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11 IN THE UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 JOSEFA LOPEZ, et al.,
14 Plaintiffs,

15 vs.

16 EXECUTIVE TRUSTEE SERVICES, LLC, et
17 al.,
18 Defendants.

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

**COUNTRYWIDE AND WELLS
FARGO'S JOINT OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

TABLE OF CONTENTS

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
26
27
28

	<u>Page</u>
INTRODUCTION.....	1
PLAINTIFFS’ COMPLAINT AND THEIR MOTION.....	5
GOVERNING RULE 23 STANDARDS.....	9
ARGUMENT.....	10
I. PLAINTIFFS’ ATTEMPTED PIECEMEAL CLASS CERTIFICATION IS IMPROPER.....	10
A. The Declaratory Judgment and Injunctive Relief Claims Cannot Be Certified for Class Treatment.....	10
1. Certification of Count X implicates certification of the whole case, but there is no basis in the record for doing so.	10
2. Declaratory judgment is not available as a remedy, and so cannot support a class action.	12
3. This is not properly a case for certification under Rule 23(b)(2).	13
B. Plaintiffs Cannot Obtain Class Certification of Only a Part of Counts IX and X, the Limited Issue of Whether the Putative Class Should be “Free” From Foreclosures Because MERS Allegedly Has No “Standing to Foreclose.”.....	15
II. EVEN IF THIS COURT COULD ENGAGE IN PIECEMEAL CERTIFICATION, NO CLASS SHOULD BE CERTIFIED HERE.	16
A. Plaintiffs Have Not Put Forth Sufficient Evidence or Legal Discussion To Support Class Certification.	16
1. Plaintiffs’ Motion Is Not Supported By Facts.	17
2. Plaintiffs Fail To Show That The Law In Each State Is The Same.	19
3. Plaintiffs Cannot Rely On Their “Expert” To Remedy The Inadequacies in Their Motion.	20
B. The Requirements For Class Certification Under Rule 23(b)(2) Are Not Met Even If the Inadequate Record is Overlooked.	24
1. There Are Disparate Factual Circumstances That Affect The Claims Of Each Class Member.	26
2. The Law In Each Of The Twenty-Nine Jurisdictions Varies, Destroying Cohesiveness.	30
3. Defenses To Plaintiffs’ Claims for Injunctive and Declaratory Relief, and Other Considerations, Should Prevent Any Certification.	35
C. Plaintiffs Have Failed To Carry Their Burden Of Demonstrating That Rule 23(a) Requirements Have Been Met.....	41
1. The Named Plaintiffs Are Not Typical Of The Class.	41
2. Plaintiffs Have Not Shown That They Will Adequately Represent The Putative Class.....	43
D. Nothing Can or Should Be Certified Because Plaintiffs Have Not Submitted A Trial Plan.....	46
CONCLUSION	48

TABLE OF AUTHORITIES

CASES: **PAGE(S)**

1

2

3 Abbott Bldg. Corp. v. United States,

4 951 F.2d 191 (9th Cir. 1991)31

5 Adams v. SCME Mortg. Bankers, Inc.,

6 No. CV F 09-0501 LJO SMS, 2009 WL 1451715 (E.D. Cal. May 22, 2009).....31

7 Ahmed v. Washington,

8 276 F.3d 464 (9th Cir. 2001)37

9 Akootchook v. United States,

10 271 F.3d 1160 (9th Cir. 2001)24

11 Allison v. Citgo Petroleum Corp.,

12 151 F.3d 402 (5th Cir. 1998)13, 14

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14 521 U.S. 591 (1997).....25

15 Arch v. Am. Tobacco Co.,

16 175 F.R.D. 469 (E.D. Pa. 1997).....15

17 Armstrong v. Davis,

18 275 F.3d 849 (9th Cir. 2001)41, 42

19 Azoiani v. Love’s Travel Stops & Country Stores, Inc.,

20 No. EDCV 07-90-ODW (OPx), 2007 WL 4811627 (C.D. Cal. Dec 18, 2007)21, 45

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22 161 F.3d 127 (3d Cir. 1998).....25

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26 No. CV-97-0081 (CPS), 1998 WL 199842 (E.D.N.Y. Mar. 16, 1998)29

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28 No. C 06-4756 MHP, 2007 WL 1223777 (N.D. Cal. Apr. 25, 2007).....43, 45

Bolin v. Sears, Roebuck & Co.,

231 F.3d 970 (5th Cir. 2000)12, 13

Brown v. Brewer,

No. CV 06-3731-GHK (JTLx), 2009 WL 1574556 (C.D. Cal. May 29, 2009)44

Burkhalter Travel Agency v. MacFarms Int’l, Inc.,

141 F.R.D. 144 (N.D. Cal. 1991).....17, 44

1 Carrizosa v. Stassinis,
 2 No. C-05-02280 RMW, 2009 WL 839095 (N.D. Cal. Mar. 30, 2009)29

3 Castano v. Am. Tobacco Co.,
 4 84 F.3d 734 (5th Cir. 1996) passim

5 Celotex Corp. v. Edwards,
 6 514 U.S. 300 (1995).....36, 40

7 Chamberlan v. Ford Motor Co.,
 8 402 F.3d 952 (9th Cir. 2005)17

9 Chin v. Chrysler Corp.,
 10 182 F.R.D. 448 (D.N.J. 1998).....46

11 City of Brownsville v. Golden Spread Elec. Coop., Inc.,
 12 192 S.W.3d 876 (Tex. App. 2006).....33

13 City of New York v. Int’l Pipe & Ceramics Corp.,
 14 410 F.2d 295 (2d Cir. 1969).....47

15 Coopers & Lybrand v. Livesay,
 16 437 U.S. 463 (1978).....10

17 Del Campo v. Am. Corrective Counseling Servs., Inc.,
 18 No. C 01-21151JW (PVT) 2008 WL 2038047 (N.D. Cal. May 12, 2008).....45

19 Diessner v. Mortgage Elec. Registration Sys.,
 20 618 F. Supp. 2d 1184 (D. Ariz. 2009)6

21 Dombovari v. Countrywide Home Loans, Inc.,
 22 No. CV09 01593 (Dist. Ct. Washoe County, Nev. May 20, 2009) 35-36

23 Doninger v. Pac. Nw Bell, Inc.,
 24 564 F.2d 1304 (9th Cir. 1977) 16-17

25 Dunlap v. Mortgage Elec. Registration Sys., Inc.,
 26 No. 2:08-cv-00918, slip op. (D. Nev. Jan. 5, 2009)..... 30-31

27 Elias v. HomeEQ Servicing,
 28 No. 2:08-CV-1836 JCM (PAL), 2009 WL 481270 (D. Nev. Feb. 25, 2009).....7, 31, 32

Endres v. Wells Fargo Bank,
 No. C 06-7019 PJH, 2008 WL 344204 (N.D. Cal. Feb. 6, 2008).....35

Farahani v. Cal-Western Reconveyance Corp.,
 No. C 09-194 JF (RS), 2009 WL 1309732 (N.D. Cal. May 8, 2009).....6

Finizio v. Am. Hardware Mut. Ins. Co.,
 967 P.2d 188 (Colo. App. 1998).....33

1 First Am. Title Ins. & Trust Co. v. Cook,
 2 12 Cal. App. 3d 592 (Cal. Ct. App. 1970)21, 33

3 Gartin v. S & M NuTec LLC,
 4 245 F.R.D. 429 (C.D. Cal. 2007)35

5 General Motors Corp. v. Bryant,
 6 285 S.W.3d 634 (Ark. 2008).....19

7 Goodwin v. Executive Tr. Servs., LLC,
 8 No. 3:09-cv-00306-ECR-PAL (D. Nev. July 11, 2009)8

9 Grace v. Perception Tech. Corp.,
 10 128 F.R.D. 165 (D. Mass. 1989).....19

11 Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),
 12 218 B.R. 916 (B.A.P. 9th Cir. 1998).....40

13 Hanlon v. Chrysler Corp.,
 14 150 F.3d 1011 (9th Cir. 1998)17, 42, 43

15 Hanon v. Dataprods. Corp.,
 16 976 F.2d 497 (9th Cir. 1992)9, 10

17 Henry v. St. Croix Alumina, LLC,
 18 No. 1999-0036, 2008 WL 2329223 (D.V.I. June 3, 2008).....15

19 Hodgers-Durgin v. de la Vina,
 20 165 F.3d 667 (9th Cir. 1999)25, 26

21 Illinois v. Harper & Row Publishers, Inc.,
 22 301 F. Supp. 484 (N.D. Ill. 1969)19

23 In re Am. Med. Sys., Inc.,
 24 75 F.3d 1069 (6th Cir. 1996)17, 19, 34

25 In re Andersen,
 26 179 F.3d 1253 (10th Cir. 1999)36, 40

27 In re Bridgestone/Firestone, Inc.,
 28 288 F.3d 1012 (7th Cir. 2002)19

In re Conseco Life Ins. Co. Cost of Ins. Litig.,
 No. ML 04-1610 AHM (Mcx), 2005 WL 5678842 (C.D. Cal. Apr. 26, 2005).....27

In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,
 691 F.2d 1335 (9th Cir. 1982)10

In re Hanford Nuclear Reservation Litig.,
 292 F.3d 1124 (9th Cir. 2002)16

1 In re Hawkins,
 No. BK-S-07-13593-LBR, 2009 WL 901766 (Bankr. D. Nev. Mar. 31, 2009).....34

2

3 In re Huggins,
 357 B.R. 180 (Bankr. D. Mass. 2006)30

4 In re Hydrogen Peroxide Antitrust Litig.,
 552 F.3d 305 (3d Cir. 2009).....9, 16

5

6 In re Katbah,
 Adversary No. 4:09-ap-00109-JMM (Bankr. D. Ariz. May 15, 2009).....22

7

8 In re N.D. Cal. Dalkon Shield IUD Prods. Liab. Litig.,
 693 F.2d 847, 856 (9th Cir. 1982)15

9

10 In re Pardee,
 218 B.R. 916 (B.A.P. 9th Cir. 1998).....36, 40

11 In re Paxil Litig.,
 212 F.R.D. 539 (C.D. Cal. 2003)9, 47

12

13 In re Pizza Time Theatre Sec. Litig.,
 112 F.R.D. 15 (N.D. Cal. 1986).....19

14 In re Quarterdeck Office Sys., Inc. Sec. Litig.,
 No. CV 92-3970-DWW (GHKx), 1993 WL 623310 (C.D. Cal. Sept. 30, 1993).....44

15

16 In re Rhone-Poulenc Rorer Inc.,
 51 F.3d 1293 (7th Cir. 1995)19, 47

17

18 In re Sheridan,
 No. 08-20381-TLM, 2009 WL 631355 (Bankr. D. Idaho Mar. 12, 2009)34

19 In re St. Jude Medical, Inc.,
 425 F.3d 1116 (8th Cir. 2005)27

20

21 In re Unioil Sec. Litig.,
 107 F.R.D. 615 (C.D. Cal. 1985)10

22

23 In re Vargas,
 396 B.R. 511 (Bankr. C.D. Cal. 2008).....34

24 Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat’l Trust & Sav. Ass’n,
 23 F. Supp. 2d 1166 (D. Nev. 1998).....38

25

26 Jackson v. Mortgage Elec. Registration Sys., Inc.,
 ___ N.W.2d ___, 2009 WL 2461257 (Minn. Aug. 13, 2009)7, 30

27

28 James v. Home Constr. Co. of Mobile, Inc.,
 621 F.2d. 727 (5th Cir. 1980)39

1 Jefferson v. Sec. Pac. Fin. Servs.,
161 F.R.D. 63 (N.D. Ill. 1995).....39

2

3 Johnston v. HBO Film Mgmt., Inc.,
265 F.3d 178 (3rd Cir. 2001)40

4

5 Kemp v. Metabolife Int’l, Inc.,
No. CIV. 00-3513, 2002 WL 113894 (E.D. La. Jan. 25, 2002).....15

6 Khalil v. Fidelity National Default Solutions Tustin,
No. A560582, slip. op. (Dist. Ct. Clark County, Nev. Nov. 24, 2008).....6, 31

7

8 Klay v. Humana, Inc.,
382 F.3d 1241 (11th Cir. 2004)19, 20

9

10 Lemon v. Int’l Union of Operating Eng’rs,
216 F.3d 577 (7th Cir. 2000)25

11 Lewallen v. Medtronic USA, Inc.,
No. C 01-20395-RMW, 2002 WL 31300899 (N.D. Cal. Aug. 28, 2002)25

12

13 Logan v. City of Pullman,
392 F. Supp. 2d 1246 (E.D. Wash. 2005)..... 20-21

14 Lumzy v. Mortgage Elec. Registration Sys., Inc.,
No. 2:08 cv 23 KS-MTP, 2008 WL 3992671 (S.D. Miss. Aug. 21, 2008)7

15

16 Mansour v. Cal-Western Reconveyance Corp.,
No. CV-09-37-PHX-DGC, 2009 WL 1066155 (D. Ariz. Apr. 21, 2009)6, 32

17

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805 F. Supp. 761 (N.D. Cal. 1991)9

19 Mazza v. Am. Honda Motor Co.,
254 F.R.D. 610 (C.D. Cal. 2008)29

20

21 McLeod v. DHI Mortgage Co.,
No. 08cv2190-WQH-BLM, 2009 WL 1396395 (S.D. Cal. May 15, 2009)32

22

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247 F.R.D. 598 (S.D. Cal. 2007)21

24 Metro Publ’g Co. v. San Jose Mercury News,
No. 91-20605 SW, 1993 WL 266786 (N.D. Cal. 1993)38

25

26 Mills v. Harmon Law Offices, P.C.,
344 F.3d 42 (1st Cir. 2003).....37

27

28 Moeller v. Taco Bell Corp.,
220 F.R.D. 604 (N.D. Cal. 2004).....26

1 Molski v. Gleich,
 2 307 F.3d 1155 (9th Cir. 2002)13, 14

3 Mortgage Elec. Registration Sys., Inc. v. Azize,
 4 965 So. 2d 151 (Fla. Dist. Ct. App. 2007)7

5 Mortgage Elec. Registration Sys., Inc. v. Revoredo,
 6 955 So. 2d 33 (Fla. Dist. Ct. App. 2007)7, 30

7 Mortgage Elec. Registration Sys., Inc. v. Ventura,
 8 No. CV054003168S, 2006 WL 1230265 (Conn. Super. Ct. Apr. 20, 2006)7, 31

9 Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles,
 10 246 F.R.D. 621 (C.D. Cal. 2007)27

11 Murray v. Auslander,
 12 244 F.3d 807 (11th Cir. 2001)13, 14

13 Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
 14 259 F.3d 154 (3d Cir. 2001).....47

15 Oneida Motor Freight, Inc. v. United Jersey Bank,
 16 848 F.2d 414 (3d Cir. 1988).....36

17 Parkinson v. Hyundai Motor Am.,
 18 No. Sa CV 06-345 AHS (MLGx), 2008 WL 5233200 (C.D. Cal. Dec. 12, 2008).....21

19 Pastor v. State Farm Mut. Auto. Ins. Co.,
 20 No. 05 C 1459, 2005 WL 2453900 (N.D. Ill. Sept. 30, 2005).....19

21 Peyton v. ReconTrust Co.,
 22 No. TC021868, Notice of Ruling (Cal. Super. Ct. L.A. County Oct. 15, 2008)7

23 Pitchford v. Oakwood Mobile Homes, Inc.,
 24 124 F. Supp. 2d 958 (W.D. Va. 2000)33

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 26 354 F. Supp. 2d 1132 (C.D. Cal. 2005)23, 24

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 28 No. CV-S-94-1126-RLH-RJJ, 2002 WL 1991180 (D. Nev. June 25, 2002),
 aff'd, 379 F.3d 654 (9th Cir. 2004).....9

Precision Instrument Mfg. Co. v. Auto. Maint. Machinery,
 324 U.S. 806, 814 (1945).....38

Ramos v. Mortgage Elec. Registration Sys., Inc.,
 No. 2:08-CV-1089-ECJ-RJJ (D. Nev. Mar. 5, 2009)6, 31, 37

Richards v. Delta Air Lines, Inc.,
 453 F.3d 525 (D.C. Cir. 2006)12

1 Riker v. Gibbons,
 2 No. 308CV-00115-LRH-RAM, 2009 WL 102635 (D. Nev. Jan 13, 2009)43

3 Rodriguez v. DePasquale Bldg. & Realty Co.,
 4 926 A.2d 616 (R.I. 2007)33

5 Rodriguez v. Litton Loan Servicing LP,
 6 No. 2:09-cv-00029-MCE-DAD, 2009 WL 1326339 (E.D. Cal. May 12, 2009)32

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 8 511 F.2d 668, 673 (9th Cir. 1975)9

9 Scherer v. Combined Ins. Co. of Am.,
 10 253 F.R.D. 40 (D. Conn. 2008).....20

11 Schwartz v. Upper Deck Co.,
 12 183 F.R.D. 672 (S.D. Cal. 1999)18

13 Sepulveda v. Wal-Mart Stores, Inc.,
 14 237 F.R.D. 229, 235 (C.D. Cal. 2006)21

15 Shook v. Bd. of County Comm’rs of County of El Paso,
 16 543 F.3d 597 (10th Cir. 2008)25, 27

17 Siles v. ILGWU Nat’l Ret. Fund,
 18 783 F.2d 923 (9th Cir. 1986)24

19 Sitek v. Striker,
 20 764 N.W.2d 585 (Minn. App. 2009).....32

21 Smith v. Bank of New York,
 22 366 B.R. 149 (Bankr. D. Colo. 2007)7, 32

23 Smith v. Texaco,
 24 263 F.3d 394 (5th Cir. 2001)15

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 26 ___ F.R.D. ___, 2009 WL 2137148 (N.D. Cal. July 17, 2009)10

27 Sprouse v. Wentz,
 28 781 P.2d 1136 (Nev. 1989).....33

Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.,
 298 F.3d 1137 (9th Cir. 2002)36

Sweet v. Pfizer,
 232 F.R.D. 360 (C.D. Cal. 2005)24, 25

Taylor v. CSX Transp., Inc.,
 Nos. 3:05 CV 7383, 3:06 CV 1116, , 2007 WL 2891085 (N.D. Ohio Sept. 28, 2007)15

1 Therasense, Inc. v. Becton, Dickinson & Co.,
 2 No. C 04-02123 WHA, 2008 WL 2323856 (N.D. Cal. May 22, 2008).....23, 24

3 Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.,
 4 209 F.R.D. 159 (C.D. Cal.2002)21

5 Thompson v. Marine Midland Bank,
 6 No. 99-7051, 1999 WL 752961 (2d Cir. Sept. 16, 1999)11

7 Trent v. Mortgage Elec. Registration Sys., Inc.,
 8 288 Fed. App’x 571 (11th Cir. 2008)6, 30

9 United States v. Everett,
 10 972 F. Supp. 1313 (D. Nev. 1997)24

11 Valentino v. Carter-Wallace, Inc.,
 12 97 F.3d 1227 (9th Cir. 1996) passim

13 Vega v. T-Mobile USA, Inc.,
 14 564 F.3d 1256 (11th Cir. 2009)46

15 Vespers Realty Advisors, Inc. v. Binswanger Mgmt. Corp.,
 16 No. 044245BLS2, 2007 WL 867085 (Mass. Super. Feb. 1, 2007).....33

17 Vinole v. Countrywide Home Loans, Inc.,
 18 571 F.3d 935 (9th Cir. 2009)16, 37

19 Zinser v. Accufix Research Inst., Inc.,
 20 253 F.3d 1180 (9th Cir. 2001)9, 46, 47

21

22 **RULES AND REGULATIONS**

23 Fed R. Civ. P. 8(a)7

24 Fed. R. Civ. P 9(b)7

25 Fed. R. Civ. P. 23 passim

26 Fed. R. Civ. P. 23(a) passim

27 Fed. R. Civ. P. 23(a)(2).....16, 17

28 Fed. R. Civ. P. 23(a)(3).....18, 41

Fed. R. Civ. P. 23(a)(4).....18, 43, 45

Fed. R. Civ. P. 23(b) passim

Fed. R. Civ. P. 23(b)(1).....13

1	Fed. R. Civ. P. 23(b)(2).....	passim
2	Fed. R. Civ. P. 23(b)(3).....	10, 13, 25
3	Fed. R. Civ. P. 23(c)(4).....	15, 16
4	Fed. R. Evid. 703	21
5	Fed. R. Evid. 705	21
6		
7	<u>STATUTES:</u>	
8	11 U.S.C. § 362(b)(8)	27
9	18 U.S.C. § 1001 <u>et seq.</u>	38
10	Cal. Civ. Code, § 3401	33
11	Cali. Civ. Code § 2924(a)(1).....	31
12		
13	Fair Housing Act	
14	42 U.S.C. § 3601 <u>et seq.</u>	7, 11
15	Ga. Code Ann. § 44-14-30.....	30
16	Iowa Code § 654.1	30
17	Nevada’s Unfair Lending Practices	
18	Nev. Rev. Stat. § 598D.100	7, 11
19	Truth in Lending Act	
20	15 U.S.C. § 1601 <u>et seq.</u>	41
21		
22	<u>OTHER AUTHORITIES:</u>	
23	5 Moore’s Federal Practice § 23.43[1][b] (3d ed. 2009)	27
24	5 Moore’s Federal Practice § 23.43[1][c] (3d ed. 2009).....	27
25	5 Moore’s Federal Practice § 23.43[2][b] (3d ed. 2009)	30
26		
27	7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, <u>Federal Practice & Procedure</u> , §§ 1775 - 76 (2d ed. 1986).....	26-27
28	7A Charles Alan Wright, <u>Federal Practice & Procedure</u> , § 1766 (3d ed. 2005).....	43

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2 Practices to Prevent Home Loss and Lower Costs (March 2008)37
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9 Restatement (Second) Conflicts of Laws, § 228.....19
10 Restatement (Second) Conflicts of Laws, § 229.....19
11
12
13
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1 Defendants, Countrywide Home Loans, Inc., Countrywide Financial Corporation,
2 (collectively “Countrywide”), and Wells Fargo Bank, N.A., dba Wells Fargo Home Equity and dba
3 Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. (collectively “Wells Fargo”) (all
4 Defendants together collectively “Defendants”), hereby oppose Plaintiffs’ Motion for Class
5 Certification (“Motion”).

6 **INTRODUCTION**

7
8 This sprawling case – with nearly twenty defendants and a putative class of hundreds of
9 thousands, if not millions, of home loan borrowers – should not be tried collectively and does not
10 share sufficient commonality among the parties and claims to be fairly litigated as a single matter.
11 Rather, this case is nothing more than a series of individual disputes by individual homeowners each
12 with their own lender, where the homeowner has defaulted on his or her loan and is trying to avoid
13 foreclosure. This Court should not indulge Plaintiffs’ attempt to stitch those thousands of individual
14 disputes into a single lawsuit, putting this Court in the inappropriate position of intervening in
15 thousands of individual foreclosures spread across the country.

16 Given the sweep of the allegations, it is not surprising that Plaintiffs struggle mightily – and
17 unsuccessfully – to come up with a viable theory for class certification. Their lawsuit was filed by
18 ten borrowers who, among them, took out loans at various times from six different lenders. Several
19 of the borrowers claim unlawful credit discrimination (for alleged disparities based on their ethnicity
20 or disability), and they and the rest of the borrowers contend both that their various lenders made
21 them “predatory” loans and that all the lenders conspired to hide that conduct by listing Mortgage
22 Electronic Registration Systems (“MERS”) (rather than their lender) as a beneficiary on the loan
23 deeds of trust. They seek damages, punitive damages, and attorneys’ fees.

24 As the Court might expect, and as Plaintiffs undoubtedly recognized at the outset, the
25 testimony of individual borrowers who have been deposed confirmed that their individual situations
26 (and resulting claims) are different. That is not surprising, given the nature of the claims and legal
27 causes of action. Plaintiffs effectively concede this case should not be certified as pleaded, because
28 they do not seek to certify a class for their whole lawsuit and instead promise they will file a second
certification motion later. Motion at 22.

1 Plaintiffs ask the Court instead to peel off and certify a mandatory, Rule 23(b)(2) class only
2 of their causes of action for declaratory and injunctive relief. But what looks at first as a request to
3 do something modest is in fact utterly unworkable because the declaration they seek is a
4 pronouncement that they should win under the other eight counts of their Complaint. This is not the
5 proper province for a declaratory judgment, and so cannot support a class, and is not a permissible
6 Rule 23(b)(2) class. A mandatory class action cannot be constituted where, as here, any substantial
7 aspect of the case seeks money damages. In any event, there is no record basis on which this Court
8 could conclude that the multiple claims of these hundreds of thousands of borrowers should be
9 litigated as a class.

10 Plaintiffs appear to suggest that, notwithstanding their request to certify all of the injunctive
11 and declaratory relief counts, they may want a certification only of one of the many theories of
12 recovery pleaded in those counts – that the use of MERS on the deeds of trust somehow made the
13 security interest in their homes void. There is no legal basis for an issue class action. Cases are
14 certified (or not), not issues in part of a cause of action in part of a case. While there is limited
15 authority to separately litigate collective issues within a case (in unusual circumstances not present
16 here), the case must first be certified as a class on its own merits. Plaintiffs wrongly assume that the
17 Rules permit them to file multiple motions for certification as it suits them at various points during
18 the pendency of this action.

19 Even if procedurally proper, the Court should not certify a nationwide issues class of
20 hundreds of thousands of borrowers who received loans from dozens of lenders across twenty-eight
21 states and the District of Columbia. Plaintiffs bear the burden of proving each element of Rule 23,
22 but they have submitted a motion to the Court devoid of specificity or citation to relevant facts that
23 would support class certification. Plaintiffs' conclusory allegations and vague affidavits are not
24 enough to satisfy the "rigorous analysis" that the Court must engage in prior to certifying a class.
25 Indeed, Plaintiffs base their claims entirely on violations of state law, yet Plaintiffs make no showing
26 that laws of the all of the 28 states (plus the District of Columbia) are uniform in such a way that a
27 single court can adjudicate the parties' rights – even a limited set of questions as to those rights –
28 across all of those jurisdictions.

1 Plaintiffs' sole effort to bridge that gap are two affidavits from a retired Florida attorney
2 currently engaged in a self-described "war" with mortgage companies, Neil Garfield. He says,
3 among other things, that millions of class members' loans are legally unenforceable, the Defendants
4 are not "holders in due course", and MERS' appearance on the deeds of trust and holding of an
5 interest in it had the effect of voiding the security. The affidavits add nothing to support certification.
6 Garfield offers, at most, (uninformed) legal opinions, which should be stricken for that reason. See
7 Motion of Fannie Mae & Freddie Mac to Strike Garfield Affidavit at 2-4 (filed today). Moreover,
8 Garfield – who never worked in the mortgage industry yet spends his time on the Internet writing a
9 "blog" that excoriates financial institutions ("pretender lenders," he mockingly calls Defendants),
10 whose last experience of any conceivable relevance to his "opinions" about mortgage lending was
11 more than 35 years ago, and whose occupation is to give seminars to distressed homeowners and
12 their lawyers and to sell a \$250 self-help book to as many of them as possible – is utterly unqualified
13 to give any expert opinion.

14 Plaintiffs also do not come close to complying with the requirements of Rule 23(b)(2) for an
15 injunctive relief class, which requires them to show that each defendant "has acted or refused to act
16 on grounds that apply generally to the class, so that final injunctive relief or corresponding
17 declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The class
18 Plaintiffs seek is composed of anyone who obtained a loan between 2004 and 2008 in one of twenty-
19 eight states (plus Washington, D.C.) that permit nonjudicial foreclosure and whose loan was secured
20 by a deed of trust listing MERS as a beneficiary. Motion at 3. Put another way, to meet Rule
21 23(b)(2), Plaintiffs must show that there was a repeated and essentially uniform action that affected
22 this entire class of some 6 million borrowers, that a uniform injunction can correct. But though the
23 injunction sought is to stop all nonjudicial foreclosures, Defendants are not foreclosing on everyone
24 in the proposed class. Far from it, for the class encompasses all loans, including millions that are not
25 even in default. And, because of the nature of mortgages – where payments are due monthly and
26 obligations are frequently paid off – the class is not cohesive in any way, such that one could ever
27 say that any Defendants (never mind all defendants) were acting on grounds "generally applicable"
28 to all borrowers. Rule 23(b)(2) is intended and best-suited for civil rights cases or government cases,

1 and not for the type of class Plaintiffs propose.

2 Even with the vapid factual record, it is apparent Plaintiffs fall short of meeting Rule 23's
3 requirements for a number of other reasons as well. First, even in the context of the limited (and
4 impermissible) "issue" class Plaintiffs seek, there are many facts and circumstances unique to
5 individual putative class members, their loans, or the states in which their properties are located that
6 render common treatment through certification improper. Though their theory focuses on the
7 contracts, Plaintiffs make no showing that the language and provisions of the contracts at issue –
8 each putative class members' deed of trust and note – are the same. And even if the words were the
9 same, there is no showing that the law applicable to those contracts is the same on the legal issues
10 implicated by the claims. Indeed, it is clear there will never be a basis for invalidating all MERS
11 deeds of trust because many of the included states expressly permit foreclosures when MERS is part
12 of the secured transaction.

13 Defendants each have defenses and counterclaims that would require an individualized
14 inquiry, further making a necessary finding of class cohesiveness impossible. The class is in aid of
15 an injunction which, as discussed in the oppositions to the injunction motion filed today, necessarily
16 raises several issues that may or do individually vary from class member to class member. One
17 element of the injunction test, balancing the harms to the party, is not something that fairly can be
18 done classwide and uniformly. Some of the properties are investment properties or second homes,
19 and many class members have vacated the properties. Nor is the injunction necessarily something
20 each class member would want; most defaults and foreclosures result from death, divorce, and
21 unemployment, and past experience teaches that borrowers often want to be rid of the loan if they
22 simply cannot pay it. Another issue will be whether class members, who seek equity, have done
23 equity or have unclean hands. Regrettably, depositions in the case already have shown that several
24 of the named Plaintiffs apparently committed misrepresentations in obtaining their loans. That may
25 be true of others among the millions of class members. Based on these facts, Defendants also may
26 seek to bring counterclaims, for rescission or substantial damages. These circumstances, and others,
27 raise factual and legal questions that require a borrower-by-borrower review.

28 The Motion also fails to satisfy the four requirements of Rule 23(a). As the issues and

1 relevant proof vary by class member, the named Plaintiffs are not typical of the claims of the other
2 members of the putative class. Even taking Plaintiffs' legal theories at face value, and standing
3 alone, the named Plaintiffs are not the same. For instance, Plaintiff Graves was not affected by any
4 MERS conspiracy, and his loan is not invalid even under Garfield's view of the world, since the
5 original lender still owns the loan. Plaintiffs also are not adequate representatives of the class, as
6 they lack standing to seek injunctive relief (see Countrywide's and Wells Fargo's Opposition to
7 Motion for Preliminary Injunction at 11 filed today) and are insufficiently involved in the case to
8 provide any representation for the class.

9 **PLAINTIFFS' COMPLAINT AND THEIR MOTION**

10 Plaintiff Josefa Lopez filed this lawsuit on April 4, 2009. On May 4, 2009, plaintiffs filed a
11 First Amended Class Action Complaint ("Am. Compl."), adding Jose Trinidad Casas and Maria
12 Casas, Lyndon Graves, Tyrone and Michellina Evenson, Bryan and Helen Gray, Patrick Frankoski,
13 and Christopher Peternell as plaintiffs and proposed class representatives. The First Amended
14 Complaint asserts a hodgepodge of claims concerning alleged misconduct in the loan origination and
15 foreclosure process. One of their central claims is that Defendants made "predatory" loans to
16 Plaintiffs, allegedly knowing they could not repay them. *Id.* ¶ 155. Plaintiffs further attack the loans
17 on other, unrelated grounds, such as having been made in violation of anti-discrimination laws or
18 state law restrictions on lending practices. *Id.* ¶¶ 115-151. Under these theories, Countrywide is
19 alleged to be liable to Plaintiffs Lopez, Graves, Peternell and the Evensons, either because it made
20 the loans to Plaintiffs or became liable for the conduct of the lender who did. Wells Fargo is alleged
21 to be liable derivatively for the conduct of the lender who made the loan to the Casases. Each of
22 these borrowers has been deposed for purposes of this Motion (and the related injunction motion).

23 As a separate set of claims, Plaintiffs assert that Defendants also used MERS to profit from
24 making these predatory loans by conspiring to hide the identity of the lenders and investors in the
25 loan. *Id.* ¶¶ 167-68. In addition to seeking damages for this imagined conspiracy, Plaintiffs now
26 contend – in a theory not even pleaded directly in the Amended Complaint – that the use of MERS
27 on deeds of trust, as part of this conspiracy, was actually detrimental to the lenders. They assert, in
28 their Motion (and in other lawsuits their counsel has filed), that because MERS appears in the deed

1 of trust as named beneficiary but is actually only the nominee for the note holder, and the note is not
 2 held by MERS, the deed of trust is invalid, for two reasons. Motion at 10-12. First, they believe that
 3 no one can be a nominee beneficiary, and so the instrument is void. Id. at 10. And, second, they
 4 assert that the note and deed of trust were separated, and in so doing the note became unsecured. Id.
 5 at 12.

6 Plaintiffs' newfound complaints about MERS deeds of trust are Garfield's brainchild and
 7 completely without merit. Courts across the country have approved of MERS' role in commencing
 8 foreclosure or enforcement proceedings under a mortgage or deed of trust, results that cannot be
 9 squared with the theory that MERS' presence has voided the deed of trust. Indeed, courts in
 10 Arizona, California and Nevada, as well as other deed of trust states such as Mississippi and
 11 Colorado, have held in favor of lenders' use of MERS. Here in Nevada, for example, this Court
 12 recently examined a deed of trust implicating MERS and found that, consistent with Nevada law,
 13 "MERS was empowered to foreclose on the property and to appoint [another defendant] as substitute
 14 trustee for purpose of conducting the foreclosure." Ramos v. Mortgage Elec. Registration Sys., Inc.,
 15 No. 2:08-CV-1089-ECJ-RJJ (D. Nev. Mar. 5, 2009) (attached as Ex. 1).¹

16 Similarly, in Khalil v. Fidelity National Default Solutions Tustin, No. A560582, slip. op., at
 17 2-3 (Dist. Ct. Clark County, Nev. Nov. 24, 2008) (attached as Ex. 2), a court found that "MERS, as
 18 a lender's nominee and the named beneficiary [on the Deeds of Trust], ha[d] standing to foreclose on
 19 the Deeds of Trust" and that the plaintiff's claims against the defendants failed as a matter of law
 20 "because a lender's nominee has standing to act as beneficiary under a deed of trust." Id. at 3.

21 Additional cases approving the use of MERS are set forth in the margin.² While there is some sparse
 22 _____

23 ¹ Unless otherwise noted, all exhibits are attached as exhibits to the declaration of Eric I. Goldberg.

24 ² See also Trent v. Mortgage Elec. Registration Sys., Inc., 288 F. App'x 571, 572 (11th Cir. 2008)
 25 ("Under the mortgage contracts, [MERS] has the legal right to foreclose on the debtors' property"
 26 and "is the mortgagee" and "notices sent to the debtors" by MERS "restated information from the
 27 mortgage contracts and were not likely to mislead even the least-sophisticated debtor"); Diessner v.
 28 Mortgage Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (dismissing plaintiff's
 claim seeking declaratory relief from the court that MERS had "no legal claim to title" on property
 because MERS did not possess note, holding that Arizona "does not require presentation of the
 original note before commencing foreclosure proceedings"); Farahani v. Cal-Western Reconveyance
Corp., No. C 09-194 JF (RS), 2009 WL 1309732, at *2 (N.D. Cal. May 8, 2009) (dismissing claims
 alleging that non-judicial foreclosure was illegal because defendants did not possess underlying note
 or deed, and upholding each defendant's role, including MERS' role, in executing the non-judicial

1 caselaw Plaintiffs cite which they wrongly contend support their view, that caselaw is addressed in
 2 the injunction briefing where it is relevant to the likelihood of success on the merits aspect of the
 3 test.

4 Countrywide and Wells Fargo (and the other defendants) have moved to dismiss the First
 5 Amended Complaint in its entirety. Dkt. Nos. 174 and 172.³ That Motion is fully briefed and,
 6 Defendants contend, ought to be decided first, before this Motion, for if the lawsuit must be
 7 dismissed it would be inappropriate to consider certifying a class.

9 foreclosure under California law); Mansour v. Cal-Western Reconveyance Corp., No. CV-09-37-
 10 PHX-DGC, 2009 WL 1066155, at *4 (D. Ariz. Apr. 21, 2009) (granting motion to dismiss and
 11 dismissing complaint to stop foreclosure proceedings where MERS named as defendant); Elias v.
 12 HomeEQ Servicing, No. 2:08-CV-1836 JCM (PAL), 2009 WL 481270, at *1 (D. Nev. Feb. 25,
 13 2009) (holding that the recorded deeds of trust confirmed the standing of the loan servicer, the loan
 14 owner, and MERS as the nominee beneficiary to seek foreclosure); Lumzy v. Mortgage Elec.
 15 Registration Sys., Inc., No. 2:08 cv 23 KS-MTP, 2008 WL 3992671, at *2 (S.D. Miss. Aug. 21,
 16 2008) (there were no facts to support a claim of false representations or deceptive acts to collect a
 17 debt where MERS was listed as nominee beneficiary on the deed of trust); Smith v. Bank of New
 18 York, 366 B.R. 149, 151 (Bankr. D. Colo. 2007) (defendant loan owner had the right to foreclose
 19 where MERS was named as the beneficiary on the deed of trust, because “MERS is the designated
 20 nominee for whomever the Note is assigned to”); Jackson v. Mortgage Elec. Registration Sys., Inc.,
 21 ___ N.W.2d ___, 2009 WL 2461257 (Minn. Aug. 13, 2009) (holding that MERS could institute
 22 foreclosure proceedings under a deed of trust even if it did not possess an interest in the note);
 23 Mortgage Elec. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33, 34 (Fla. Dist. Ct. App. 2007)
 24 (“no substantive rights, obligations or defenses are affected by the use of the MERS device”);
 25 Mortgage Elec. Registration Sys., Inc. v. Azize, 965 So. 2d 151, 154 (Fla. Dist. Ct. App. 2007)
 26 (holding that if MERS was the note holder, it had standing to proceed, even if it was not the holder
 27 of the beneficial interest in the note); Peyton v. ReconTrust Co., No. TC021868, Notice of Ruling, at
 28 2 (Cal. Super. Ct. L.A. County Oct. 15, 2008) (finding that “California permits non-judicial
 foreclosures” and that MERS “is specifically identified as the beneficiary and nominee in Plaintiff’s
 loan documents”) (attached as Ex. ___); Mortgage Elec. Registration Sys., Inc. v. Ventura, No.
 CV054003168S, 2006 WL 1230265, at *1 (Conn. Super. Ct. Apr. 20, 2006) (holding that MERS,
 acting as nominee for the lender and its successors and assigns, was the correct party to bring
 foreclosure action).

³ That Motion demonstrates that the First Amended Complaint fails to state a claim primarily
 because the allegations do not satisfy the pleading standards of Rules 8(a) and 9(b). Plaintiffs failed
 to allege facts in support of their conclusory claims of statutory violations of the Fair Housing Act,
 the Fair Debt Collection Practices Act, and the Nevada Unfair Lending Practices Statute, or of
 common law fraud or intentional infliction of emotional distress. Nor do the allegations demonstrate
 a plausible claim of conspiracy to commit fraud on the part of the Defendants. The motions further
 urge dismissal of many of the Plaintiffs’ claims because they are time-barred or because Plaintiffs
 asserted them against the wrong parties. Plaintiffs’ responses, filed on July 20, 2009, explicitly
 concede several of Defendants’ arguments. For example, Plaintiffs agree that Countrywide and
 Wells Fargo are not debt collectors under the Fair Debt Collection Practices Act and that they have
 not stated a claim for intentional infliction of emotional distress. Plaintiffs fail to address the
 majority of the remaining arguments in Defendants’ motions to dismiss, impliedly conceding those
 as well. Countrywide and Wells Fargo filed a reply on August 10, 2009. The motion remains
 pending.

1 Notwithstanding the pendency of the motions to dismiss, Plaintiffs nonetheless intend to
2 proceed with their simultaneously-filed motions for class certification and preliminary injunction.
3 The purpose of these dual motions is to engineer a class-wide injunction that would freeze
4 nonjudicial foreclosure proceedings in 29 jurisdictions, including for borrowers whose loans are not
5 yet in default.⁴ Plaintiffs' Motion includes a long (and ultimately misleading) discussion about
6 MERS, deeds of trust, and foreclosure practices. However, as explained chiefly in MERS'
7 oppositions to Plaintiffs' twin motions, also filed today, Plaintiffs are misguided about MERS and its
8 use by the lending industry. Not a tool of a grand conspiracy, the use of MERS has instead lowered
9 mortgage costs and made it easier for more individuals to become homeowners. In any event, there
10 is no secrecy and no conspiracy. All of the Defendants and MERS itself have disclosed to borrowers
11 every aspect of the use of MERS by lenders. Unsurprisingly, none of the Plaintiffs questioned the
12 involvement of MERS in their individual loan transactions until they entered foreclosure due to
13 entirely unrelated circumstances.

14 By their Motion, Plaintiffs seek to certify a class consisting of:

15 residential homeowners in Nevada, Arizona, and California and in
16 other states in the United States wherein non-judicial foreclosure
17 procedures existed (listed in Exhibit 1 filed herewith) who obtained
18 residential mortgages secured by a deed of trust listing MERS,
Mortgage Electronic Registration Systems, or MERSCORP as the
purported beneficiary between the years of 2004 and 2008.

19 Motion at 3 (the referenced Exhibit 1 lists twenty-eight states plus the District of Columbia as being
20 non-judicial foreclosure jurisdictions). Plaintiffs seek to certify this class based on only two of their
21 ten counts: Counts IX and X. Count IX seeks injunctive relief and Count X seeks declaratory relief.
22 None of Plaintiffs' eight substantive statutory or common law causes of action are included by
23 specific reference in their motion for partial certification.
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25
26 ⁴ Shortly after filing this case, Plaintiffs' counsel filed the Goodwin case, in which they also filed
27 simultaneous motions for class certification and a preliminary injunction. The difference between
28 the two motions is that Goodwin seeks to certify a "bank REO ["Real Estate Owned"] class," i.e.,
the proposed class consists of those plaintiffs whose homes have already been sold to the "bank"
(any of the named defendants) through nonjudicial foreclosure sales. See Pls.' Motion to Certify
Bank REO Class, Goodwin v. Executive Tr. Servs., LLC, No. 3:09-cv-00306-ECR-PAL (Dkt. No.
99 at 11) (D. Nev. July 11, 2009). As of August 14, 2009, Goodwin was stayed. (Dkt. No. 199.)

GOVERNING RULE 23 STANDARDS

1
2 The party seeking class certification bears the burden of demonstrating that the party has met
3 each of the four requirements of Federal Rules of Civil Procedure 23(a) – numerosity, commonality,
4 typicality, and adequacy of representation – and at least one of the requirements of Rule 23(b).
5 Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001); Hanon v. Dataprods.
6 Corp., 976 F.2d 497, 508 (9th Cir. 1992). If any one of the Rule 23 requirements is not met,
7 certification must be denied. Hanon, 976 F.2d at 509 (affirming denial of class certification motion
8 because typicality requirement was not met); Mateo v. M/S KISO, 805 F. Supp. 761, 770-71 (N.D.
9 Cal. 1991) (“The failure, in this case, of plaintiffs to carry their burden as to any one of the
10 requirements of Rule 23 precludes the maintenance of the lawsuit as a class action.”) (citing
11 Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975)).

12 Before ordering that a lawsuit may proceed as a class action, the district court must
13 rigorously analyze whether the class action allegations meet the requirements of Rule 23. Mateo,
14 805 F. Supp. at 771; In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 & n.5 (3d Cir.
15 2009) (“rigorous analysis” must be applied to all Rule 23 requirements); In re Paxil Litig., 212
16 F.R.D. 539, 543 (C.D. Cal. 2003) (noting that the court “is a fiduciary for the absent class members
17 and must conduct an independent and ‘rigorous analysis’ of the moving party’s claims to examine
18 whether the requirements of Rule 23 are met.”). In order to permit the court to make such an
19 analysis, the party seeking certification has a burden to “provide facts to satisfy these requirements;
20 simply repeating the language of the rules is . . . insufficient.” In re Paxil Litig., 212 F.R.D. at 543
21 (internal quotation and citations omitted). “A party’s assurance to the court that it intend or plans to
22 meet the requirements is insufficient.” In re Hydrogen Peroxide Litig., 552 F.3d at 318. Plaintiffs
23 appear unaware of this “rigorous standard.” They have neither pursued discovery nor put forth any
24 “facts to satisfy [this] requiremen[t].” See In re Paxil Litig., 212 F.R.D. at 543.

25 In conducting the rigorous analysis required by the law, the district court may consider both
26 the allegations in the complaint and any supplemental materials submitted by the parties. Poulos v.
27 Caesars World, Inc., No. CV-S-94-1126-RLH-RJJ, 2002 WL 1991180, at *2 (D. Nev. June 25,
28 2002), aff’d, 379 F.3d 654 (9th Cir. 2004) (analyzing elements of claims and defenses, evidence

1 necessary to prove same, and relying on record evidence to affirm denial of class certification). The
 2 task of the court is to determine whether the case may be tried collectively, in a fashion consistent
 3 with due process and the fair administration of justice. Consequently, a class certification
 4 determination requires the court “to consider the nature and range of proof necessary to establish”
 5 the allegations in the complaint, In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust
 6 Litig., 691 F.2d 1335, 1342 (9th Cir. 1982) (hereinafter “In re Petroleum Prods.”), and “generally
 7 involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s
 8 cause of action,’” In re Unioil Sec. Litig., 107 F.R.D. 615, 618 (C.D. Cal. 1985) (citing Coopers &
 9 Lybrand v. Livesay, 437 U.S. 463 (1978)). See also Somers v. Apple, Inc., ___ F.R.D. ___, 2009
 10 WL 2137148, at *3 (N.D. Cal. July 17, 2009) (“[T]he court may look beyond the pleadings to
 11 determine whether the requirements of Rule 23 have been met.”). Thus, “even though the evidence
 12 may also relate to the underlying merits of the case,” Hanon, 976 F.2d at 509, the court “is required
 13 to consider” it in deciding whether to certify a class. In re Petroleum Prods., 691 F.2d at 1342.

ARGUMENT

I. PLAINTIFFS’ ATTEMPTED PIECEMEAL CLASS CERTIFICATION IS IMPROPER.

17 Plaintiffs’ Motion should be denied because it seeks only to certify part of this lawsuit, under
 18 Rule 23(b)(2), with the promise of a “second” motion for certification under Rule 23(b)(3) for
 19 “damages” at some later time. Motion at 22. Their piecemeal approach to class certification should
 20 not be entertained, as it is an improper attempt to sidestep Rule 23’s clear requirements and
 21 introduce further inefficiency into this already-sprawling lawsuit.

A. The Declaratory Judgment and Injunctive Relief Claims Cannot Be Certified for Class Treatment.

1. Certification of Count X implicates certification of the whole case, but there is no basis in the record for doing so.

26 Plaintiffs’ Motion seeks certification “on the injunctive and declaratory relief issues
 27 presented in Counts IX and X of the Amended Complaint.” Motion at 3. Count X, the declaratory
 28 relief count, in turn prays for a series of declarations that sweep in every claim for relief in the case:

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225. As alleged in Plaintiffs’ claims regarding Defendants’ violations of the Fair Housing Act and other state and federal laws, the Defendants have violated Plaintiffs’ rights under federal and state law.

226. Plaintiffs seek a declaratory judgment against Defendants stating that Defendants have violated Plaintiffs’ rights under federal and state law as alleged above.

Amended Complaint ¶¶ 225-26. Count IX identifies no “issues” at all – it simply prays for an injunction. Id. ¶¶ 196-223.

But even though they seek to certify Count X, which by its own language encompasses the entire case, Plaintiffs have not made any attempt to establish that the Court should or could certify the entire case. Indeed, they effectively concede they cannot get such a broad class now, admitting they will only seek to certify Counts I-VIII later. Motion at 22 (“Plaintiffs contemplate two motions for class certification”). No class can be certified of the whole case based on this record.

Plaintiffs likely did not seek certification across all counts of the Amended Complaint because they recognize that many of their causes of action – on their face – would require individualized inquiries into the circumstances of each class member’s loan. For example, Count I of the Amended alleges violations of the Fair Housing Act, 42 U.S.C. § 3601 et seq. (“FHA”), a statute which prohibits discrimination against persons in protected classes. To state just a prima facie case on this claim requires individualized evidence of whether a particular class member (1) was a member of a protected class; (2) qualified for a loan; (3) were subject to adverse action taken by a defendant with respect to the loan; and (4) that a defendant showed a preference for a similarly-situated person outside the protected class. Thompson v. Marine Midland Bank, No. 99-7051, 1999 WL 752961, at *2 (2d Cir. Sept. 16, 1999). Others of Plaintiffs’ causes of action present similar individualized issues. See, e.g., Count III (alleging violations of Nevada’s Unfair Lending Practices Statute, Nev. Rev. Stat. § 598D.100, which requires an individualized inquiry into whether the lender that originated a mortgage loans “that included no evaluation of any commercially reasonable means or mechanism that would demonstrate the Plaintiffs’ capacity to repay” the loan).⁵ Still other

⁵ See also Fourth Claim for Relief (predatory lending); Sixth Claim for Relief (Unjust Enrichment); Seventh Claim for Relief (intentional infliction of emotional distress; requires individualized evidence to prove intent); Eighth Claim for Relief (that “true terms of the loans” were somehow concealed from them by “Defendants,” that “Defendants” “fail[ed] to explain” that Plaintiffs “were

1 counts introduce differing states' laws related to fraud, unjust enrichment, and intentional infliction
2 of emotional distress.

3 This case is complex, involving the laws of 29 different jurisdictions and the policies of
4 dozens of different lenders. Hundreds of thousands or even millions of transactions are involved.
5 Just reciting the assertion that Plaintiffs could prove that every loan was "predatory," or "deceptive"
6 or "likely to result in default" (Count V), or that every borrower was "targeted" or "lured into"
7 improper loans they "were handicapped in understanding" (Count VI), or that every borrower was
8 "not qualified" and Defendants "knew the loan would be subject to foreclosure" as a result (Count
9 IV), demonstrates why no case-wide class could stand. And, not surprisingly, Plaintiffs have not
10 even attempted to show that the factual and legal uniformity necessary for certification exists here.

11 **2. Declaratory judgment is not available as a remedy, and so cannot support**
12 **a class action.**

13 Furthermore, the requests in Count X for declarations that Plaintiffs should win their claims
14 for damages in Counts I through VIII are not the proper province for declaratory judgment at all. As
15 such, Count X cannot support a class action.

16 Declaratory judgments are not available when the sole purpose of the declaration is to pave
17 the way for the recovery of damages. Richards v. Delta Air Lines, Inc., 453 F.3d 525, 530 (D.C. Cir.
18 2006) (a class may not be certified pursuant to Rule 23(b)(2) "when the relief sought would simply
19 serve as a foundation for a damages award" or "when the requested injunctive or declaratory relief
20 merely attempts to reframe a damages claim"); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 978
21 (5th Cir. 2000) ("The mere recitation of a request for declaratory relief cannot transform damages
22 claims into a Rule 23(b)(2) class action."). As a corollary, Plaintiffs may not obtain class
23 certification of a declaratory judgment claim as a method to avoid difficulties with certifying the
24 underlying claims to which the declaration relates. See Bolin, 231 F.3d at 976 (plaintiffs may not
25 "attempt to shoehorn damages actions into the Rule 23(b)(2) framework"). This is precisely what
26 Plaintiffs attempt to do here. They seek to certify Count X, which seeks a declaratory judgment that

27
28 not qualified to enter the loans on the terms stated," and that "Defendants" misrepresented the ability
of Plaintiffs to qualify for the loans obviously requires individualized evidence regarding the nature
of the misrepresentations).

1 they should prevail in the lawsuit on their damages claims. Similarly, they seek an injunctive relief
 2 class under Count IX as an adjunct to the declaration that they allegedly will win on their damages
 3 claims. The Court should not and cannot permit Plaintiffs' attempted end-run around the
 4 insurmountable hurdles they face with certifying the case through the sleight of hand of certifying a
 5 declaratory judgment.

6 **3. This is not properly a case for certification under Rule 23(b)(2).**

7
 8 Plaintiffs' request that the Court certify an injunctive and declaratory relief class under Rule
 9 23(b)(2) should also be refused because this is predominantly a money damages case.⁶ It is
 10 axiomatic, as well as obvious from the very structure of Rule 23, that Rule 23(b)(2) is not a
 11 substitute for class treatment in a damages case where Rule 23(b)(3) cannot be met. Where, as here,
 12 the practices applicable to class members vary significantly and the relief requested is predominantly
 13 monetary in nature, a Rule 23(b)(2) class is inappropriate and cannot be certified. Fed. R. Civ. P.
 14 23(b)(2), 1966 Adv. Comm. Notes; Molski v. Gleich, 307 F.3d 1155, 1167-68 (9th Cir. 2002);
 15 Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); Allison v. Citgo Petroleum Corp., 151
 16 F.3d 402, 411-16 (5th Cir. 1998). To hold otherwise would deprive absent class members of due
 17 process, because, in classes certified under Rule 23(b)(2), notice of the class action to individual
 18 class members and a right to opt out has traditionally not been required. Id. It also would allow a
 19 putative class to avoid the rigorous standards of a Rule 23(b)(3) class – including especially the
 20 “predominance” requirement – merely by requesting vague or duplicative injunctive or declaratory
 21 relief in the complaint. See Bolin, 231 F.3d at 975-76.

22 Rule 23(b)(3) and Rule 23(b)(2) serve very different purposes. An injunctive relief class
 23 presupposes a need for broad, classwide relief to a class of persons whose interests are

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 25 ⁶ In their Motion, Plaintiffs make passing references to other aspects of Rule 23(b), parroting the
 26 subsections' language to assure the Court that the class could be certified under Rule 23(b)(1) and/or
 27 Rule 23(b)(3). Motion at 22. Neither is a serious argument as Plaintiffs offer no explanation or
 28 discussion in support of the application of either Rule. They plainly do not carry the burden of either
 factual presentation or legal discussion that could support certification under those subsections.
 Plaintiffs' only attempt at a “rigorous analysis” is presented in favor of a class under Rule 23(b)(2),
 and so this opposition addresses only that subsection in depth.

1 homogeneous, such as in a civil rights case. See Murray, 244 F.3d 807. In contrast, a damages class
2 under Rule 23(b)(3) is designed as an aggregation device, to bring into one proceeding the disparate
3 claims of many. Id. at 812. Because of these different purposes, it is well-settled that a Rule
4 23(b)(2) class is not appropriate unless the predominant relief sought is injunctive. Id. Put another
5 way, in a passage expressly adopted by the Ninth Circuit in Molski, the Fifth Circuit explained that
6 money damages sought or to be obtained in a Rule 23(b)(2) case must be wholly incidental or else
7 that Rule cannot be invoked:

8 By incidental, we mean damages that flow directly from liability to the
9 class as a whole.... Ideally, incidental damages should be only those to
10 which class members automatically would be entitled once liability to
11 the class (or subclass) as a whole is established.... That is, the
12 recovery of incidental damages should typically be concomitant with,
13 not merely consequential to, class-wide injunctive or declaratory
14 relief.... Liability for incidental damages should not require additional
15 hearings to resolve the disparate merits of each individual’s case....

13 Allison, 151 F.3d at 415 (emphasis added); see Molski, 307 F.3d at 1167. Because damages must be
14 merely “incidental” in order to be sought as part of a Rule 23(b)(2) class, any request for
15 certification based on (b)(2) must fail if the damages aspect of the case would require individualized,
16 case-specific evidence. Murray, 244 F.3d at 812.

17 That is the case here. Notwithstanding the request for declaratory and injunctive relief in two
18 of the counts, this suit is plainly one where money damages are the overriding goal and will require
19 individualized proof. Indeed, Plaintiffs admit that the class they seek to certify now is narrower than
20 the entire case and that a second “damages” class will be sought later. Their declaratory judgment
21 count is an avenue to obtain damages, and the complaint requests actual damages, attorneys’ fees,
22 costs and punitive damages. Amended Complaint at 46. Monetary damages are clearly the main
23 form of relief requested by the named Plaintiffs (who themselves have no injunctive claims left, as
24 they have injunctions in place to cover their individual situations).

25 There also is no way to conclude on this record that proof of damages will be incidental to
26 the declaration and injunction sought. The Ninth Circuit has held that where a claim for damages for
27 emotional distress is in the complaint – and Count VII of Plaintiffs’ complaint is such a claim – the
28 damages sought are not incidental. Molski, 307 F.3d at 1168. It is obvious that the range of other

1 causes of action will require the sort of “additional hearings to resolve the disparate merits or each
2 individual’s case” (*id.* at 1167), that prevents this case from being characterized as seeking damages
3 as only incidental to the sought-for declaratory or injunctive relief.

4 **B. Plaintiffs Cannot Obtain Class Certification of Only a Part of Counts IX and X,
5 the Limited Issue of Whether the Putative Class Should be “Free” From
6 Foreclosures Because MERS Allegedly Has No “Standing to Foreclose.”**

7 Given the actual scope of Counts IX and X, Plaintiffs’ certification request is effectively that
8 this Court certify only part of Count X. Indeed, their Motion diverges wildly from Counts IX and X:
9 it seeks only a preliminary and partial class action, so this Court can decide “whether Plaintiffs have
10 a right to be free from foreclosure” where the deed of trust named MERS as the beneficiary because
11 “MERS has no standing to foreclose.” Motion at 12, 13, 21, 22. This is not even mentioned as an
12 aspect of the declaratory judgment sought in Count X, and the “issue” of MERS’ standing to
13 foreclose is not presented in the injunctive relief in Count IX. Even if the Court were to look past
14 this defect, it is plain there is no legal authority to obtain certification of an “issue” class like this.

15 Plaintiffs point to Rule 23(c)(4), which they contend allows issue-by-issue certification of
16 aspects of a single cause of action in a multi-count complaint. Motion at 22. But Rule 23(c)(4) does
17 not trump the general Rule 23(a) and 23(b) requirements, or give a plaintiff license to pick and
18 choose what he wants to seek to certify and when. That Rule instead has limited application. “[It] is
19 a housekeeping rule that allows courts to sever the common issues for a class trial.” Castano v. Am.
20 Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996) (citing In re N.D. Cal. Dalkon Shield IUD Prods.
21 Liab. Litig., 693 F.2d 847, 856 (9th Cir. 1982)). Rule 23(c)(4) does not permit a class plaintiff to
22 strategically isolate a single or limited set of issues, cutting the case down to something
23 unrecognizable so as to carve away any un-common issues, for the “result would be automatic
24 certification in every case in which there [is] a common issue, a result that could not have been
25 intended.” Castano v. American Tobacco Co., 84 F.3d 734, 745; Arch v. Am. Tobacco Co., 175
26 F.R.D. 469, 496 (E.D. Pa. 1997) (“Plaintiffs cannot read the predominance requirement out of (b)(3)
27 by using (c)(4) to sever issues until the common issues predominate over the individual issues”); see
28 also Smith v. Texaco, 263 F.3d 394, 409 (5th Cir. 2001); Henry v. St. Croix Alumina, LLC, No.
1999-0036, 2008 WL 2329223 (D.V.I. June 3, 2008); Taylor v. CSX Transp., Inc., Nos. 3:05 CV

1 7383, 3:06 CV 1116, , 2007 WL 2891085 (N.D. Ohio Sept. 28, 2007); Kemp v. Metabolife Int'l,
2 Inc., No. CIV. 00-3513, 2002 WL 113894 (E.D. La. Jan. 25, 2002).

3 Plaintiffs seek to stretch Rule 23(c)(4) far beyond its intended scope, and employ it as a
4 substitute for Rule 23(b). This Court cannot, and should not, divide, subdivide, and split Plaintiffs'
5 complaint – or a particular count in the Complaint – until a single “issue” can be identified as to
6 which a class supposedly can be certified. The Rule does not permit such a crabbed approach, for, if
7 it did, then the preliminary finding of “commonality” under Rule 23(a)(2) would always lead to
8 automatic certification of at least those issues.

9 Rather, at most, Rule 23(c)(4) permits the Court to exercise management powers over a case
10 that otherwise meets the requirements of the four elements of Rule 23(a) and one of the subparts of
11 Rule 23(b). The Ninth Circuit has confirmed that in all cases the movant must establish all of the
12 requirements of Rule 23(a) and at least one of the alternative requirements of Rule 23(b) in order to
13 obtain certification of anything. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir.
14 1996); In re Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1139 (9th Cir. 2002) (suggesting
15 that the district court consider issue certification “only for questions of generic causation common to
16 plaintiffs who suffer from the same or a materially similar disease”). Accord Castano, 84 F.3d at
17 745 (noting that “it [was] impossible for the court to know whether the common issues would be a
18 ‘significant’ portion of the individual trials” without first conducting a predominance inquiry).
19 Plaintiffs cannot invoke Rule 23(c)(4) to overcome the Rule 23(b) issues they face.

20 **II. EVEN IF THIS COURT COULD ENGAGE IN PIECEMEAL CERTIFICATION, NO**
21 **CLASS SHOULD BE CERTIFIED HERE.**

22 **A. Plaintiffs Have Not Put Forth Sufficient Evidence or Legal Discussion To**
23 **Support Class Certification.**

24 Plaintiffs bear the burden of proving each element of Rule 23 before the Court can certify a
25 class. It is their burden to support the Motion, and to give this Court the evidentiary materials and
26 detailed legal discussion that it needs in order to conduct the “rigorous analysis” this Court must
27 conduct. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 309. Plaintiffs have not done so.
28 The only “evidence” submitted by Plaintiffs in support of class certification consists of a few
website excerpts and their own attorneys’ declarations. See Motion Exs. The only legal argument is

1 some case law in a few of the many jurisdictions, and the legal opinions of their highly biased
2 expert of dubious credibility. This is not enough. This Court should not and cannot certify a class
3 (even a partial class) without a sufficient factual showing that certification is appropriate. Vinole v.
4 Countrywide Home Loans, Inc., 571 F.3d 935, 947-48 (9th Cir. 2009); Doninger v. Pac. Nw Bell,
5 Inc., 564 F.2d 1304, 1309 (9th Cir. 1977) (plaintiffs moving for class certification must support their
6 motion with “articulable facts” demonstrating that class treatment comports with Rule 23; “merely
7 mimic[ing] the language of Rule 23” will not suffice).

8 Plaintiffs have the duty to show how this case meets the Rule 23(a) and 23(b) requirements
9 and can be tried with common evidence to a fair verdict. To support certification, Plaintiffs were
10 required to provide the Court with a detailed record and sufficient foundation to support the
11 mandated rigorous examination of each of the necessary elements. See, e.g., Chamberlan v. Ford
12 Motor Co., 402 F.3d 952 (9th Cir. 2005) (plaintiffs cited to numerous interrogatories, depositions,
13 and other documents to create a factual foundation in support of the necessary elements in their
14 Motion for Class Certification); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998)
15 (consider certification because “[t]he record [wa]s fully developed”). Plaintiffs simply cannot meet
16 that burden by resting on mere allegations in their Complaint or, worse yet, unsubstantiated
17 argument that is not even in the Complaint. Burkhalter Travel Agency v. MacFarms Int’l, Inc., 141
18 F.R.D. 144, 152 (N.D. Cal. 1991); see also Doninger, 564 F.2d at 1312 (affirming denial of class
19 certification because trial court “had no more . . . than conclusory allegations from” the party
20 seeking certification, while “it had been supplied with substantial and specific facts” from party
21 opposing certification); In re Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996) (“A class is
22 not maintainable as a class action by virtue of its designation as such in the pleadings.”). Yet, that is
23 exactly what they do. Motion at 10 (purporting to “adopt and incorporate by reference” the
24 Complaint).

25 Rather, this Court must examine in detail how the case will be tried, and Plaintiffs have the
26 unwavering obligation to provide the Court with a sufficient record to support their Motion. As
27 explained below, there is no sufficient record here, even for a limited “issues” class.

28 **1. Plaintiffs’ Motion Is Not Supported By Facts.**

1 The evidence in support of Plaintiffs' Motion is scant. As to the Rule 23(a) standards, while
2 they do attach a few newspaper articles and website printouts that they claim establish numerosity
3 and file attorney affidavits to assert that their counsel are adequate (Motion at 15-16 & Exs.), there
4 are no facts cited by Plaintiffs in support of their claim that Rule 23(a)(2) is met because there exist
5 common questions of law and fact. Motion at 16-17. Plaintiffs make similar conclusory arguments
6 in support of their assertion that, as measured by Rule 23(a)(3), their claims are typical, asserting
7 baldly that the "course of conduct of the defendants and MERS . . . was the same for every class
8 member" and so the claims of the named plaintiffs were typical. This is not evidence, it is
9 meaningless argument. Saying that there are common questions is far different from showing it.
10 And as to their own adequacy under Rule 23(a)(4), Plaintiffs merely assert the conclusion –
11 "plaintiffs' interests are not antagonistic to those of the class" (Motion at 19) – and do not provide
12 facts to show that they are adequate representatives because they are both interested in and actively
13 protecting the class. Such rote assurances that the Rule requirements are met are simply not
14 evidence, and provide no basis for certification. Schwartz v. Upper Deck Co., 183 F.R.D. 672, 681
15 (S.D. Cal. 1999) (rejecting certification because court would not "rely on the cursory allegations of"
16 party seeking certification).

17 Plaintiffs' assertion that Rule 23(b)(2) is met is also unsupported by facts. That Rule requires
18 proof that "the party opposing the class has acted . . . on grounds that apply generally to the class, so
19 that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a
20 whole." Fed. R. Civ. P. 23(b)(2). Plaintiffs contend the first part of this test is met – consistent
21 action – because defendants all are actively defending the case and are "foreclosing." Motion at 22.
22 They offer no evidence. Then, they contend the second part of the test – classwide relief is
23 appropriate – with argument that relief is appropriate because their legal position is correct. Id. at
24 22-23. Nowhere do Plaintiffs offer proof of what Defendants are doing, the documents that
25 constitute the relevant contracts, the similarities (or differences) among class members' situations, or
26 any other aspect of the facts that would make relief "respecting the class as a whole" appropriate.
27 As discussed below, this is because there is no factual basis for a classwide remedy but, in any event,
28 their failure to build a record for it is fatal to their Motion.

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2. Plaintiffs Fail To Show That The Law In Each State Is The Same.

Just as Plaintiffs have failed to show facts in support of their motion, they have also failed to make the legal showing necessary to certify a nationwide class on issues governed by state law.⁷ Plaintiffs' issue class – founded on an assertion that “Plaintiffs have a right to be free from foreclosure” where the deed of trust named MERS as the beneficiary because “MERS has no standing to foreclose” (Motion at 12, 13, 21, 22) – is governed by state law. The right of MERS to foreclose, and, more generally, the effect that MERS' presence on the deed of trust has on the security instrument, will depend on the law of the state where the property is located. Restatement (Second) Conflicts of Laws, §§ 228-29; see, e.g., Motion Ex. 2 (Casas Deed of Trust at 10; Peternell Deed of Trust at 11) (stating that “[t]his Security Instrument shall be governed by . . . the law of the jurisdiction in which the Property is located”). To support the Motion, therefore, Plaintiffs must show that the laws of the 28 states plus the District of Columbia are uniform in relevant respects. In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2002) (“No class action is proper unless all litigants are governed by the same legal rules.”); In re Am. Medical Sys. Inc., 75 F.3d at 1085 (nationwide class certification is improper where “more than a few of the laws of the fifty states differ”). This is so even where the differences among varying state laws are asserted to be merely “nuances.” Pastor v. State Farm Mut. Auto. Ins. Co., No. 05 C 1459, 2005 WL 2453900, at *9 (N.D. Ill. Sept. 30, 2005) (citing In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) (even where laws may be “basically uniform,” minor differences between states mandate denial of certification)).

Thus, where a multi-state class action based on state law claims is requested, it is the plaintiff's burden to establish that the laws of the various states are sufficiently uniform to make class certification proper. Klay v. Humana, Inc., 382 F.3d 1241, 1262 (11th Cir. 2004) (“The burden

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⁷ Indeed, all of the examples Plaintiffs cite of courts certifying nationwide class actions are cases involving federal issues or issues of state law where the plaintiff had actually made a showing of uniformity. See Motion at 13 n.13 (citing General Motors Corp. v. Bryant, 285 S.W.3d 634 (Ark. 2008); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Grace v. Perception Tech. Corp., 128 F.R.D. 165, 171 (D. Mass. 1989); In re Pizza Time Theatre Sec. Litig., 112 F.R.D. 15, 20 (N.D. Cal. 1986)).

1 of showing uniformity . . . rests squarely with the plaintiffs.”). The “plaintiff must prove through
 2 extensive analysis that there are no material variations among the law of the states for which
 3 certification is sought. If a plaintiff fails to carry his or her burden of demonstrating similarity of
 4 state laws, then certification should be denied.” Id. (internal quotation omitted); see also Scherer v.
 5 Combined Ins. Co. of Am., 253 F.R.D. 40, 43 (D. Conn. 2008) (denying class certification where
 6 “[plaintiffs did] not examine the differences among the statutes in their memorandum of law”).
 7 Plaintiffs simply do not do this. There is no discussion, explanation, citations, or other support for a
 8 conclusion that the law of Nevada is just like the law of Arizona is just like the law of North
 9 Carolina and is just like the law of Texas. Plaintiffs simply assume it to be true. That type of
 10 assumption is impermissible, and cannot support a nationwide class certification.

11 Moreover, as explained below and in other parties’ pleadings filed today, their apparent
 12 belief that the laws of all 29 of these jurisdictions are the same is demonstrably wrong. A number of
 13 states have concluded that MERS can serve as a beneficiary and have standing to foreclose, and the
 14 cases Plaintiffs cite from other states are simply inapposite. Without a convincing showing that the
 15 rights of each class member is governed buy the same principles of law as apply to others, the
 16 Motion must be denied.

17 **3. Plaintiffs Cannot Rely On Their “Expert” To Remedy The Inadequacies** 18 **in Their Motion.**

19 To patch over their failure to offer either facts or substantial legal analysis, Plaintiffs wrongly
 20 rely on a purported “expert,” a retired Florida attorney, Neil F. Garfield, Esq. Motion Ex. 7.
 21 Garfield’s affidavit advocates the view that MERS “was essential” to the alleged predatory lending
 22 scheme of the defendants, and then expounds upon “egregious elements” of the scheme, how the
 23 loans are not enforceable, and why all foreclosures should be judicial proceedings. Id. The affidavit
 24 does not provide any record support for the requested certification.

25 In the most basic sense, the affidavit is unhelpful because it does not provide facts upon
 26 which this Court may rely that bear upon any of the Rule 23 factors. Indeed, the affidavit contains
 27 opinions that are nothing other than opinions of law, which of course is improper opinion testimony.
 28 See Motion of Fannie Mae & Freddie Mac to Strike Garfield Affidavits at 4. To the extent the

1 affidavit contains anything else, in the nature of “facts,” that content does not provide a record basis
2 for this Court to find facts. While an expert can base an opinion on facts he believes to be true, those
3 facts cannot be proven through the expert’s opinion. Logan v. City of Pullman, 392 F. Supp. 2d
4 1246, 1254 (E.D. Wash. 2005) (“Although Federal Rule of Evidence 703 and 705 allow experts to
5 rely on facts that might otherwise be inadmissible to formulate their expert opinions, neither Rule
6 703 or Rule 705 permit expert reports to automatically become proof of the facts underlying the
7 expert’s opinion.”); see also Fed. R. Evid. 703 Advisory Committee’s Note 2000 Amendments
8 (“Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible
9 information to form an opinion or inference, the underlying information is not admissible simply
10 because the opinion or inference is admitted.”).

11 The affidavit provides no basis for certification for the separate reason that Garfield is
12 unqualified by training, education or experience to render any opinions or somehow to sponsor for
13 the Court’s reliance the purported facts which he cites. In connection with class certification, the
14 Court must examine purported expert materials to determine whether they are relevant and useful,
15 and may not rely upon them when, using Daubert standards, the opinions are so flawed such that
16 they would not be admissible. Parkinson v. Hyundai Motor Am., No. Sa CV 06-345 AHS (MLGx),
17 ___ F.R.D. ___, 2008 WL 5233200 (C.D. Cal. Dec. 12, 2008); McPhail v. First Command Fin.
18 Planning, Inc., 247 F.R.D. 598, 604-05 (S.D. Cal. 2007); Sepulveda v. Wal-Mart Stores, Inc., 237
19 F.R.D. 229, 235 (C.D. Cal. 2006); Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives &
20 Composites, Inc., 209 F.R.D. 159, 162 (C.D. Cal. 2002). Here, the court need not examine the
21 opinions themselves, for it is clear that Garfield is not an expert at all and what he offers is not
22 relevant to the Motion.

23 The affidavit, which is lengthy and which Plaintiffs attempted to supplement at Garfield’s
24 deposition, tries to provide information and opinion on a wide variety of topics. See Garfield Aff.
25 In the end, they amount to assertions about (i) the nature and legal effect of mortgage contracts and
26 deeds of trust (id. ¶¶ 4a-f), (ii) the knowledge and actions of trustees on every class members’ loan
27 (id. ¶¶ 4f-i, k); (iii) the reasons why judicial foreclosures are necessary and why the 28 states’
28 legislatures passed their nonjudicial foreclosure laws (id. ¶¶ 4j, 11-13); (iv) what MERS is and does,

1 and how it “provided cover” for the alleged conspiracy (id. ¶¶ 4, 4l, 10, 12); (v) how the mortgage
2 loan securitization process worked and resulted in the supposed cancellation of the deed of trust and
3 the promissory note (id. ¶¶ 4m, 5-9); and (vi) the profits defendants made on loan securitization (id.
4 ¶ 5). But Garfield has no training, education, or experience that could allow him to make these
5 statements and offer these views.

6 In his affidavit, Garfield identified his qualifications as consisting most centrally of the fact
7 he worked on Wall Street until 1983 and he has “recently been qualified as an expert” in federal
8 bankruptcy court as to 26 separate subjects and the laws of 4 states. Id. ¶ 3. At deposition, these
9 purported qualifications melted away. It turns out that while on Wall Street, Garfield only had one
10 occasion where he had any involvement in the securitization of mortgages, and that was in “the early
11 1970s” – thirty-five years ago. Garfield Dep., Vol. 1 at 38, 130-31 (relevant excerpts attached as
12 Exhibit 3). While he asserted he had involvement litigating “securities matters” more recently, into
13 the early 1990s, Garfield refused to answer any questions about those experiences. Id., Vol. 2 at 18-
14 22. As for his purported service as an expert in another case, Garfield knew only what the lawyer in
15 that case had told him (id., Vol. 1 at 77-78) – and it turns out from an examination of the relevant
16 docket sheet that the bankruptcy court has never received anything from Garfield and certainly has
17 not qualified him as an expert in anything. See “Debtor’s Amended Response to Motion and Relief
18 from Stay,” In re Katbah, Adversary No. 4:09-ap-00109-JMM (Bankr. D. Ariz. May 15, 2009)
19 (attached as Ex. 4).⁸

20 In the deposition testimony, Garfield was not able to articulate any other relevant training,
21 education or experience. Much of what he believes entitles him to have opinions about the mortgage
22 industry is the fact he writes a blog and receives e-mails from persons he does not know telling him
23 what they think has been done wrong to them by their mortgage company. Garfield Dep., Vol. 1 at
24 154-55, 158-60; Vol. 2 at 6-16, 24-25. Garfield does profess to have spoken with various lender and
25 MERS employees, and so-called Wall Street “insiders,” but he could not recall any of their names,
26 _____

27 ⁸ The plaintiffs in Katbah listed Garfield as a potential expert on mortgage loan forensics, i.e., Mr.
28 Garfield was to perform an audit on the plaintiff’s loan documents to see whether they complied
with all relevant statutes. Id. at 7-9. Mr. Garfield’s expertise has not been accepted by the defendant
or the court in Katbah. Indeed, Mr. Garfield has never testified as an “expert” in any case, ever.

1 has no record of those conversations, and believes at least some of them are confidential. Id. Vol. 1
2 at 127-28, 146. Garfield never worked for a mortgage lender and has had no involvement with
3 mortgage securitization since Richard Nixon was President. Id. Vol. 1 at 33, 38. Even his claimed
4 understanding of the relevant laws and intentions of the states' legislatures comes from as little as 10
5 hours of legal research as to states where he has never been licensed to practice. Id. Vol. 1 at 31;
6 Vol. 2 at 26.

7 Under these circumstances, there would be no grounds on which this Court could certify
8 Garfield as an expert because he lacks any basis for his opinions (and for the "facts" he asserts).
9 Indeed, the lack of basis is evident from Garfield's affidavit itself, which is entirely general and
10 provides the Court with no more specificity than does Plaintiffs' Motion. For example, Garfield
11 makes statements such as "In the cases at bar, the Trustee appears to have received instructions ...,"
12 (Garfield Aff. ¶ 4(g)) and "The trustee's identity ... may in fact be in doubt...." Id. ¶ 4(k). These
13 general statements, and indeed all of statements in the affidavit, are not supported by citation to a
14 single document or fact – which is not at all surprising given Garfield's lack of any qualifications.

15 Moreover, Garfield, who devotes his days to a "war" with mortgage companies, appears to
16 be far too biased to provide any reliable expert service in this case. Pop v. Yarborough, 354 F. Supp.
17 2d 1132, 1140 (C.D. Cal. 2005) (holding that expert's partisanship was a valid reason to discount her
18 testimony which was essentially advocacy); Therasense, Inc. v. Becton, Dickinson & Co., No. C 04-
19 02123 WHA, 2008 WL 2323856, at *2 (N.D. Cal. May 22, 2008) (excluding expert testimony where
20 partisan expert's testimony was used to convey otherwise inadmissible facts).

21 Garfield's sentiments are crystal clear: he "has come out of retirement with a bang" and
22 "seeks nothing less than to stop All (sic) foreclosures on property financed between 2001-2008."
23 Neil F. Garfield & Brad Keiser, Foreclosure Defense Workshop: Garfield Continuum 4, 6 (2009)
24 (attached as Ex. 6). Garfield promises that "homeowners can walk into the courthouse in foreclosure
25 and walk back out having foreclosed on their lender." Id. at 5. To accomplish that, Garfield
26 advocates such outlandish schemes as filing legal clouds on title, so that lenders in nonjudicial
27 foreclosure states will be forced to foreclose judicially. Garfield Dep., Vol. 1 at 171-72; Vol. 2 at
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1 43. He also advises borrowers “You don’t owe it — you only think you do,”⁹ and uses his blog to
2 recruit class representatives for other, potential class actions.¹⁰

3 Concerns regarding bias of an expert witness are properly considered in weighing the
4 probative value of that proffered witness’s testimony. United States v. Everett, 972 F. Supp. 1313,
5 1325 (D. Nev. 1997). Here, Garfield’s bias is significant and undeniable. While Garfield has an
6 absolute right to advocate on the Internet for a “war” with defendants, and to charge people who
7 want to come see him espouse his anti-industry sentiments in person, the Court should afford his
8 biased affidavit no weight. Pop, 354 F. Supp. 2d at 1140 (holding that expert’s partisanship was a
9 valid reason to discount her testimony which was essentially advocacy); Therasense, 2008 WL
10 2323856, at *2 (excluding expert testimony where partisan expert’s testimony was used to convey
11 otherwise inadmissible facts).

12 In sum, Garfield’s affidavit does not add to the record in this case and provides no basis for
13 certification. The Court should find that Plaintiffs failed to meet the required burden needed to
14 support certification of a class under Rule 23. Siles v. ILGWU Nat’l Ret. Fund, 783 F.2d 923, 930
15 (9th Cir. 1986) (class certification denied because plaintiffs failed to provide sufficient evidence).

16 **B. The Requirements For Class Certification Under Rule 23(b)(2) Are Not Met**
17 **Even If the Inadequate Record is Overlooked.**

18 Plaintiffs do not come close to satisfying the criteria under Rule 23(b)(2). In order to certify
19 a class, Plaintiffs must satisfy at least one of the subsections of Rule 23(b). Plaintiffs brought their
20 motion pursuant to subsection (b)(2). Motion at 30. To carry their certification burden under Rule
21 23(b)(2), plaintiffs must demonstrate that Defendants “acted or refused to act on grounds that apply
22 generally to the class, so that final injunctive relief . . . is appropriate.” Fed. R. Civ. P. 23(b)(2); see
23 also Akootchook v. United States, 271 F.3d 1160 (9th Cir. 2001).

24 This standard is an exacting one, with two key components. First, plaintiffs must show that
25 there was repeated and essentially uniform action that affected the entire class and which is the

26 ⁹ Neil F. Garfield, Why You Don’t Owe the Money (Dec. 8, 2008), <http://livinglies.wordpress.com/2008/12/08/why-you-dont-owe-the-money/> (attached as Ex. 6).

27 ¹⁰ See “Class Action Firm Seeks Central Missouri Homeowners,” (July 24, 2009) available at
28 <http://livinglies.wordpress.com/2009/07/24/class-action-firm-seeks-central-missouri-homeowners/>
(accessed on August 21, 2009) (attached as Ex. 7).

1 object of the suit – that Defendants “acted or refused to act on grounds that apply generally to the
2 class.” This is the requirement that the class be cohesive. Sweet v. Pfizer, 232 F.R.D. 360,
3 374 (C.D. Cal. 2005) (citing Barnes v. Am. Tobacco Co., 161 F.3d 127, 142-43 (3d Cir. 1998)); see
4 also Akootchook, 271 F.3d 1160 (denying class certification where defendant’s action did not affect
5 the entire class).

6 “Rule 23(b)(2) operates under the presumption that the interests of the class members are
7 cohesive and homogenous such that the case will not depend on adjudication of facts particular to
8 any subset of the class nor require a remedy that differentiates materially among class members.”
9 Lemon v. Int’l Union of Operating Eng’rs, 216 F.3d 577, 580 (7th Cir. 2000); see also Shook v. Bd.
10 of County Comm’rs of County of El Paso, 543 F.3d 597, 604 (10th Cir. 2008) (“Rule 23(b)(2)
11 demands a certain cohesiveness among class members with respect to their injuries, the absence of
12 which can preclude certification.”); Barnes v. Am. Tobacco Co., 161 F.3d 127, 142-43 (3d Cir.
13 1998) (applying the “cohesiveness” requirement articulated in Amchem Prods., Inc. v. Windsor, 521
14 U.S. 591 (1997), to 23(b)(2) class actions). This cohesiveness is destroyed when individualized
15 issues predominate over common ones. Sweet, 232 F.R.D. at 374 (barring certification under Rule
16 23(b)(2) because individual issues predominated). “[E]ven though Rule 23(b)(2), unlike Rule
17 23(b)(3), does not specifically contain predominance and superiority requirements, a class under
18 Rule 23(b)(2) must not be overrun with individual issues.” Id.; see also Lewallen v. Medtronic
19 USA, Inc., No. C 01-20395-RMW, 2002 WL 31300899, at *3 (N.D. Cal. Aug. 28, 2002) (“the
20 requisite cohesiveness is lacking where individual issues predominate”; denying certification of
21 medical monitoring class because individual questions predominated, plaintiffs sought to certify a
22 class for the remedy but not the underlying tort, and the remedy was monetary in nature) (citing
23 Barnes, 161 F.3d at 142-43).¹¹

24 _____
25 ¹¹ The requirement of homogeneity of the 23(b)(2) class safeguards the interests of the class
26 members and promotes judicial efficiency. As noted by the Third Circuit Court of Appeals, there are
27 two reasons for certifying only classes where individualized issues are minimal. “First, unnamed
28 members with valid individual claims are bound by the action without the opportunity to withdraw
and may be prejudiced by a negative judgment. . . . Second, the suit could become unmanageable
and little value would be gained in proceeding as a class action . . . if significant individual issues
were to arise consistently.” Barnes, 161 F.3d at 143 (internal quotations and citation omitted).

1 Second, plaintiffs must show that the general conduct that allegedly gives the class a
2 cohesive interest can be vindicated uniformly by the legal claims that are pressed – that the conduct
3 thereby makes “final injunctive relief . . . appropriate.” Fed. R. Civ. P. 23(b)(2). If the class has
4 some common interest but, under the controlling law or facts, individualized treatment is required of
5 many (or even each) class members’ legal claims, then there cannot be an injunctive class. So, for
6 example, in Hodgers-Durgin v. de la Vina, 165 F.3d 667 (9th Cir. 1999), the Ninth Circuit upheld
7 the rejection of a class certification brought by those who had been subject to border stops because
8 although each shared common the common fact of being stopped, the legal claims asserted could not
9 be proven classwide. Id. at 681. Instead, individual review of what happened to each class member
10 was needed. Id.

11 These twin requirements of Rule 23(b)(2) mean that this Court must consider whether the
12 class is cohesive and whether the legal claims they assert as a remedy can be determined classwide.
13 As discussed below, this test is not met here. There are simply too many variables – none of which
14 are addressed by Plaintiffs – that destroy cohesiveness and that prevent this Court from certifying a
15 class.

16 **1. There Are Disparate Factual Circumstances That Affect The Claims Of**
17 **Each Class Member.**

18 There are multiple differences between the loans of each class member that bar certification
19 of a class. Plaintiffs have done little to show that their claims and those of the class are cohesive.
20 All that they state is that: “Defendants in this case, by their opposition to Plaintiffs’ request for relief
21 under Counts IX and X, have acted on grounds applicable to all class members in denying that all
22 class members in denying that all class members have a right to be free from foreclosure actions
23 brought in the name of MERS.” Motion at 21. This nonsensical statement is both unsupported by
24 any citation to the record or any other fact insofar as it appears that they rely on Defendants’
25 unwillingness to capitulate to their demands as a basis for granting certification under Rule 23(b)(2).

26 Plaintiffs’ claim that they should be “free from foreclosure” because of the involvement of
27 MERS in every transaction, sweeping as it is, requires examination of the individual circumstances
28 of each loan and the reasons for each plaintiffs’ failure to make their monthly payments. These

1 distinctions bar certification.

2 As the cases set forth in the margin make clear, class certification under Rule 23(b)(2) was
 3 designed to address issues present in civil rights cases.¹² This case is markedly different from a civil
 4 rights class action because Plaintiffs allege neither discrimination nor violation of rights of particular
 5 individuals. Unlike a class of citizens harmed by an allegedly racist or sexist policy, the
 6 circumstances here of each borrower's loan are distinct. Thus, the proposed class lacks the
 7 cohesiveness required to obtain class certification under Rule 23(b)(2). See In re St. Jude Medical,
 8 Inc., 425 F.3d 1116, 1121-22 (8th Cir. 2005); Shook, 543 F.3d at 604.

9 (a) Defendants Are Not Foreclosing On Everyone In The Class, And
 10 Certainly Will Not Foreclose On Anything But A Fraction of the
 11 Loans.

12 The most obvious reason the purported class does not meet the test of whether Defendants
 13 have acted on generally-applicable grounds, justifying the classwide resolution of the issue of
 14 standing to foreclose, is that there is no showing Defendants are foreclosing on everyone – or ever
 15 will. Plaintiffs' proposed class includes all borrowers who reside in one of the 29 jurisdictions and
 16 who have MERS as a beneficiary on their deed of trust; it is not limited to loans that are in the
 17 foreclosure process now. The putative class also includes tens of thousands of borrowers who
 18 entered bankruptcy;¹³ at least while those borrowers are in bankruptcy, foreclosures are stopped
 19 already by operation of the Bankruptcy Code. 11 U.S.C. § 362(b)(8).

20 ¹² See, e.g., Moeller v. Taco Bell Corp., 220 F.R.D. 604, 613 (N.D. Cal. 2004) (“[S]ubdivision
 21 (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil
 22 rights area, in large part because the class suit is a uniquely appropriate procedure in civil rights
 23 cases, which generally involve an allegation of discrimination against a group as well as the
 24 violation of rights of particular individuals.”) (quoting 7A Charles Alan Wright, Arthur R. Miller &
 25 Mary Kay Kane, Federal Practice & Procedure §§ 1775 - 76 (2d Ed. 1986)); In re Conseco Life Ins.
 26 Co. Cost of Ins. Litig., No. ML 04-1610 AHM (Mcx), 2005 WL 5678842, at * 8 (C.D. Cal. Apr. 26,
 27 2005) (noting that class certification under Rule 23(b)(2) were “designed for civil rights cases.”);
Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles, 246 F.R.D. 621, 632 (C.D.
 Cal. 2007) (“Originally designed for civil rights cases, Rule 23(b)(2) class actions are limited to
 those class actions seeking primarily injunctive or corresponding relief.”) (citing Newberg on Class
Actions, § 4.11 (4th ed. 2002)). See also 5 Moore's Federal Practice § 23.43[1][b] and [c] (3d ed.
 2009) (noting that certification of non-civil rights claims under 23(b)(2) is rare and limited to cases
 involving government benefits, due process, violations, First Amendment claims, prisoner claims,
 and medical monitoring claims) (collecting cases).

28 ¹³ See e.g., Nancy Trejos, “Personal Bankruptcy Surges 34 Percent,” Washington Post (Aug. 14,
 2009) available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/13/AR2009081303399.html> (accessed on August 21, 2009) (attached as Ex. 8).

1 The class also fails the Rule 23(b)(2) test for similar reasons because the class includes
 2 people who are in the process of working out their default as well as those whose personal
 3 circumstances have changed such that they do not oppose foreclosure. Declaration of Mark Acosta,
 4 ¶ 13 (filed herewith); Declaration of Kim Miller, ¶13 (filed herewith). Many borrowers are facing
 5 temporary financial problems and once they correct those problems, often with an assist from their
 6 lender through a workout, they will begin to make payments on their loans. *Id.* ¶ 4. None of these
 7 borrowers will want or need an injunction, and Defendants – through their workout programs and
 8 willingness to accept settlements of the debt, such as “short sales” and “deed in lieu of foreclosure” –
 9 are not foreclosing on them, or have suspended or cancelled the foreclosure. *Id.* ¶¶ 4, 5, 13.

10 It is indisputable that millions of the members of the putative class do not face foreclosure
 11 and/or will never face foreclosure. Not only does that mean that Defendants have not acted
 12 generally and consistently towards the entire class, but any classwide certification and related relief
 13 would be nothing short of an invitation to many to stop paying on loans without fear of foreclosure.
 14 This result is obviously inappropriate.

15 (b) Plaintiffs Do Not Show That Each Borrowers’ Loan Documents Are
 16 The Same

17 The Motion also fails because the factual basis for it, that millions of Deeds of Trust are
 18 invalid because they name MERS as a beneficiary, presupposes an absolute uniformity in the
 19 language of every loan document in the class. But plaintiffs have not established what the contracts
 20 actually say. This case involves millions of deeds of trust across 29 jurisdictions, entered into over a
 21 five-year period. While there are “standard” forms for deeds of trust, loan products and the forms
 22 themselves do vary. *See, e.g.*, Special Purpose: Legal Documents, available at
 23 <https://www.efanniemae.com/sf/formdocs/documents/specialpurpose/> (accessed Aug. 21, 2009)
 24 (attached as Ex. 9) (listing 29 different Balloon Loan Refinancing Instruments that are unique to 29
 25 different states). And there are thousands of lenders across the country who may or may not have
 26 used the forms or may have varied them. The Court may not presume that every one of six million
 27 deeds of trust are identical in relevant part.

28 (c) MERS Is Not Implicated In All Borrowers’ Loans.

As part of their “issue” class, Plaintiffs apparently intend to argue that they can be “free from

1 foreclosure” because the promissory notes were sold on the secondary mortgage market and cannot
 2 be enforced because MERS held the deeds of trust, which thereby were severed from the notes.
 3 Motion at 8. According to Garfield, anyone whose mortgage loan was securitized has a “complete
 4 defense to foreclosure.” Garfield Dep., Vol. 1 at 120.

5 Putting aside the merits of these fanciful theories, if this is what they intend to prove,
 6 Plaintiffs cannot establish classwide liability. Thousands of loans in the putative class are still
 7 owned by the lender that made the loan. As just one example for the Court’s consideration, Plaintiff
 8 Graves’ note was never severed from his deed of trust because it has remained in possession of the
 9 lender – Countrywide Bank, FSB (now merged into Bank of America, N.A.) – since the day his loan
 10 originated. Declaration of Erin Abugow, ¶ 3 (filed herewith). Graves’ loan is not unique.
 11 Borrowers whose loans were never sold cannot claim to have been injured by the use of MERS and
 12 thus their presence in the class destroys cohesiveness.

13 (d) Plaintiffs Limit Their Class To Residential Homeowners, But
 14 Discerning Who Is A Member Of That Class Creates Individualized
Issues.

15 Plaintiffs “seek to certify this matter as a class consisting of residential homeowners,”
 16 (Motion at 3) (emphasis added)), but this limitation makes the class uncertifiable. Many loans in the
 17 class were taken out for investment purposes, or as second homes. Individualized inquiries will be
 18 required to determine whether each class member is a “residential homeowner.” There is no easy
 19 way to determine which borrowers are investors in the subject property, or own it as a vacation
 20 house, and which are residential homeowners. Take Graves, who swore under penalty of perjury on
 21 his loan application that he was taking out a loan in order to live at the mortgage property. Graves
 22 Dep. at 56. Now, Graves admitted at deposition that he has never lived there, and that he does not
 23 live there now. Id. In fact, Graves was an experienced real estate speculator, who had purchased
 24 one of his two homes as an investment. Id. at 14, 23-24.

25 When, as here, it is difficult to discern if someone is a member of the class, and an
 26 individualized factual determination of membership will have to be made, a class should not be
 27 certified. Carrizosa v. Stassinis, No. C-05-02280 RMW, 2009 WL 839095 (N.D. Cal. Mar. 30,
 28 2009) (noting that class would not be certified if definition was limited to personal or family

1 borrowers); Berrios v. Sprint Corp., No. CV-97-0081 (CPS), 1998 WL 199842 (E.D.N.Y. Mar. 16,
 2 1998) (class certification is unlikely where separation of business and commercial debts is difficult).
 3 Cf. Mazza v. Am. Honda Motor Co., 254 F.R.D. 610 (C.D. Cal. 2008) (class action allowed where it
 4 was easy to discern who purchased vehicles for commercial purposes). And Rule 23(b)(2) cannot be
 5 the basis for certifying a class where individualized determinations respecting the class members is
 6 required. See also 5 Moore’s Federal Practice § 23.43[2][b] (3d ed. 2009) (“A class action may not
 7 be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be
 8 necessary to correct the alleged wrongful conduct of the defendant.”)

9 **2. The Law In Each Of The Twenty-Nine Jurisdictions Varies, Destroying**
 10 **Cohesiveness.**

11 Even if the facts as to every Plaintiff were the same, certification of a class would be
 12 impossible because the class would be divided amongst the 28 different states and the District of
 13 Columbia. As discussed below, while Defendants have no burden to establish the non-uniformity of
 14 the relevant laws, even a partial review of the states’ laws shows a lack of uniformity among the
 15 jurisdictions’ laws.

16 (a) Agency Law and Foreclosure Statutes Vary From State To State,
 17 Destroying Cohesiveness

18 State laws in the twenty-seven states that both conduct non-judicial foreclosure proceedings
 19 and use deeds of trust vary widely as to whether a nominee can appear on a deed of trust and
 20 whether MERS can act as an agent in a foreclosure proceeding.¹⁴

21 In many states, the use of MERS in a foreclosure proceeding has been upheld. See e.g.
 22 Jackson v. Mortgage Elec. Registration Sys., Inc., ___ N.W.2d ___, 2009 WL 2461257 (Minn. Aug.
 23 13, 2009) (holding that MERS could institute foreclosure proceedings under a deed of trust);
 24 Mortgage Elec. Registration Sys. v. Revoredo, 955 So. 2d 33, 34 (Fla. Dist. Ct. App. 2007) (noting
 25 that MERS acts “essentially as a[n] . . . agent for the current owner”); In re Huggins, 357 B.R. 180,
 26 183 (Bankr. D. Mass. 2006) (“In Massachusetts, mortgage foreclosure may be effectuated . . . under

27 ¹⁴ Georgia and Iowa were included in Plaintiffs’ listing of states to be covered by the proposed
 28 injunction. Georgia, however, does not use deeds of trust but rather security deeds which do not
 convey title, Ga. Code Ann. § 44-14-30, and Iowa does not permit non-judicial foreclosure, Iowa
 Code § 654.1.

1 power of sale ..., which provides as follows: ‘The mortgagee ... or a person authorized by the power
2 of sale ... may, upon breach of condition and without action, do all the acts authorized or required by
3 the powers.’ Thus, MERS as the mortgagee named in a recorded mortgage (albeit in a nominee
4 capacity) is authorized to conduct a foreclosure by power of sale under Section 14.”); see also Trent
5 v. Mortgage Elec. Registration Sys., Inc., 288 Fed. App’x 571, 572 (11th Cir. 2008); Dunlap v.
6 Mortgage Elec. Registration Sys., Inc., No. 2:08-cv-00918, slip op. at 1 (D. Nev. Jan. 5, 2009)
7 (attached hereto as Exhibit 10); Mortgage Elec. Systems, Inc. v. Ventura, No. CV054003168S, 2006
8 WL 1230265, at *1 (Conn. Super. Ct. Apr. 20, 2006). The conduct that Plaintiffs claim is improper
9 – that they believe MERS “has no standing to foreclose” – has been recognized as proper under the
10 laws of at least sixteen states, if not more. The states encompassed in Plaintiffs’ proposed class
11 employ varying approaches to the “issue” Plaintiffs want to certify, making it completely impractical
12 for this Court to rule on Plaintiffs’ request for injunction with any continuity among the class
13 members in twenty-seven separate states.

14 For example, California law specifically allows agents for a trustee, beneficiary or mortgagee
15 to initiate the foreclosure process. See Adams v. SCME Mortg. Bankers, Inc., No. CV F 09-0501
16 LJO SMS, 2009 WL 1451715, at *7 (E.D. Cal. May 22, 2009) (pursuant to California Civil Code
17 § 2924(a)(1), a trustee, beneficiary, mortgagee, or any of their agents, may conduct the foreclosure
18 process). There is Nevada case law that suggests that an agent in general, and MERS in specific, is a
19 proper party in a foreclosure. Ramos, No. 2:08-CV-1089-ECJ-RJJ, slip op. at 7 (“MERS was
20 empowered to foreclose on the property and to appoint [another defendant] as substitute trustee for
21 purpose of conducting the foreclosure.”); Khalil, No. A560582, slip op. at 3 (finding that “MERS, as
22 a lender’s nominee and the named beneficiary [on the Deeds of Trust], ha[d] standing to foreclose on
23 the Deeds of Trust” and that “a lender’s nominee has standing to act as beneficiary under a deed of
24 trust.”); Elias v. HomeEQ Servicing, No. 2:08-CV-1836 JCM (PAL), 2009 WL 481270, at *1 (D.
25 Nev. Feb. 25, 2009) (recorded deeds of trust confirmed the standing of MERS as the nominee
26 beneficiary to seek foreclosure); see also Abbott Bldg. Corp. v. United States, 951 F.2d 191,
27 193 (9th Cir. 1991) (Company that foreclosed was the beneficiary of the note while another
28 company held the deed in trust; “ABC executed a promissory note in favor of Sierra Savings & Loan

1 Association (Sierra). Payment of the note was secured by a deed of trust on certain real property
2 owned by ABC under which Sierra was the beneficiary and Western was the trustee.”).

3 Moreover, and every bit as significant, each of the jurisdictions have different foreclosure
4 statutes. See generally Cutts & Merrill, at 5 & App’x Table A1 (noting that the “foreclosure process
5 varies widely across states” and providing chart illustrating such differences among all 50 states and
6 the District of Columbia). Plaintiffs have made no showing that despite the varying laws of each
7 state, and the forms those state laws dictate lenders use, class certification is appropriate.

8 (b) The Law Applying To Nominees Varies, Destroying Cohesiveness.

9 On this record, there also is no basis for concluding that the law is uniform that the use of a
10 nominees necessarily renders a Deed of Trust invalid. In most states, it is clear that appointing
11 MERS as a nominee on the deeds of trust in no way invalidates the deeds of the trust at issue. In
12 California and Arizona, for instance, state law allows appointment of a nominee for the lender, who
13 may initiate foreclosure proceedings. McLeod v. DHI Mortgage Co., No. 08cv2190-WQH-BLM,
14 2009 WL 1396395 (S.D. Cal. May 15, 2009) (MERS, the lender’s nominee, along with mortgagee
15 and trustee, initiated foreclosure proceedings; court implicitly accepted nominee’s ability to do so);
16 Rodriguez v. Litton Loan Servicing LP, No. 2:09-cv-00029-MCE-DAD, 2009 WL 1326339, at *6
17 (E.D. Cal. May 12, 2009) (denying all debtor’s arguments that nominee of the lender could not
18 initiate foreclosure proceedings); Mansour v. Cal-Western Reconveyance Corp., No. CV-09-37-
19 PHX-DGC, 2009 WL 1066155 (D. Ariz. Apr. 21, 2009) (MERS, the lender’s nominee, along with
20 mortgagee and trustee, initiated foreclosure proceedings; court implicitly accepted nominee
21 beneficiary’s ability to do so); see also Elias v. HomeEQ Servicing, No. 08-1836, 2009 WL 481270,
22 at *1 (D. Nev. Feb. 25, 2009); Smith v. Bank of New York, 366 B.R. 149, 151 (Bankr. D. Colo.
23 2007); Sitek v. Striker, 764 N.W.2d 585 (Minn. App. 2009). While Plaintiffs contend they may be
24 able to prove that the appearance of a nominee invalidates the deed of trust, that hope is not likely to
25 hold true as to all states. There cannot be a class when the relevant law is, at best, not uniform.

26 (c) Whether Deeds Of Trust May Be Modified Varies In Each
27 Jurisdiction, And the Facts Will Vary.

28 Further, whether Plaintiffs’ claims – even if correct – actually necessitate injunctive relief
depends on contract law in each state. Having an improper nominee, which is only one aspect of the

1 deed of trust contract, does not necessarily allow a borrower to invalidate the deed of trust. Even if
2 this Court determines that naming MERS as a nominee on deeds of trust is improper, such a
3 determination would not invalidate the deed of trust or prohibit foreclosures because the court will
4 have to consider whether to modify or reform the deed of trust to conform with the parties'
5 intentions to create a secured loan. See, e.g., Cal. Civ. Code, § 3401 (“[T]he Court may inquire what
6 the instrument was intended to mean, and what were intended to be its legal consequences, and is not
7 confined to the inquiry what the language of the instrument was intended to be.”); First Am. Title
8 Ins. & Trust Co. v. Cook, 12 Cal. App. 3d 592, 598 (Cal. Ct. App. 1970) (Where “the contract does
9 not truly express the real intention of the parties, it may be revised to express that intention.”
10 Generally, the laws of all twenty-seven states at issue in this case allow for modification or “blue
11 penciling” of invalid or ambiguous contract provisions. Yet, approaches to modification and reasons
12 considered acceptable to modify a contract are not uniform among the states. Compare, e.g., City of
13 Brownsville v. Golden Spread Elec. Coop., Inc., 192 S.W.3d 876, 881 (Tex. App. 2006) (provisions
14 may be severed where the “invalidated portions of the contract do not constitute the main or essential
15 purpose of the agreement”) with Beneficial Hawaii, Inc. v. Kida, 30 P.3d 895, 917 (Haw. 2001)
16 (similar but adding requirement that “the illegal provision does not involve serious moral turpitude”
17 before permitting severance); see also Sprouse v. Wentz, 781 P.2d 1136, 1140 (Nev. 1989)
18 (“Whether a contract is entire, or separable into distinct and independent contracts, is a question of
19 the intention of the parties, to be ascertained from the language employed and the subject matter of
20 the contract.”); see also Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 965 (W.D.
21 Va. 2000); Rodriguez v. DePasquale Bldg. & Realty Co., 926 A.2d 616, 623 (R.I. 2007); Vespers
22 Realty Advisors, Inc. v. Binswanger Mgmt. Corp., No. 044245BLS2, 2007 WL 867085, at *2 (Mass.
23 Super. Feb. 1, 2007); Finizio v. Am. Hardware Mut. Ins. Co., 967 P.2d 188, 191 (Colo. App. 1998).

24 With or without variations of law, the facts and equitable consideration pertinent to the
25 remedy of modification likely could vary from borrower-to-borrower. Among the facts and factors
26 the Court is likely to consider in deciding those issues are: the type of loan; whether the loan is
27 residential or an investment property; the extent MERS’ role was disclosed; the parties’ intentions;
28 and other equitable factors. This will destroy the type of cohesiveness that is central to any class

1 certification.

2 (d) Use of MERS Has Been Upheld In Most (If Not All) Jurisdictions

3 Moreover, some states have already reached decisions on the validity of lenders' use of
4 MERS on deeds of trusts and mortgages, but not all states are in agreement and others have not had
5 occasion to address the issue (in a reported decision). Many courts have rendered favorable decisions
6 pertaining to lenders' use of MERS, as discussed above. Plaintiffs cite to other decisions where,
7 they contend, other courts have reached different conclusions pertaining to MERS' role. See, e.g., In
8 re Hawkins, No. BK-S-07-13593-LBR, 2009 WL 901766, at *7 (Bankr. D. Nev. Mar. 31, 2009)
9 (holding that MERS did not have standing to lift automatic stay because "MERS may not enforce the
10 notes as the alleged beneficiary" and "[w]hile MERS may have standing . . . in the name of its
11 [m]ember as a nominee, there is no evidence that the named nominee is entitled to enforce the note
12 or that MERS is the agent of the note's holder"); In re Sheridan, No. 08-20381-TLM, 2009 WL
13 631355, at *6 (Bankr. D. Idaho Mar. 12, 2009) (denying MERS' motion for relief from automatic
14 stay because "even if a 'nominee' such as MERS could properly bring a motion for stay relief in the
15 name of and on behalf of the real party in interest – the entity that has rights in and pecuniary interest
16 under the Note secured by the Deed of Trust – nothing of record adequately establishes who that
17 entity actually is"); In re Vargas, 396 B.R. 511, 516-17 (Bankr. C.D. Cal. 2008) (denying MERS'
18 motion for relief from automatic stay because it was not itself the note holder, had not established
19 who the note holder was, and had not established its authority to act on the note holder's behalf).
20 These cases do not establish that MERS has no standing to foreclose or that its presence invalidates
21 the deeds of trust, and, as trial-level bankruptcy court decisions, may not even accurately predict the
22 law of the state.

23 To the extent that Plaintiffs are correct and those jurisdictions have differing opinions on the
24 subject of MERS, they have simply established that there are variations in state law – a circumstance
25 that makes certifying a class for members in this many different states contrary to the language and
26 purpose of Rule 23. A court should not certify a class where so many issues of state law will differ
27 among class members. See Valentino, 97 F.3d at 1230 (finding that the district court abused its
28 discretion in certifying a class where issues of state law varied widely in personal injury claim

1 against medical device manufacturer); see also In re Am. Med. Sys., Inc., 75 F.3d at 1085 (“If more
2 than a few of the laws of the fifty states differ, the district judge would face an impossible task of
3 instructing a jury on the relevant law, yet another reason why class certification would not be the
4 appropriate course of action”).

5 **3. Defenses To Plaintiffs’ Claims for Injunctive and Declaratory Relief, and**
6 **Other Considerations, Should Prevent Any Certification.**

7 There also are defenses to Plaintiffs’ injunctive relief claim that would require individualized
8 discovery and evidence, thus destroying cohesiveness. See Gartin v. S & M NuTec LLC, 245
9 F.R.D. 429, 441 (C.D. Cal. 2007) (“[T]he presence of defenses unique to a particular class member
10 precludes certification on representativeness and typicality grounds.”); Endres v. Wells Fargo Bank,
11 No. C 06-7019 PJH, 2008 WL 344204, at *11-12 (N.D. Cal. Feb. 6, 2008) (denying class
12 certification in part “because plaintiffs’ claims would require individualized inquiries into the
13 circumstances of each member of the class,” and because the “application of affirmative defenses
14 would require an individualized analysis as to each class member”).

15 (a) There Are Many Class-Member Specific Defenses.

16 While Plaintiffs posit their Motion as seeking a simple declaration that they should be “free
17 from foreclosure,” numerous individual defenses to that request make a class action inappropriate.
18 As discussed above, many of the class members do not face foreclosure at all, so there is nothing to
19 be “free” from and Defendants would have a class member-specific defense to any requested
20 injunction. With respect to others, the borrowers plainly intended to create a secured instrument,
21 see, e.g., Lopez Depo. at 143 (stating that she understood that “her house was going to secure the
22 loan obligation”) (attached as Exhibit 11); Peternell Depo. at 92 (agreeing that if he failed to make
23 payments on his mortgage loan, his house could be foreclosed upon to satisfy the outstanding
24 balance) (attached as Exhibit 12), so it is likely that reformation or modification of the deeds of trust
25 will be available. It is undoubtedly the case that many of the members of the putative class may
26 have tried, on their own, to sue their lender to halt their foreclosure either in a state or a bankruptcy
27 court. It would not be surprising, however, if most of those lawsuits had been unsuccessful. For
28 example, Kristzina Dombovari is a Countrywide borrower in default in Reno. She has been named

1 as a class representative in the Green case. As noted above, Green is a putative class action with an
2 identical class definition as Lopez. Even though Ms. Dombovari is a purported class representative,
3 she has separately brought a pro se action against Countrywide. See Dombovari v. Countrywide
4 Home Loans, Inc., No. CV09 01593 (Dist. Ct. Washoe County, Nev. May 20, 2009). While her case
5 remains pending, there are countless other borrowers who have brought – and lost – similar
6 individual actions against lenders or other entities involved in their foreclosure. Under Celotex, it is
7 not open for this Court to reach into other courts’ cases and review, modify, or upset any of those
8 orders.¹⁵

9 There are several doctrines – judicial estoppel, res judicata, and the Rooker-Feldman doctrine
10 – that courts routinely apply to limit relitigation of claims that were or should have been litigated in
11 prior actions. It is highly likely that in a class as large as the class Plaintiffs propose to certify,
12 thousands of borrowers’ claims are barred by one of these doctrines. To determine which
13 borrowers’ claims are barred would require an individualized inquiry.

14 Claims of borrowers who have entered bankruptcy due to foreclosure are likely barred by
15 judicial estoppel. Judicial estoppel prevents a debtor from bringing suit outside of their bankruptcy
16 to control, assert, or collect on an asset that was not previously disclosed. When a debtor chooses
17 not to list a cause of action, and thereby reveal it to the bankruptcy court, the trustee, and his
18 creditors, judicial estoppel bars him from raising the claim outside of bankruptcy. Oneida Motor
19 Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988) (debtors’ “failure to list its
20 claim against the bank worked in opposition to preservation of the integrity of the system which the
21 doctrine of judicial estoppel seeks to protect”). Here, those class members who failed to list their
22 claims on their bankruptcy schedules must be excluded from the class. To determine which class
23 members fall into this category, requires an individualized inquiry.

24
25 ¹⁵ The collateral attack doctrine applies to this case even if the prior orders in those cases are subject
26 to reconsideration and modification. The Supreme Court itself, in Celotex, applied the doctrine to
27 bar attacks upon an interlocutory order (a section 105 injunction) which, of course, was subject to
28 appeal. Celotex Corp. v. Edwards, 514 U.S. at 309 n.7, 313. Nor can plaintiffs avoid the doctrine by
arguing that the orders of the other courts were in error, or may not have considered the issues raised
by this case. The prohibition on collateral attacks applies even if the other court’s order are
erroneous, since every order otherwise would be subject to collateral attack. In re Pardee, 218 B.R.
916 (B.A.P. 9th Cir. 1998); In re Andersen, 179 F.3d 1253 (10th Cir. 1999).

1 Similarly, res judicata prohibits relitigation of claims where “there is (1) an identity of
 2 claims, (2) a final judgment on the merits, and (3) privity between parties.” Stratosphere Litig.
 3 L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137, 1143 n. 3 (9th Cir. 2002). Here, to the extent the
 4 validity of a putative class member’s deed of trust was at all at issue in the bankruptcy and litigated
 5 “on the merits,” those individuals would be barred by res judicata from being a member of this class.
 6 Necessarily, individualized inquiries are necessary to determine which borrowers would fall into this
 7 category.

8 Finally, the Rooker-Feldman doctrine “precludes courts from exercising subject matter
 9 jurisdiction where the issues presented in the case are ‘inextricably intertwined’ with questions
 10 previously adjudicated by a state court, such that the federal court would be in the unseemly position
 11 of reviewing a state court decision for error.” Mills v. Harmon Law Offices, P.C., 344 F.3d 42, 44
 12 (1st Cir. 2003) (emphasis added); Ahmed v. Washington, 276 F.3d 464, 467 (9th Cir. 2001)
 13 (Rooker-Feldman provides that a federal district court lacks subject matter jurisdiction to decide a
 14 case that would require it to review the decision of a state court, even if the case presents federal
 15 constitutional issues). In other words, the Rooker-Feldman doctrine precludes review by a federal
 16 court of a state court judgment. Many putative class members have already litigated their
 17 foreclosures and lost. This Court should not be permitted to disturb those judgments.

18 (b) Many Borrowers May Not Want The Relief That An Injunction Would
 19 Give Them.

20 Apart from issues Defendants seek to raise, a classwide remedy is not “appropriate” – and so
 21 no class should be certified – because many putative class members would not want the injunction
 22 and declaration being sought. The most common reasons for foreclosure are those very unfortunate
 23 life events that lead to curtailment of income necessary to support the loan (or any loan), such as
 24 death, divorce, and unemployment.¹⁶ It is not surprising that, at the time foreclosure begins, a
 25 significant percentage of properties are already vacant, and more become vacant as time goes on.

26 _____
 27 ¹⁶ See Acosta Decl. ¶ 6; Miller Decl. ¶ 6; Amy Crews Cutts & William A. Merrill, Interventions in
 28 Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs, at 25 & Table
 4 (March 2008), available at [http://www.freddiemac.com/news/pdf/interventions_in_mortgage_](http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf)
 default.pdf (“Cutts & Merrill”) (attached as Ex. 13).

1 Acosta Decl. ¶ 12; Miller Decl. ¶ 12. Historically, many homeowners in financial distress soberly
2 realize their circumstances might not be remediable; a large number of those simply do not contest
3 the foreclosure. Id. ¶ 13. Others sell the property in exchange for a forgiveness of the debt. Id.
4 These circumstances are certainly prevalent with respect to investment properties or second homes.

5 Despite these hard realities, the proposed injunction will inevitably lead to a significant
6 lengthening of the time during which the subject borrowers remain obligated on the loan. Id. ¶ 9.
7 During this time, they will become liable to pay property taxes, homeowners insurance, and
8 maintenance expenses. Id. ¶¶ 14-16. If they do not pay those sums, Defendants will, and bill those
9 back to the borrower and the loan. Id.

10 For these reasons, many members of the putative class actually are likely not to object to the
11 nonjudicial foreclosure process. A classwide remedy that requires everyone to hold onto their
12 property is not clearly in everyone's interest.

13 (c) Many Plaintiffs Have Unclean Hands, Requiring Individual Inquiries
14 Into Individual Circumstances.

15 The injunctive and declaratory class also cannot be certified because the issue of unclean
16 hands will need to be resolved, and cannot be litigated other than on an individualized basis. An
17 injunction is an equitable remedy and so is unavailable to one who has unclean hands. See, e.g.,
18 Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 23 F. Supp. 2d
19 1166, 1175 (D. Nev. 1998) (citing Precision Instrument Mfg. Co. v. Auto. Maint. Machinery, 324
20 U.S. 806, 814 (1945)) (contractor could not obtain equitable relief where evidence showed that he
21 had repeatedly and blatantly violated the applicable regulatory scheme); Metro Publ'g Co. v. San
22 Jose Mercury News, No. 91-20605 SW, 1993 WL 266786, at *6 (N.D. Cal. 1993) (denying
23 preliminary injunction in part due to plaintiff's unclean hands). After only a few borrower
24 depositions, it is obvious that unclean hands is a legitimate defense to the requested relief, and will
25 need to be weighed on an individualized basis.

26 Testimony so far has revealed that several of the named Plaintiffs – Lopez, Casas, and
27 Peternell, in particular – are likely to have unclean hands because they may have committed perjury
28

1 in knowingly signing a false loan application.¹⁷ For example, Plaintiff Graves obtained a low rate by
 2 stating he would live in the \$1.2 million property he sues about, but he actually never occupied it as
 3 his primary residence. Graves Dep. at 97 (attached as Exhibit 15); see also Peternell Dep. at 45-46,
 4 52; Amended Complaint ¶ 111 (Mr. Peternell admitted in the complaint and at deposition that
 5 information regarding his income was not correct on the loan application that he signed under
 6 penalty of perjury). Other named Plaintiffs present variations on the same theme. Ms. Lopez states
 7 in the Amended Complaint that she “had no income at the time she applied for the mortgage” and
 8 that she never even signed the mortgage application. Am. Compl. ¶ 61. However, she did in fact
 9 sign two separate mortgage applications, (attached as Exhibit 14), and she admitted in her deposition
 10 that she did sign those applications. Lopez Dep. at 51, 54-55. One of the applications states that Ms.
 11 Lopez indeed had had a job for three years (at the “Tholl Fencing Company”).¹⁸ The Evensons also
 12 may have been untruthful on their loan application as well. Indeed, Mr. Evenson admitted that the
 13 monthly income and the statement of employment on his loan application are false. T. Evenson
 14 Dep. at 131, 135-36 (attached as Exhibit 16).¹⁹

15 Defendants recognize that these individuals may have explanations for their misstatements or
 16 could present countervailing considerations for why the court should exercise equitable powers in
 17
 18

19
 20 ¹⁷ The Uniform Residential Loan Application states above each Plaintiff’s signature:

21 “I/We fully understand that it is a Federal crime punishable by fine or
 22 imprisonment, or both, to knowingly make any false statements concerning
 any of the above facts as applicable under the provisions of Title 18, United
 States Code, Section 1001, et seq.”

23 See, e.g., Ex. 14.

24 ¹⁸ Similarly, during her deposition, Ms. Lopez stated that she returned to work part-time in 2005,
 25 indicating that she may have had some income when she applied for the mortgage. Lopez Dep. at
 25. However, if, in fact, her statement in the Complaint that she was unemployed at the time of the
 application is true, then Ms. Lopez also committed perjury in signing this loan application.

26 ¹⁹ In addition, the Amended Complaint states that Mr. Evenson was disabled at the time he applied
 27 for a mortgage. Amended Complaint ¶ 88. However, his loan application, which he signed on
 28 October 26, 2006, says that he owned his own trucking business for the five years leading up to the
 date of the application. See Ex. 17. During his deposition, Mr. Evenson stated that he started a
 trucking business in 2004, but that he closed it in 2006 when he was going through a bankruptcy,
 and that the information on his loan application regarding his trucking business is incorrect. T.
Evenson Dep. at 56-57, 111-113.

1 their favor.²⁰ But that would only cement the fact that an individualized inquiry into their conduct
 2 would be necessary. To resolve this dispute and similar disputes involving loans of other putative
 3 class members, the Court will need to hear testimony to determine if a particular borrower has
 4 unclean hands and whether the borrower is entitled to injunctive relief.

5 (d) The Class Would Interfere With Other Courts' Orders And Business,
 6 And Therefore Is Inappropriate.

7 Further, any class action would be an impermissible collateral attack on orders entered by
 8 courts that are handling, or have already disposed of, class members' bankruptcy or individual
 9 foreclosure cases and would interfere with those class members' cases, which are scattered
 10 throughout the country. Plaintiffs' demand for a nationwide class runs headlong into the rule against
 11 collateral attacks. A lawsuit that amounts to a collateral attack on other courts' orders is not
 12 permissible. Celotex Corp. v. Edwards, 514 U.S. 300, 305-06, 313 (1995) ("It is for the court of first
 13 instance to determine the question of the validity of the law, and until its decision is reversed for
 14 error by orderly review, either by itself or by a higher court, its orders based on its decision are to be
 15 respected") (internal quotations and citation omitted); Great Lakes Higher Educ. Corp. v. Pardee (In
 16 re Pardee), 218 B.R. 916 (B.A.P. 9th Cir. 1998); In re Andersen, 179 F.3d 1253 (10th Cir. 1999). As
 17 discussed at length above, many class members will have litigated, actually or effectively, whether
 18 the deed of trust is valid or foreclosure appropriate. Putting aside defenses of res judicata and the
 19 like, Plaintiffs request that this Court reconsider those decisions by certifying a class as an avenue
 20 for injunctive relief would violate fundamental considerations of comity.

21 This Court can apply a strong measure of discretion in its class certification ruling. Johnston
 22 v. HBO Film Mgmt., Inc., 265 F.3d 178, 183, 186 (3d Cir. 2001) . By its very nature, this case will
 23 draw this Court into taking cognizance over or reviewing in some fashion the most important parts
 24 and pieces of cases pending in other courts regarding the validity of putative class members' deeds

25
 26 ²⁰ In addition to a defense of unclean hands, these (and other) misstatements may entitle defendants
 27 to other legal and equitable defenses such as rescission. See, e.g., James v. Home Constr. Co. of
 28 Mobile, Inc., 621 F.2d. 727, 731 (5th Cir. 1980) ("each individual obligor" must make rescission
 decision); Jefferson v. Sec. Pac. Fin. Servs., 161 F.R.D. 63, 69-70 (N.D. Ill. 1995) ("[a]n award of
 rescission, whether 'declaratory' or not" raises individual issues that preclude class treatment). The
 only way to know if any of these defenses apply is to conduct an individualized review of each case.

1 of trusts. Based on these comity concerns, this Court should not certify the class.

2 **C. Plaintiffs Have Failed To Carry Their Burden Of Demonstrating That Rule**
3 **23(a) Requirements Have Been Met.**

4 Even if this Court allows Plaintiffs to seek partial class certification under Rule 23(b)(2),
5 Plaintiffs' attempt to certify a class nonetheless fails because Plaintiffs cannot satisfy the
6 requirements of Rule 23(a). Rule 23(a) requires Plaintiffs to demonstrate: "(1) the class is so
7 numerous that joinder of all members is impracticable, (2) there are questions of law or fact common
8 to the class, (3) the claims or defenses of the representative parties are typical of the claims or
9 defenses of the class; and (4) the representative parties will fairly and adequately protect the interests
10 of the class." Here, Plaintiffs' attempt to satisfy the Rule 23(a) requirements fails because they have
11 not shown that the named plaintiffs' claims are typical or that the named plaintiffs or their counsel
12 will be adequate.

13 **1. The Named Plaintiffs Are Not Typical Of The Class.**

14 Rule 23(a) requires that "the claims or defenses of the representative parties are typical of the
15 claims or defenses of the class" Fed. R. Civ. P. 23(a)(3). The claims of the class
16 representatives are typical of those of the class "when each class member's claim arises from the
17 same course of events, and each class member makes similar legal arguments to prove the
18 defendant's liability." (internal quotations and citation omitted). Armstrong v. Davis, 275 F.3d 849,
19 868 (9th Cir. 2001); see also Valentino, 97 F.3d at 1234 (reversing class certification in part because
20 the named plaintiffs had each suffered different types of injuries, and thus the typicality requirement
21 was not met).

22 Here, several of the named plaintiffs are atypical, at least in comparison to what Plaintiffs
23 contend the class to be. Several of the named Plaintiffs have grievances with, and filed this lawsuit
24 against, Defendants for reasons that have absolutely nothing to do with MERS or even foreclosures.
25 For example, Mr. Graves is not the subject of any foreclosure and his sole complaint is that
26 Countrywide Bank, FSB allegedly violated the Truth in Lending Act, 15 U.S.C. § 1601 et seq., in
27 making the loan to him. Graves Dep. at 134, 138. The Amended Complaint makes no mention of
28 TILA. Mr. Graves' situation is also atypical for the reason that even if he wanted to litigate the
MERS issues, he would lose because his loan was never sold on the secondary market. Abugow

1 Decl. ¶ 3. Thus, Mr. Graves cannot claim that the presence of MERS has had any effect on him or
2 his loan at all.

3 The Casases' claims against Wells Fargo are atypical as well. Mr. Casas is suing only
4 because he believes that his monthly payment is higher than what he was told at closing it would be.
5 J. Casas Dep. at 8-9 (attached as Exhibit 18). He has no dispute with MERS. See also M. Casas
6 Dep. at 39 (Ms. Casas' primary complaint is that there was a misrepresentation at the time of
7 origination as to the amount of their monthly payment) (attached as Exhibit 19). The Evensons too
8 are concerned not with MERS's "standing" but with alleged misrepresentations made to them by
9 their lender. T. Evenson Dep. at 85-90 (Mr. Evenson's complaint is that he was promised and was
10 not able to obtain a refinancing of his loan after six months to obtain a lower interest rate). T.
11 Evenson Dep. at 85-90. Mr. Evenson contends, uniquely, that he was discriminated against because
12 he is disabled. Amended Complaint ¶ 120. Others of the named plaintiffs disavow such a claim.

13 At deposition, each of the named Plaintiffs admitted that the presence of MERS on their deed
14 of trust has nothing to do with their default on the mortgage loan. For example, Graves stopped
15 paying his mortgage when his business fell apart. Graves Dep. at 95, 109, 140-41; see also Peternell
16 Dep. at 116 (default caused by lost income); J. Casas Dep. at 15, 26-27 (lost income due to reduced
17 hours). However, even if the Casases' home was foreclosed upon, Mr. Casas owns another property,
18 and testified that he could move into that home if he had to. J. Casas Dep. at 12. Graves also owns
19 another home that he is residing in currently; thus, he would not be injured by any allegedly
20 unlawful foreclosure on his property. Graves Dep. at 10.

21 None of the named Plaintiffs were able to articulate any harm from the listing of MERS as a
22 beneficiary on their deed of trust. None of them would have avoided foreclosure had MERS not
23 been so listed and none of them would have acted any differently at closing or after if MERS was
24 not part of their loan.

25 Indeed, Plaintiffs are hardly typical because the facts they present, and the claims they make,
26 are not even consistent among them. And none of these Plaintiffs stated that their claims are the
27 same as the issues Plaintiffs seek to certify here. Plaintiffs cannot seek to certify a class here
28 because there is no showing of typicality between the named plaintiffs. See Armstrong, 275 F.3d at

1 869 (“[T]he unnamed class members [must] have injuries similar to those of the named plaintiffs and
2 that the injuries result from the same, injurious course of conduct.”).

3 **2. Plaintiffs Have Not Shown That They Will Adequately Represent The**
4 **Putative Class.**

5 The other element of Rule 23(a) directed to the representatives – the requirement that they be
6 adequate representatives – also is not met. Individual interests and rights must be protected in any
7 class action. Critical to absent class member protection is the adequacy of the named
8 representatives. Hanlon, 150 F.3d at 1020 (the adequacy of both “the named plaintiffs and their
9 counsel” is necessary to protect absent class members). Here, as demonstrated below, the Court
10 cannot certify a class because Plaintiffs have not shown that they are either able or willing to
11 adequately represent the putative class. Id.

12 (a) The Plaintiffs lack knowledge and interest in their case against MERS.

13 It is evident from their depositions that each named Plaintiff agreed to be part of this lawsuit
14 as a last-ditch effort to avoid losing properties on which they defaulted. Several Plaintiffs, such as
15 Mr. Peternell and Mr. Casas simply want to stay in their home and are willing to make some kind of
16 payment; they do not contest that they owe money on their mortgages. J. Casas Dep. at 42; Peternell
17 Dep. at 92-93. None of them has any real issues with MERS, nor do they have any knowledge of
18 any of the specifics of their case.

19 Plaintiffs’ depositions make clear that they have little, if any, knowledge of any of the
20 substantive claims of their lawsuit except for the few lines they apparently were cautioned to repeat
21 ad nauseum at the depositions. Courts have required a showing that named plaintiffs have some
22 understanding of the complaint and proceedings. Riker v. Gibbons, No. 308CV-00115-LRH-RAM,
23 2009 WL 102635, at *2 (D. Nev. Jan 13, 2009); Bodner v. Oreck Direct, LLC, No. C 06-4756 MHP,
24 2007 WL 1223777, at *2 (N.D. Cal. Apr. 25, 2007) (refusing to certify class “[i]n light of plaintiff’s
25 undeniable and overwhelming ignorance regarding the nature of this action, the facts alleged, and the
26 theories of relief against defendant”); see also 7A Charles Alan Wright, Federal Practice &
27 Procedure, § 1766 (3d ed. 2005) (“If the representative displays . . . a lack of knowledge or
28 understanding concerning what the suit is about, then the court may conclude that Rule 23(a)(4) is
not satisfied.”). As the excerpts below show, the named Plaintiffs’ testimony consistently

1 demonstrates that they lack independent knowledge or interest in any facet of this case, ranging from
2 the facts that gave rise to their claims or the injunctive relief that they seek.

3 Several of the named Plaintiffs testified that they were unaware of the types of claims they
4 are asserting in this case, and how many causes of action or claims they were asserting against
5 various defendants, including Countrywide, Wells Fargo, or MERS. For example, Peternell testified
6 that the only knowledge he has with regard to MERS and the lawfulness of foreclosures at issue here
7 comes from the documents drafted by his counsel in this case, and from a television report on which
8 Mr. Hager appeared to discuss MERS. Peternell Dep. at 20-21, 74-75, 78-79; M. Casas Dep. at 22.
9 Others admitted they have no knowledge of the laws they claim defendants violated. See, e.g., J.
10 Casas Dep. at 40; Graves Dep. at 138; 155. Mr. Graves even retained a third party loan audit
11 company to conducted an investigation into his loan documents, and that audit did not conclude that
12 MERS did anything wrong. Graves Dep. at 229;²¹ see also M. Casas Dep. at 26 (Ms. Casas does not
13 know anything about this lawsuit other than from what her counsel has told her); Peternell Dep. at
14 87-88 (same); J. Casas Dep. at 34 (same); T. Evenson Dep. at 150-51, 159-60 (same); Lopez Dep. at
15 215-16 (same). Plaintiffs' failure to understand the nature of their claims is hardly surprising given
16 that they each admit no harm due to MERS. Therefore, Plaintiffs would have no reason to have
17 focused on or understood this issue.

18 The failure to command even a general understanding of their claims demonstrates that the
19 named Plaintiffs are not adequate to serve as representatives for the purported class. Burkhalter
20 Travel Agency, 141 F.R.D. at 153 (“[A] party who is not familiar with the basic elements of his
21 claims is not considered to be an adequate representative for the class because there is no sense that
22 there is an actual party behind counsel’s prosecution of the action”). “A plaintiff is an inadequate
23 representative where he is so unfamiliar with the case that he will not serve the necessary role of
24 check[ing] the otherwise unfettered discretion of counsel in prosecuting the suit.” Brown v. Brewer,

25
26 ²¹ Mr. Graves testified that he retained a company named “loan doc audits” to conduct a “forensic
27 loan audit” on his loan after he started to have difficulties making his mortgage payments. Graves
28 Dep. at 111, 132-34. Mr. Graves explained that the findings of this audit revealed “severe
violations,” but admitted that he did not conduct any investigation into the legitimacy of this
company or the “severe violations.” Graves Dep. at 133-36.

1 No. CV 06-3731-GHK (JTLx), 2009 WL 1574556, at *4 (C.D. Cal. May 29, 2009) (internal
 2 quotations and citations omitted). The named Plaintiffs here fare no better – they, too, fail to
 3 understand any of the bases of their claims. The Court should deny the motion to certify because
 4 Plaintiffs are not qualified to act as representatives for the proposed class. See In re Quarterdeck
 5 Office Sys., Inc. Sec. Litig., No. CV 92-3970-DWW (GHKx), 1993 WL 623310, at *5-6 (C.D. Cal.
 6 Sept. 30, 1993).

7 (b) Plaintiffs have ceded control of this case to their counsel.

8 Plaintiffs' lack of interest in and knowledge about their case has a more pernicious effect – it
 9 leads them to rely too heavily on class counsel, ceding control of the case and not acting as a true
 10 representative. Courts have long rejected proposed class representatives when it is clear that they
 11 “[have] done nothing to monitor [the] lawyer-driven litigation.” Azoiani v. Love’s Travel Stops &
 12 Country Stores, Inc., No. EDCV 07-90-ODW (OPx), 2007 WL 4811627, at *2 (C.D. Cal. Dec 18,
 13 2007); Bodner, 2007 WL 1223777, at *2. That is the case here. For example, Mr. Casas stated that
 14 Mr. Hager makes the decisions about the case, and that the relief he seeks is “[s]imply what the
 15 attorney arranges.” J. Casas Dep. at 37, 42; see also Graves Dep. at 148; T. Evenson Dep. at 201.

16 After lending their name to initiate this action, Plaintiffs have not taken any steps to
 17 supervise it or even to maintain the barest level of involvement. Several of the named Plaintiffs did
 18 not review the complaint until after their counsel filed it and are otherwise completely unaware of
 19 the status of the case. See Peternell Dep. at 149, T. Evenson Dep. at 204, Graves Dep. at 155-56, J.
 20 Casas Dep. at 40.²² The extent to which the Plaintiffs rely on their counsel about the basic facts

21
 22 ²² Furthermore, there are also concerns about the named plaintiffs' truthfulness. Courts have found
 23 that the honesty and trustworthiness of proposed class representatives are factors in determining their
 24 adequacy to represent the class. Del Campo v. Am. Corrective Counseling Servs., Inc., No. C 01-
 25 21151JW (PVT) 2008 WL 2038047, at *5 (N.D. Cal. May 12, 2008). Graves' deposition in
 26 particular raises questions about his ability to act consistently and honestly. First, Graves testified
 27 that information on his loan application was false at the time he signed it. Graves Dep. at 52.
 28 Second, Graves also admitted that his income was inaccurate in his application for a loan
 modification. Id. at 127-29. Third, Graves admitted that he did not comply with several provisions
 in his loan documents – such as informing his lender about the incorrect information on the loan
 application. Id. at 79-80. Graves also ignored his responsibility under the terms of his loan that
 required him to establish the property as his principal residence within sixty days, and to have
 resided there for at least a year. Id. at 97.

1 renders Plaintiffs' adequacy arguments unpersuasive. See Bodner, 2007 WL 1223777, at *1
2 (refusing to certify class where "virtually all of plaintiff's knowledge regarding this matter has come
3 from his attorneys"). The named Plaintiffs' lack of interest in the case, possibly resulting in their
4 lack of knowledge, causes them to depend even more on their counsel, and thus leaves the proposed
5 class without a representative to supervise this complex action. Because the proposed class
6 representatives are not adequate to satisfy the requirements of Rule 23(a)(4), their motion for class
7 certification must be denied.

8 These sorts of inconsistencies render plaintiffs inadequate class representatives. This is a
9 complex case. As class representatives, they must seek a basic understanding of it so they can
10 adequately represent the class and make decisions on behalf of the class. Their inability to grasp
11 certain facts of the case results in Plaintiffs depending more on their counsel, and effectively
12 abdicating their supervisory role, and thus allowing counsel to completely manage and control the
13 litigation. This makes them inadequate.

14 **D. Nothing Can or Should Be Certified Because Plaintiffs Have Not Submitted A**
15 **Trial Plan.**

16 Plaintiffs have not submitted a trial plan and have failed to present the Court with any other
17 indications as to how this Court can conceivably manage this case, which could include millions of
18 class members residing in 29 different jurisdictions. Nor have they explained how or when they
19 intend to certify a class regarding the other counts of the Amended Complaint. Plaintiffs should not
20 leave the Court in a position where it must guess Plaintiffs' intentions.

21 Generally, Plaintiffs seeking to certify multistate class actions should present the court with a
22 trial plan explaining how the court could reasonably manage the case as a class action. Zinser, 253
23 F.3d at 1189 ("Because [plaintiff] seeks certification of a nationwide class for which the law of
24 forty-eight states potentially applies, she bears the burden of demonstrating a suitable and realistic
25 plan for the trial of class claims.") (quotation omitted); see also Vega v. T-Mobile USA, Inc., 564
26 F.3d 1256, 1278-79 (11th Cir. 2009) (finding district court had abused its discretion for failure to
27 require a trial plan); Valentino, 97 F.3d at 1234 (suggesting the need for a trial plan for nationwide
28 products liability tort class action); Castano, 84 F.3d at 741-44 (requiring trial plan for multistate
tobacco class action); Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998) (requiring trial plan for

1 class action requiring application of law from 52 jurisdictions). A trial plan will inform the court of
2 how the claims will be tried. Castano, 84 F.3d at 742 (discussing the importance of requiring
3 plaintiffs to articulate a trial plan that informs the court of how the claims will be tried).

4 Plaintiffs have not met this fundamental requirement. The absence of a trial plan here is
5 particularly telling because they have promised that they may seek to certify unknown future classes
6 at some unspecified time in the future. Motion at 22. Only an adequate and detailed trial plan will
7 allow the Court to determine whether a plaintiff's claims in are best tried by use of the class action
8 mechanism. See Fed. R. Civ. P. 23. 1966 Advisory Comm. Notes.

9 This complicated case involves thousands of potential class members in more than half the
10 stands and involves practically every mortgage lender in the United States. Putting aside any dispute
11 between the parties about what facts and law are at issue, it is plain that it would be an incredibly
12 complex and difficult case to try. Plaintiffs offer no explanation for how a jury could ever try a case
13 where the laws of 29 different jurisdictions and the practices of dozens of mortgage originators and
14 servicers are implicated. See, e.g., City of New York v. Int'l Pipe & Ceramics Corp., 410 F.2d 295,
15 298 (2d Cir. 1969) (“[O]n a moment's reflection it should be apparent that the capacities of judges
16 and jurors to absorb the factual situations thus presented are finite and courthouses are not
17 coliseums.”); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 191 (3d Cir.
18 2001) (“[W]ith hundreds of millions of [security] trades, it is difficult to imagine how this case can
19 be tried.”); In re Paxil Litig., 212 F.R.D. at 546 (“The completed picture will no doubt be too vast
20 and too complicated for even the most diligent jury to grasp.”). Just the named plaintiffs have a
21 wide variety of predatory lending claims against different lenders (many of whom they did not even
22 sue). How a jury could ever grasp these distinct claims – let alone the claims of millions of others –
23 is left unexplored in Plaintiffs' Motion.

24 Plaintiffs are likely to complain that any trial plan should only be limited to the “issue” class
25 they seek to certify. That assertion would be wrong, both from the standpoint of case management
26 and because Plaintiffs' claim for a jury trial requires this Court to consider how all parties' Seventh
27 Amendment rights will be accommodated in the entire lawsuit. In re Rhone-Poulenc Rorer Inc., 51
28 F.3d at 1302-03. Such an argument also would be irrelevant because they have not proposed a trial

1 plan for a limited “issue” class either.

2 This Court and Defendants must know exactly how Plaintiffs intend to try their claims in
3 order to prepare for and manage pre-trial and trial proceedings. Without any indication as to how
4 this case can be managed, certification should be denied. Valentino, 97 F.3d at 1234 (part of
5 plaintiffs’ manageability burden is to present a viable trial plan showing how the court could conduct
6 a class trial); Zinser, 253 F.3d at 1190 (affirming denial of class certification where plaintiff failed to
7 present manageable trial plan); In re Paxil Litig., 212 F.R.D. at 546-48 (finding proposed six-page
8 trial plan insufficiently vague).

9 **CONCLUSION**

10 For the foregoing reasons, this Court should deny Plaintiffs’ Motion for Class Certification.

11
12 Respectfully submitted,

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Fargo, N.A.

Dated: August 21, 2009

CERTIFICATE OF SERVICE

1
2 I HEREBY CERTIFY that, on the 21st day of August, 2009 and pursuant to FRCP 5(b), I
3 served via CM/ECF and/or deposited for mailing in the U. S. Mail a true and correct copy of the
4 foregoing Defendants Countrywide Home Loans, Inc.'s and Wells Fargo Bank, N.A.'s Opposition to
5 Motion for Class Certification, postage prepaid (if U. S. Mail) and addressed to all counsel as listed
6 on the CM/ECF-generated Notice of Electronic Filing to receive notice via electronic service in this
7 matter.

8 /

9
10 /s/ Linda M. Kaptcia
11 An employee of
12 BALLARD SPAHR ANDREWS & INGERSOLL, LLP
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