being sought:
25

1 When appropriate, an action may be brought or maintained as a class action
2 with respect to particular issues.

3 This rule allows the court to consider a class action that is limited in scope to one
4 particular issue or one claim for relief in an amended complaint. Manual for Complex
5 Litigation (3rd Ed.) § 30.17. In Counts IX and X of the First Amended Complaint,
6 Plaintiffs seek a determination as to whether Plaintiffs have a right to be free from
7 foreclosure by MERS, its assignees, or the by named defendants who originated the loans
8 which were secured by a deed of trust listing MERS as the beneficiary. The class
9 certification sought at this point relates solely to the issue of the right to declaratory and
10 injunctive relief and it is well within this court's authority to consider this issue separately
11 from the remainder of the case. Indeed, Plaintiffs contemplate two motions for class
12 certification: the present motion for certification of the injunctive relief issue, and a second
13 to determine what claims are compensable as a class action for monetary damages.
14
15

16 //

17 //

18 **D. APPOINTMENT OF CLASS COUNSEL IS APPROPRIATE**

19 Upon certification of a class, pursuant to Rule 23(g), the court must appoint class
20 counsel. Because the Plaintiffs' counsel have identified and investigated the claims, have
21 experience in handling class actions and complex litigation, have developed knowledge of
22 the applicable law, and will commit sufficient resources to represent the class, Plaintiffs'
23 counsel would be appropriate as class counsel.
24
25

²⁸ See Stipulations entered as to Plaintiffs Lopez, Casas, Evenson, Gray, Frankoski, and Peternell

1 **E. NOTICE IS NOT REQUIRED IN A RULE 23(b)(2) CLASS**

2 Notice is not required in a Rule 23(b)(2) class.²⁹ However, if notice is required,
3 Plaintiffs propose that MERS be ordered to give notification to the class of the certification
4 of the class through the information contained in MERS's database.

5
6 **III. CONCLUSION**

7 In deciding the motion for certification, a court should focus on whether the
8 requirements of the class action rule are met. Certification of the class is reviewed on the
9 basis of abuse of discretion. *DeBoer, supra*, 64 F.3d at 1175 (class action certification does
10 not address the merits of the underlying action); *Eisen v. Carlise & Jacquelin*, 417 U.S.
11 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974). For certification, Plaintiffs need
12 show only that they have some proof of each of the class action requirements.³⁰ Federal
13 law states that trial courts should err in favor of certification, rather than against it.³¹ The
14 pragmatically correct action, in the face of a close question as to certification, has been said
15 to be to sustain certification.
16

17
18 The prerequisites of Rule 23 are met. The class should be certified. There is ample
19 proof that the class satisfies the four threshold requirements of Rule 23(a): (1) numerosity;

20
21 filed herein, Doc. Nos. 59-62.

22 ²⁹ See Federal Rule of Civil Procedure 23(c)(2).

23
24 ³⁰ See, e.g., *Carnegie v. Household Intern., Inc.*, 376 F.3d 656 (7th Cir. 2004) (substantial
25 compliance with Rule 23 is all that is required); *Ojalvo, supra*, 466 N.E.2d at 877 (noting that trial
court went too far in requiring a "certainty that a common issue of breach of three to six thousand
contracts probably exists"); *Anthony v. General Motors Corp.*, 33 Cal.App.3d 699, 109 Cal. Rptr.
254 (1973).

³¹ See, e.g., *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417 (D. N.M. 1988).

1 (2) commonality; (3) typicality; and (4) adequacy of representation. Because these
2 prerequisites are met, together with the provisions of Rule 23(b), the court should certify
3 this case as a class action.

4 //

5 //

6 //

7 //

8 //

9 //

10 //

11 //

12 //

13 //

14 //

15 //

16 //

17 //

18 //

19 //

20

21

22

23

24

25

For the foregoing reasons, Plaintiffs move for an order certifying the proposed plaintiff class, defining the class, designating plaintiffs as class representatives, designating Plaintiffs' counsel as class counsel, and directing that notice of certification be given to the class members. Certification, if granted by the court, would facilitate the wide-ranging relief sought by Plaintiffs. Pursuant to Rule 23(g)(2)(A) of the Federal Rules of Civil Procedure, Plaintiffs ask for the entry of an order providing:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROOF OF SERVICE

I hereby certify that on May 22, 2009, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants (designated in boldface type), and as to the parties on the list set forth below who are not CM/ECF registrants, by placing it in the U.S. Mail, first-class, postage prepaid.

AIG United Guaranty Corporation
230 N. Elm St.
Greensboro, NC 27401

Federal Home Loan Mortgage Corporation
c/o Molly B. Nesline
8200 Jones Branch Dr., MS212
McLean, VA 22102

Federal National Mortgage Association
Corp. Service Company
1090 Vermont Ave., N.W.
Washington, DC 20005

G.E Money Bank
Attn.: Diane Dix
c/o GE Consumer Finance, Inc.
950 Forrer Blvd.
Kettering, OH 45420

National City Mortgage
3232 Newmark Dr.
Miamisburg, OH 45342

J.P. Morgan Chase Bank
c/o CT Corporation System
111 8th Ave., Fl. 13
New York, NY 10011-5213

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

National City Corp.
50 W. Broad St., Suite 1800
Columbus, OH 43215

PNC Financial Services
1 PNC Plaza
249 5th Ave.
Pittsburgh, PA 15222-2707
Attn: Robert Kresson

By /s/ Mercedes I. Witty
Mercedes I. Witty