Michael R. Kealy
Nevada State Bar No. 0971
David R. Hall
Nevada State Bar No. 9571
PARSONS BEHLE & LATIMER
50 West Liberty Street, Suite 750
Reno, NV 89501
Telephone: (775) 323-1601
Facsimile: (775) 348-7250
mkealy@parsonsbehle.com
dhall@parsonsbehle.com

LeAnn Pedersen Pope, (admitted *pro hac vice*)
Danielle J. Szukala,(admitted *pro hac vice*)
BURKE, WARREN, MACKAY &
SERRITELLA, P.C.
330 North Wabash Avenue, 22nd Floor
Chicago, Illinois 60611-3607
Telephone: (312) 840-7000
Facsimile: (312) 840-7900
lpope@burkelaw.com
dszukala@burkelaw.com

Attorneys for JPMorgan Chase Bank, N.A.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

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

Plaintiffs,

v.

EXECUTIVE TRUSTEE SERVICES, LLC.; COUNTRYWIDE HOME LOANS, INC., a New York corporation; MERSCORP, INC., a Virginia corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a subsidiary of MERSCORP, INC., a Delaware corporation; RECONSTRUCT, SAXON MORTGAGE SERVICES, INC., GALE GROUP dba T.D. FINANCIAL

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

DEFENDANTS CITIMORTGAGE, INC. AND JPMORGAN CHASE BANK N.A.'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

-AND-

DEFENDANTS CITIMORTGAGE, INC. AND JPMORGAN CHASE BANK N.A.'S JOINDER IN CERTAIN DEFENDANTS' MEMORANDA IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

(ORAL ARGUMENT REQUESTED)

SERVICES dba T.D. SERVICE COMPANY, SECURITY UNION TITLE INSURANCE COMPANY, CAPITAL ONE dba CHEVY CHASE BANK, NATIONAL DEFAULT SERVICING CORPORATION, FEDERAL HOME LOAN MORTGAGE CORPORATION, a Virginia corporation; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a District of Columbia corporation; GMAC MORTGAGE, L.L.C., a Delaware corporation; NATIONAL CITY MORTGAGE, a foreign company and a division of NATIONAL CITY BANK, a subsidiary of National City Corporation; NATIONAL CITY CORPORATION, a Delaware corporation and a subsidiary of PNC Financial Services, Inc.; PNC FINANCIAL SERVICES, INC., a Pennsylvania corporation; J.P. MORGAN CHASE BANK, N.A., a New York corporation; CITIMORTGAGE, INC., a New York corporation; HSBC MORTGAGE CORPORATION, U.S.A., a Delaware 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.

Plaintiffs ask this Court to certify a sprawling class action comprised of millions of borrowers spread across twenty-eight states and the District of Columbia (a total of 29 jurisdictions) who agreed to home loans over a four-year period, with the only conceivable common link among these divergent claims being that plaintiffs' loans were allegedly secured by deeds of trust that listed MERS Inc. as the nominee for the lenders. Plaintiffs seek class certification in order to enjoin the twenty-two defendants from using non-judicial foreclosure on home loans in any of the twenty-nine jurisdictions included in the putative class – essentially shutting down non-judicial foreclosure in over half the country and threatening substantial injury to the economy while in the midst of a recession. Such extreme and unwarranted relief

to borrowers is based on the novel theories of Neil Garfield, plaintiffs' purported expert who runs an anti-mortgage industry blog, and a complaint filled with conclusory allegations that is the subject of numerous pending motions to dismiss.

Plaintiffs' motion for class certification, as applied to defendants CitiMortgage, Inc. ("CitiMortgage") and JPMorgan Chase Bank, N.A. ("Chase") fails because the putative class sought to be certified is not in any way connected to the conduct or actions of CitiMortgage and Chase, neither of whom have any connection to plaintiffs' loans. Plaintiffs' motion further fails because the requirements for class certification under Federal Rule of Civil Procedure 23 are not met in this case. In support of their position, defendants CitiMortgage and Chase file this memorandum of points and authorities in opposition to plaintiffs' motion for class certification [#77] and join in and incorporate by reference the following oppositions: Countrywide and Wells Fargo's Joint Opposition to Plaintiffs' Motion for Class Certification, Defendant GE Money Bank's Opposition to Plaintiffs' Motion for Class Certification, Freddie Mac and Fannie Mae's Opposition to Plaintiff's Motion for Class Certification, and the Memorandum of Points and Authorities of Defendants National City Bank, National City Mortgage, National City Corporation and PNC Financial Services Group, Inc., In Opposition to Plaintiffs' Motion for Class Certification.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

Ten named plaintiffs have brought a ten-count complaint against more than twenty defendants. The ten plaintiffs have loans with or serviced by some of the named defendants. However, none of the plaintiffs have any connection to defendants CitiMortgage and Chase. Neither CitiMortgage nor Chase originated plaintiffs' loans, and neither entity is the current loan servicer of, or holder/mortgagee on, any of plaintiffs' loans. Plaintiffs name CitiMortgage and Chase as defendants in this suit based solely on the allegation that they are member/directors of

[1] CitiMortgage and Chase understand that additional defendants have filed or will file oppositions to plaintiffs' motion for class certification. To the extent that those oppositions raise additional grounds that would also warrant denial of class certification as to CitiMortgage and Chase, CitiMortgage and Chase join in those oppositions and incorporate them herein by reference.

MERS or shareholders of MERSCORP, Inc. and not based on any action or conduct by CitiMortgage and Chase regarding the named plaintiffs.

Regarding CitiMortgage and Chase, plaintiffs conclusorily allege that these entities took part in an alleged conspiracy to defraud plaintiffs through the "MERS System." (Am. Compl., Count V.) Plaintiffs allege no other causes of action specifically against CitiMortgage or Chase, although a number of claims are alleged generically against "defendants." These counts all depend upon a party having some role in connection with the origination, ownership or servicing of plaintiffs loans – a role that plaintiffs do not and cannot allege that CitiMortgage or Chase had or have in connection with plaintiffs' loans.[2] Following these generically plead counts, plaintiffs label requests for (i) injunctive relief (Count IX) and (ii) declaratory relief (Count X) as causes of action and again reference "defendants" generically. (Am. Compl., Counts IX, X.)

Now plaintiffs seek to certify a Rule 23(b)(2) class only with respect to Count IX (injunctive relief) and Count X (declaratory relief) claiming that "Plaintiffs have a right to be free from foreclosure by MERS, its assignees, or [sic] by named defendants who originated the loans which were secured by a deed of trust listing MERS as the beneficiary." (Pl. Motion for Class Certification, pp. 20-22.) As an initial matter, this Court should deny class certification because plaintiffs have not even sufficiently pled any claims against any defendant, including CitiMortgage and Chase. *See infra* Section V. Indeed, each defendant, including CitiMortgage and Chase, has a fully-briefed motion to dismiss pending before this Court.

Furthermore, in addition to the reasons set forth in the memoranda joined in by CitiMortgage and Chase, this Court should deny certification of any class sought by plaintiffs specifically as to CitiMortgage and Chase because they have no connection to the origination of plaintiffs' loans or any foreclosure actions involving plaintiffs. CitiMortgage and Chase are not

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[2] Plaintiffs generically assert against "defendants" claims for violation of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (Count I), violation of Unfair Lending Practices, N.R.S. 598D.100 (Count III), conspiracy to commit fraud and conversion in connection with the origination of plaintiffs' loans by packaging and selling plaintiffs' loans on the secondary market (Count IV), unjust enrichment resulting from the origination of the loans (Count VI), intentional infliction of emotional distress as a result of predatory lending (Count VII), and fraud in the inducement in connection with the origination of plaintiffs' loans (Count VIII). As demonstrated in the pending motions to dismiss, each of these claims necessarily depends upon a defendant having some connection to the origination, ownership and/or servicing of plaintiffs' loans.

"MERS, its assignees, or [] named defendants who originated [plaintiffs'] loans." (Pl. Motion for Class Certification, p. 22.) Consequently, the class sought to be certified by plaintiffs has nothing to do with CitiMortgage and Chase. In addition, the "causes of action" at issue in the motion for class certification are not directed at CitiMortgage and Chase. The one count for conspiracy that specifically names CitiMortgage and Chase is not the subject of plaintiffs' motion for class certification. Instead, the motion for class certification is limited to certification of purported claims for injunctive relief and declaratory relief that cannot be directed at CitiMortgage and Chase. The claim for injunctive relief alleges facts pertaining to each named plaintiff and specific defendants, but not CitiMortgage or Chase. (Am. Compl., ¶¶ 196-223.) The claim for declaratory relief simply concludes that "Defendant have violated Plaintiffs' rights" under "the Fair Housing Act and other state and federal laws," (*id.*, ¶¶ 224-227), but given that CitiMortgage and Chase have no connection to plaintiffs' loans, they cannot have violated any laws in connection with those loans.

These deficiencies in plaintiffs' motion for class certification are further revealed through an analysis of the elements of class certification under Federal Rule of Civil Procedure 23 – specifically the standing, typicality, adequacy and Rule 23(b)(2) requirements. This analysis demonstrates that plaintiffs' motion does not apply to, and no class could be certified with respect to, CitiMortgage and Chase.

I. Plaintiffs Cannot Meet Their Burden On Class Certification.

The party seeking certification "bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). The Court, in turn, should conduct a "rigorous analysis" to determine whether the plaintiff has met his burden with respect to each element of Rule 23. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The Court "must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues," *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007) (internal citations and quotations omitted), and is "at

liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (internal citations and quotations omitted).

To determine whether plaintiffs have satisfied their burden of proving each requirement of Rule 23, this Court must examine the record evidence, and not be guided by the unsubstantiated allegations in the complaint or plaintiffs' motion for class certification. Only by looking to the record evidence, as well as the elements of the claims and defenses asserted, can this Court determine whether proof of plaintiffs' claims would also prove the class claims. *E.g., Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004) (analyzing elements of claims and defenses, evidence necessary to prove those claims and defenses, and relying on record evidence to affirm denial of class certification).

In this case, plaintiffs have presented no proper record evidence to support certification of a class against CitiMortgage and Chase, and overwhelmingly fail to meet their burden on any requirement for class certification. Plaintiffs failure to meet their burden on the requirements for class certification is set forth in the memoranda in which CitiMortgage and Chase join herein. To the extent plaintiffs fail to meet class certification requirements based on issues specific to CitiMortgage and Chase (*i.e.*, defendants named in the complaint solely on the allegation that they are members of MERS and/or shareholders of MERSCORP, Inc.), those deficiencies in plaintiffs' motion are set forth below.

II. The Court Should Deny Certification of Any Class Against CitiMortgage and Chase Because Plaintiffs Lack Standing to Sue CitiMortgage and Chase.

Standing is a threshold issue that must be established prior to class certification. *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997). If the proposed class representatives lack standing to assert the alleged claims in their own right, they cannot do so on behalf of a putative class. *Easter v. Am. West Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) ("The district court correctly addressed the issue of standing before it addressed the issue of class certification."); *Morgan v. County of Yolo*, 277 Fed. App'x. 734, 735, No. 06-16487, 2008 WL 2019579, at *1 (9th Cir. May 8, 2008) (where named plaintiff did not have individual standing, he lacked "standing to represent

a class"). In other words, "a plaintiff may not use the procedural device of a class action to bootstrap himself into standing he lacks under the express terms of the substantive law." *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 705 (D.C.Pa.1973); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

In order "to establish Article III standing in a class action, at least one named plaintiff must have standing in his own right to assert a claim against each named defendant before he may purport to represent a class claim against that defendant." *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev. 2004); *Epstein v. MCA, Inc.*,179 F.3d 641, 652 (9th Cir. 1999) ("The class representative must possess the same interest and suffer the same injury shared by all members of the class he represents.") (internal citations and quotations omitted). Thus, "what is required is that for every named defendant there be at least one named plaintiff who can assert a claim directly against that defendant." *Id.* In this case, there is not one named plaintiff who does or could assert a claim directly against CitiMortgage or Chase for "injunctive relief" or "declaratory relief" in connection with any loan origination or foreclosure. That is because CitiMortgage and Chase have no connection to any named plaintiffs' loan origination or foreclosure action.

Looking to plaintiffs' own pleading of Counts IX and X (the claims at issue in the motion for class certification), there are no allegations even suggesting any plaintiff has met Article III standing requirements with respect to CitiMortgage and Chase. Article III standing requires three elements: (1) injury-in-fact; (2) traceability; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Traceability "requires that there be 'a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant." *Jordan v. Paul Financial, LLC*, No. C 07-04496, 2009 WL 192888, at *4 (N.D. Cal. Jan. 27, 2009), *citing Lujan*, 504 U.S. at 560. Redressability requires

the possibility that the Court could enter a ruling that would redress some conduct by CitiMortgage or Chase.

Plaintiffs, who do not even mention CitiMortgage and Chase in Counts IX and X, cannot establish the traceability requirement of Article III because there is no injury alleged in the claims at issue in plaintiffs' motion for class certification that is traceable to any action by CitiMortgage or Chase.[3] Nor can plaintiffs establish that CitiMortgage or Chase could redress their purported injuries. The complaint does not allege that CitiMortgage or Chase played any role in the mortgage transactions upon which plaintiffs based their claims. Plaintiffs themselves admit they do not have any personal claims against CitiMortgage and Chase.[4] The sole specific allegations as to CitiMortgage and Chase in the complaint provide:

- "Upon information and belief, Defendant CitiMortgage, Inc. was a New York corporation doing business in Nevada and, at all times material hereto, was a member in the MERS system described herein and a shareholder of MERS." (Am. Comp., ¶ 31.)
- "Upon information and belief, [Chase] was a New York corporation doing business in Nevada and, at all times material hereto, was a member in the MERS system described herein. Upon information and belief, [Chase], through its affiliate or subsidiary, Chase Home Mortgage Corporation of the Southeast, was a shareholder in MERS, and through its employees or agents employed by its affiliate, J.P. Morgan Chase Co., was a director of MERS. (Am. Cmp., ¶ 30.)

The mere assertion of MERS membership is insufficient to confer standing on plaintiffs who admittedly have not had any contact with CitiMortgage or Chase. *See Trevino v. MERSCORP, Inc.*, 583 F. Supp. 2d 521 (D. Del. 2008) (dismissing claims against defendants based on status as

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[3] In *Easter*, for example, the Ninth Circuit affirmed dismissal of certain defendants "that do not hold a named plaintiff's [mortgage] note" from a putative class action challenging the terms of homeowners' mortgage loans. The court explained that the named plaintiffs lacked standing because they could not "trace the alleged injury in fact" to defendants that "have never held a named plaintiff's loan." 381 F.3d at 961-62; *see also Dash v. FirstPlus Home Loan Trust 1996-2*, 248 F. Supp. 2d 489, 503 (M.D.N.C. 2003) (dismissing putative class representatives' claims challenging terms of mortgage loans because "Plaintiffs do not allege any contractual relationship whatsoever with Defendants" and thus "cannot possibly show that their injuries … are traceable to the conduct of any of the Defendants, nor can they show that a judicial ruling in their favor would likely redress their injuries"); *Faircloth v. Nat'l Home Loan Corp.*, 313 F. Supp. 2d 544, 551 (M.D.N.C. 2003) (same); *Mull v. Alliance Mortgage Banking Corp.*, 219 F. Supp. 2d 895, 908-09 (W.D. Tenn. 2002) (dismissing putative class representatives' claims challenging terms of mortgage notes because "named plaintiffs do not have standing against any defendant who does not actually hold their loans"); *Williams v. FirstPlus Home Loan Trust 1996-2*, 209 F.R.D. 404, 414 (W.D. Tenn. 2002) (same).

[4] Ex. A, Deposition of Josefa Lopez, at 253:10-22; Ex. B, Deposition of Tyrone Everson, at 21: 5-25; Ex. C, Deposition of Maria Casas at 35.:15-17; Ex. D, Deposition of Jose Casas Dep. at 58:21-59:20, 61:14-16; Ex. E, Deposition of Christopher Peternell, at 124:13-25, 252:13-253:13; Ex. F, Deposition of Lyndon Graves, at 277:13-278:25, 282:24-283:9.

shareholder in MERSCORP, Inc.). Accordingly, the Court should deny class certification of claims against CitiMortgage and Chase because plaintiffs lack standing to bring such claims.

III. Plaintiffs Claims Against CitiMortgage and Chase Are Not Typical Of Those Of The Putative Class, And Plaintiffs Are Not Adequate Representatives Of Any Class As Against CitiMortgage and Chase.

Even assuming *arguendo* that plaintiffs could establish standing as to CitiMortgage and Chase – as demonstrated above, they cannot – plaintiffs still must satisfy the requirements of Rule 23(a) prior to class certification.[5] To establish typicality, plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The named plaintiffs "must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co.,* 457 U.S. at 156 (1982) (internal citation omitted).

To establish adequacy, plaintiffs must show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Pro. 23(a)(4). "To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hansberry v. Lee,* 311 U.S. 32, 42-43 (1940). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *See Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir.1978). *See also Hanlon v. Chrysler Corp.*,150 F.3d 1011, 1020 (9th Cir.1998).

In this case, the named plaintiffs' fail to meet their burden with respect to the typicality and adequacy requirements as applied to CitiMortgage and Chase. Not only do plaintiffs lack standing to sue or represent a class against these defendants, they do not have claims typical of those of any persons who might have claims against CitiMortgage and Chase given that plaintiffs' themselves have no basis to assert any claims for injunctive or declaratory relief against CitiMortgage or Chase. Likewise, plaintiffs are not adequate representatives because they cannot

[5] CitiMortgage and Chase address two requirements of Rule 23(a) herein (typicality and adequacy), but plaintiffs fail to meet their burden with respect to any of the requirements of Rule 23(a) as set forth in the oppositions joined in by CitiMortgage and Chase.

be said to have any interest in vigorously pursuing claims against defendants from whom plaintiffs cannot recover. When a named plaintiff has no basis to recover from a named defendant for the claims at issue at class certification, those plaintiffs fail to meet their burden for the requirements of typicality and adequacy under Rule 23. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (plaintiffs failed to establish typicality and adequacy of representation in seeking class certification against manufacturer of epilepsy drug where no named plaintiff had experienced a specific injury as result of taking the drug).[6]

IV. A Rule 23(b)(2) Class Is Not Appropriate As Against CitiMortgage And Chase.

Plaintiffs seek certification of a Rule 23(b)(2) class claiming it is "the most appropriate vehicle for class certification to address the current foreclosure issue confronting the court and counsel." (Pl. Motion for Class Certification, p. 20.) However, Rule "23(b)(2) certification is only available when injunctive and declaratory relief 'predominate.'" *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1196 (9th Cir. 2007) (where plaintiffs cannot benefit from injunctive or declaratory relief from defendant, such relief cannot possibly predominate and Rule 23(b)(2) certification was not appropriate). To obtain certification under Rule 23(b)(2), plaintiffs must show that: (1) "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and (2) "the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195 (internal citations and quotations omitted).

Here, plaintiffs cannot represent a Rule 23(b)(2) class seeking injunctive and declaratory relief from CitiMortgage and Chase because plaintiffs lack standing to seek such relief from these defendants; Citimortgage and Chase have nothing to do with plaintiffs' loans or foreclosure actions so there is no conduct to enjoin with respect to these defendants. *Deitz v. Comcast Corp.*, No. C 06-06352, 2007 WL 2015440, at *7 (N.D. Cal. Jul. 11, 2007) (plaintiff lacked standing to seek injunctive relief against cable provider after he cancelled his subscription). If there is no

[6] The inadequacy of the named plaintiffs as class representatives is further demonstrated by the fact all of the named plaintiffs no longer face the threat of foreclosure because all of the defendants involved in plaintiffs' loans have stipulated with plaintiffs that they will not foreclose on their homes during the pendency of this litigation. [#42, #59, #60, #63] As such, unlike the putative class they seek to represent, the named plaintiffs already have the relief they are seeking on behalf of the putative class.

basis for plaintiffs to obtain injunctive and declaratory relief from CitiMortgage and Chase, such relief certainly cannot predominate in the manner required for a Rule 23(b)(2) class. Accordingly, the Rule 23(b)(2) requirement is not met as to CitiMortgage and Chase. *E.g., Hyderi v. Washington Mut. Bank, FA*, 235 F.R.D. 390, 398 (N.D. Ill. 2006) (denying certification under Rule 23(b)(2) when injunctive relief did not predominate).

V. This Court Should Otherwise Deny Certification Of A Class Alleging Claims Against CitiMortgage and Chase Because Plaintiffs Have Not Stated A Claim Against Either Defendant.

This Court should also deny plaintiffs' motion for class certification because plaintiffs' do not even state a claim against CitiMortgage and Chase. Given plaintiffs failure to state a claim against these defendants, this Court should first rule on the pending motions to dismiss filed by CitiMortgage and Chase before deciding whether to certify a class. As the Ninth Circuit held in dismissing claims for declaratory and injunctive relief in a putative class action, "this is the proper course to follow where the named plaintiffs have failed to state a claim in themselves for the relief they seek." *Boyle v. Madigan*, 492 F.2d 1180, 1182 (9th Cir. 1974). *See also Wright v. Schock*, 742 F.2d 541, 545 -546 (9th Cir. 1984) ("Neither Fed.R.Civ.P. 23 nor due process necessarily requires that the district court rule on class certification before granting or denying" a dispositive motion); *Floyd v. Bowen*, 833 F.2d 529, 534 (5th Cir.1987) *citing, Miller v. Mackey International, Inc.,* 452 F.2d 424, 427 (5th Cir.1971) ("'The court always is empowered to make a determination on the merits irrespective of the denomination of the suit as a class action ... the propriety of that inquiry is limited only by concerns of whether the class determination should be postponed until after the merits determination.' C. Wright, A. Miller, and M. Cane, 7 Federal Practice & Procedure, 1785 at 128 (footnote omitted) (1986). Indeed...the class action litigation may be halted by a Rule 12 motion to dismiss or by a Rule 56 motion for summary judgment.")

CitiMortgage and Chase demonstrated in their respective motions to dismiss that the complaint is woefully inadequate under the standards laid down by the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiffs do not allege, nor could they, that CitiMortgage or Chase had anything to do with their

mortgages. Nor have plaintiffs pled facts that would allow them to recover from CitiMortgage or Chase based solely on membership in MERS, or to pierce the corporate veils of both MERS and MERSCORP, Inc. and hold CitiMortgage and Chase liable for those entities' actions.[7] *See Trevino*, 583 F. Supp. 2d 521 (dismissing claims against shareholders based on their status as shareholder in MERSCORP, Inc.). Because plaintiffs have failed to state a claim under any substantive theory, their injunctive and declaratory relief claims – the only claims at issue here – must be dismissed. *See Brady v. State Bar of Cal.*, 533 F.3d 502, 503 (9th Cir. 1976) ("Having failed to state any claim for relief, appellant had no basis for any injunctive relief"); *Florea v. United States*, Co. 07-CV-01679, 2008 WL 2699689, at *2-*3 (D. Nev. Jun. 30, 2008) ("The Declaratory Judgment Act does not provide an independent basis for subject matter jurisdiction").

In sum, plaintiffs should not be permitted to wield "the potentially enormous expense of discovery" in class litigation in an attempt to "push cost-conscious defendants to settle" an "anemic case[]" like this one. *Twombly*, 550 U.S. at 559. Instead, this Court should dismiss the claims against CitiMortgage and Chase before resolving plaintiffs' motion for class certification.

WHEREFORE, for the reasons set forth herein and in the memoranda joined in by CitiMortgage, Inc. and JPMorgan Chase Bank, N.A., as well as for any other reason considered by this Court, CitiMortgage, Inc. and JPMorgan Chase Bank, N.A. respectfully requests that this Court deny Plaintiffs' Motion for Class Certification, and grant it such other and further relief as this Court deems appropriate.

DATED this 21st day of August, 2009.

PARSONS BEHLE & LATIMER

By: /s/ David R. Hall

Michael R. Kealy (SBN 0971)
David R. Hall (SBN 9571)
50 West Liberty Street, Suite 750
Reno, Nevada 89501
Telephone: (775) 323-1601
Facsimile: (775) 348-7250

[7] In fact, plaintiffs cannot even show that Chase is a shareholder of MERSCORP, Inc. (it is not).

LeAnn Pedersen Pope, *pro hac vice* admission
Danielle J. Szukala, *pro hac vice* admission
Burke, Warren, MacKay & Serritella, P.C.
330 North Wabash Avenue, 22nd Floor
Chicago, Illinois 60611-3607
Telephone: (312) 840-7000
Facsimile: (312) 840-7900

Attorneys for JPMorgan Chase Bank, N.A.

LIONEL SAWYER & COLLINS

By: /s/ Leslie Bryan Hart

Leslie Bryan Hart, Esq. (SBN 4932)
lhart@lionelsawyer.com
50 West Liberty Street, Suite 1100
Reno, Nevada 89501
Telephone: (775) 788-8666
Facsimile: (775) 788-8682

Lucia Nale, Esq., *pro hac vice* pending
lnale@mayerbrown.com
Thomas V. Panoff, Esq., *pro hac vice* pending
tpanoff@mayerbrown.com
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711

Attorneys for Defendant CitiMortgage, Inc.

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CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5(b), I hereby certify that on the 21st day of August, 2009, I electronically filed the foregoing true and correct copy of **DEFENDANTS CITIMORTGAGE, INC. AND JPMORGAN CHASE BANK N.A.'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION –AND- DEFENDANTS CITIMORTGAGE, INC. AND JPMORGAN CHASE BANK N.A.'S JOINDER IN CERTAIN DEFENDANTS' MEMORANDA IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**, which was transmitted electronically through the Court's CM/ECF system to all counsel of record registered for electronic filing.

/s/ David R. Hall