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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOSEFA LOPEZ et al.,

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

12

Plaintiffs,

13

vs.

**COUNTRYWIDE AND WELLS
FARGO'S JOINT OPPOSITION TO
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

14

EXECUTIVE TRUSTEE SERVICES, LLC et
al.,

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Defendants.

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5 UMLIC VP LLC v. T & M Sales & Envtl. Sys., Inc.,
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25 Woliansky v. Miller,
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18 Tex. Prop. Code § 51.0001(4) 34

19 W.Va. Code § 38-1-4 18

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23 1 Corbin on Contracts § 1.7 (1993)..... 22

24 33A Fed. Proc., L. Ed. § 80:283, Expert and Opinion Testimony (2008) 20

25 Amy Crews Cutts & William A. Merrill, Interventions in Mortgage Default: Policies and

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27 Office of the Special Inspector General for the Troubled Asset Relief Program, Quarterly

28 Report to Congress (July 21, 2009)..... 25

1 Phyllis Slesinger & Daniel McLaughlin, Mortgage Elec. Registration Sys.,
2 31 Idaho L. Rev. 805 (1995) 7, 9
3 Regulatory Bulletin 37-28 (Nov. 13, 2008) 9
4
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1 A preliminary injunction is an extraordinary equitable remedy, granted only when the
2 movant makes a clear showing demonstrating entitlement to such relief. Plaintiffs come to this
3 Court seeking breathtaking, legislative-type relief—an injunction that would stop non-judicial
4 foreclosures not just in Nevada, but in twenty-seven other states and in the District of Columbia
5 as well. Plaintiffs have not come close to meeting their heavy burden of demonstrating they are
6 entitled to this kind of injunction, however, and the Court should deny their Motion for
7 Preliminary Injunction (“Motion”).

8 Most fundamentally, Plaintiffs may not enjoin non-judicial foreclosures occurring
9 throughout the country because this lawsuit should not be certified as a class action under Fed. R.
10 Civ. P. 23. Plaintiffs bear the burden of demonstrating certification is appropriate, yet they again
11 fall far short of the mark, as Countrywide and Wells Fargo have shown in a separate brief filed
12 this date. Without a certified class, no injunction may issue other than as to the ten named
13 plaintiffs themselves.

14 The facts as to the named Plaintiffs reveals that they are not entitled to injunctive relief
15 either. All but one signed a stipulation entered by the Court in which Defendants agreed not to
16 foreclose on their properties pending a trial on the merits; they have received the injunctive relief
17 sought in the Motion and lack standing to seek more. The other plaintiff (Lyndon Graves) did
18 not enter into a stipulation but lacks standing because he never received foreclosure notices and
19 never faced foreclosure by his lender. Finally, although Plaintiffs seek to invoke the equitable
20 powers of this Court, their conduct – including total cessation of loan payments; and, for some,
21 misrepresentations in their loans – has been far from equitable, and disentitles them from
22 obtaining the relief they seek.

23 A preliminary injunction seeking to halt non-judicial foreclosures also is not warranted
24 because Plaintiffs have not shown they are likely to succeed on the merits of their claim that
25 MERS’ status as the beneficiary on their deeds of trust somehow renders the security instrument
26 void or allows them to avoid foreclosure. Courts in Nevada, California and other states around
27 the country have repeatedly upheld challenges to MERS’ ability to serve a beneficiary under a
28

1 deed of trust. In March, this Court granted a motion to dismiss a Complaint alleging wrongful
2 foreclosure that was based in part on the complaint that MERS should not have been the
3 beneficiary; it held that “under the deed of trust, MERS was empowered to foreclose on the
4 property and to appoint [another defendant] as substitute trustee for purpose of conducting the
5 foreclosure.” Ramos v. Mortgage Electronic Registration Systems, Inc., No. 2:08-CV-1089-
6 ECJ-RJJ (D. Nev. Mar. 5, 2009) (attached as Exhibit 1)¹, slip op. at p. 7. Last week, the
7 Minnesota Supreme Court rejected Plaintiffs’ notion that a deed of trust and note must always
8 follow one another when a loan is sold, holding that MERS could institute foreclosure
9 proceedings under a deed of trust even if it did not possess an interest in the note. Jackson v.
10 Mortgage Electronic Registration Systems, Inc., No. A-08-397, 2009 WL 2461257 (Minn. Aug.
11 13, 2009). And, in the unlikely event that Plaintiffs were correct that MERS cannot serve as
12 beneficiary, the appropriate remedy mandated by basic contract law is not to void the deed of
13 trust and all its other operative provisions (including those allowing the lender to foreclose), but
14 rather to reform the document to meet preserve its primary purpose – which is to grant the lender
15 a security interest in property in case the borrower was unable to repay the loan.

16 Plaintiffs also fail to make the required showings on other important preliminary
17 injunction factors. Plaintiffs have not demonstrated irreparable harm if no injunction issues;
18 they have stipulations against foreclosure or foreclosure has not been instituted, and their Motion
19 seeks to enjoin the foreclosure whether the loan is even in default or not.

20 Plaintiffs’ unsupported and perfunctory statements about lack of hardships to Defendants
21 if an injunction issues ignore the practical of the relief they seek. As shown below, the
22 nonjudicial foreclosure of over 200,000 loans serviced by Countrywide or Wells Fargo would be
23 halted by an injunction, and the financial impacts will be immediate and real: taxes and
24 insurance would need to be paid without payments from borrowers to cover those expenses;
25 recovery of unpaid principal and interest payments, ordinarily obtained from proceeds of a

26
27 ¹ Unless otherwise noted, all exhibits are attached as exhibits to the declaration of Eric I.
28 Goldberg.

1 foreclosure sale, would be delayed and perhaps lost altogether; and properties would be left
2 vacant and require maintenance or suffer losses from vandalism, fires and theft. Against these
3 losses, the Court must weight hardships to borrowers whose home are a vacation home or
4 investment, who may have misrepresented their income or intentions, or who do not face
5 foreclosure at all. While some borrowers do face hardship from a possible foreclosure – and
6 they are all in default – the balance of hardships for the sweeping injunction they seek does not
7 weigh in Plaintiffs’ favor.

8 Plaintiffs advance generalities only about the public interest. Stopping all non-judicial
9 foreclosures as requested by Plaintiffs would not serve the public interest. It would interfere
10 with state statutes allowing MERS to foreclose; and with orders entered by courts in this state
11 and elsewhere which have upheld foreclosures where MERS has been involved.

12 Finally, the Motion should be denied because the requested injunction is impermissibly
13 overbroad. Plaintiffs wish to challenge the legal status of MERS, yet their deeds of trust allow
14 the lenders and trustees to foreclose in the event of default. Plaintiffs have no basis to enjoin the
15 activities of these lenders and trustees even if they are correct in their view that MERS may not
16 serve as beneficiary.

17 For all these reasons, Plaintiffs have failed to carry their burden of demonstrating that a
18 preliminary injunction should issue. The Court should accordingly deny their Motion in its
19 entirety.² Nor is there any basis for an injunction that would prevent MERS from conveying any
20 interest it has, for such conveyances have nothing to do with Plaintiffs, pose no harm to them,
21 and interfere with private parties’ rights.

22 PROCEDURAL BACKGROUND

23 Plaintiffs’ lengthy complaint contains a number of claims. First, they assert that the
24 Defendants made “predatory loans” to them which they knew Plaintiffs could not repay. “First

25
26 ² If the Court were to grant the Motion, it should require Plaintiffs and class members to
27 continue paying their loans, and also order posting of a bond to protect Defendants against
28 the harms that would accrue if the injunction were improvidently granted, as required by
Rule 65(c).

1 Amended Class Action Complaint” (May 4, 2009) (“Amended Complaint”) ¶¶ 47-53. Second,
2 Plaintiffs claims that various Defendants conspired to create MERS to hide their allegedly illegal
3 conduct from borrowers and others. Id. ¶¶ 169-70.

4 On April 9 and May 1, 2009, Plaintiffs Lopez, Casases, Evenson, Gray, Frankowski and
5 Peternell filed motions for temporary restraining orders and preliminary injunctions seeking to
6 prevent scheduled foreclosure sales with respect to the properties securing their loans. After the
7 Court granted the TRO requests, Defendants and Plaintiffs entered into stipulations in which
8 Defendants agreed, subject to several conditions such as Plaintiffs continuing to pay taxes and
9 insurance, not to pursue foreclosure activity prior to trial. (Dkt. Nos. 59-63.)

10 On May 22, 2009, Plaintiffs filed the Motion seeking a preliminary injunction
11 prohibiting, in Nevada and twenty-eight other jurisdictions, MERS “and those associated with or
12 acting in concert” from MERS from (a) commencing or conducting trustee sales pursuant to non-
13 judicial foreclosure proceedings, or (b) from transferring purported beneficial interest and/or
14 assignment of rights in, deeds of trust listing MERS as the beneficiary. Motion at 3. Plaintiffs
15 simultaneously sought certification of a putative class of persons in the same jurisdictions who
16 obtained loans between 2004 and 2008 in which MERS was listed as the beneficiary under the
17 deed of trust. Motion at 3.

18 On May 26, 2009, Countrywide, Wells Fargo and other defendants moved to dismiss the
19 Amended Complaint. These motions reveal significant defects in all aspects of the Amended
20 Complaint, and are discussed below.

21 **FACTS RELATING TO PLAINTIFFS, THEIR LOANS, AND MERS**

22 Little discovery has taken place in this lawsuit to date: Countrywide and Wells Fargo
23 have taken partial depositions of the named Plaintiffs who assert claims against them, and have
24 received documents from Plaintiffs about their loans. Even this limited discovery reveals that
25 the requested injunction should not be granted.

1 **A. Plaintiffs Obtained Loans That They Wanted, And Which Benefitted Them.**

2 Plaintiffs Lyndon Graves, Christopher Peternell, Josefa Lopez, Tyrone and Michellina
3 Evenson, and Jose and Maria Casas each obtained mortgage loans between February 2005 and
4 December 2007. Countrywide originated the Graves and Evenson loans; other lenders
5 originated the remaining loans. Amended Complaint ¶¶ 60, 75, 79, 90, 110.

6 Each Plaintiff testified that the loans conferred substantial benefits on them.³ Mr. Graves
7 used his loan to refinance an existing construction loan for a \$1 million house that he built along
8 with his development partner. The refinancing reduced the interest on his loan significantly.
9 Graves Dep. at 12-13, 15-16, 31-33, 186-87 (Countrywide “made a loan at an interest rate that
10 lowered the monthly payment by 1200 bucks on that loan. Went from 5600 to 40 something
11 hundred, reduced it a significant amount”) (attached as Ex. 2). Peternell refinanced his existing
12 mortgage loan, and also a truck loan and a credit card obligation. Peternell Dep. at 59-61
13 (attached as Ex. 3). The Casases used their loan to purchase a larger house than the one that they
14 occupied at the time. J. Casas Dep. at 20-21 (Mr. Casas obtained loan because he “wanted a
15 new house”, and agreeing that the new house is bigger and more expensive than their previous
16 house) (attached as Ex. 4). Lopez obtained \$101,000 in cash from her loan, which she used to
17 pay her living expenses. Lopez Dep. at 101-03 (attached as Ex. 5).

18 None of the Plaintiffs were coerced or forced into the loans. Each testified that the loan
19 was something that they wanted to obtain, in order to obtain the benefits described above.
20 Graves Dep. at 186-87; Peternell Dep. at 65-66 (loan was beneficial to him because “[i]t
21 consolidated [his] truck payment and house payment into one payment” and reduced his monthly
22 payment); J. Casas Dep. at 20-21; Lopez Dep. at 31-32, 41-42 (she obtained loan because she
23 was “having financial problems” and “needed money”); T. Evenson Dep. at 85-86 (attached as
24 Ex. 6) (Evensons entered into loan expecting to obtain a refinance).

25
26 ³ The relevant excerpts of the depositions of the Plaintiffs are lodged in an Appendix to this
27 brief for the convenience of the Court. They will be cited by the last name of each plaintiff;
28 thus, Plaintiff Lyndon Graves’ deposition is cited as “Graves Dep.”

1 **B. Plaintiffs Make Payments Until They Experience Financial Problems.**

2 Each Plaintiff was able to make timely payments on their loans for quite some time.
3 Graves paid his loan from December 2007 through March 2009. Graves Dep. at 146. Peternell
4 kept current from February 2005 to until early 2008, and continued to make partial payments
5 until October or November of 2008. Peternell Dep. at 117-18, 120-21. The Casases paid
6 without problem from May 2006 until November 2008. J. Casas Dep. at 26-27. Lopez made
7 timely payments from October 2005 through October 2008. Lopez Dep. at 286. The Evensons
8 were able to make payments on their loan until February 2008. T. Evenson Dep. at 188.

9 However, the downturn in the United States economy that has occurred over the last year
10 also eventually impacted the Plaintiffs. Graves, who is part owner of a printing business, saw his
11 business dramatically decline in 2008. Graves Dep. 20-21. Peternell was twice laid off for
12 several months from his carpentry job. Peternell Dep. 27. Mr. Casas works in construction and
13 only worked seventh months out of the year in 2008, and Mrs. Casas saw her hours as a casino
14 dealer reduced. J. Casas Dep. 15-16, 26-27. Lopez testified that she “no longer had money and
15 no work” as of August 2008. Lopez Dep. at 285.

16 After Plaintiffs experienced these financial difficulties, they began to miss required
17 monthly payments, and some eventually began receiving calls and notices regarding default and
18 foreclosure. Graves Dep. at 140-41; Peternell Dep. at 131, 242-45; J. Casas Dep. at 32-33. They
19 learned, either from referrals or news reports, that a Reno attorney, one of their current counsel,
20 was challenging foreclosures. Graves Dep. at 141-42; Peternell Dep. at 78-79; 133-34; J. Casas
21 Dep. at 33; T. Evenson Dep. at 197-98.

22 Some of the Plaintiffs made a deliberate choice to avoid their contractual obligation to
23 repay the amounts lent to them. See e.g., Graves Dep. at 95-96. For example, both Graves and
24 the Casases owned another property in addition to the ones at issue in this lawsuit. Instead of
25 making partial payments on two loans or giving up a property they simply could no longer
26 afford, they chose to simply stop paying their loans with Countrywide and Wells Fargo entirely.
27 Graves Dep. at 60-61, 95-96; J. Casas Dep. at 11-12. Mr. Casas, for example, admitted that his
28

1 family's financial problems were not caused by Wells Fargo, that he knew he could not live at
2 his property for free, and that it would be fair to pay some amount to Wells Fargo in connection
3 with the loan. J. Casas Dep. at 42-43. Similarly, Graves stopped paying his \$1 million loan
4 solely because a consultant told him a pre-closing loan disclosure contained inaccuracies; he
5 admitted that it would be unfair to not repay any of his \$1 million loan if any inaccuracies in the
6 disclosure were inadvertent rather than intentional. Graves Dep. at 95-96; 187-88.

7 **C. Plaintiffs Challenge MERS, Though MERS Serves Vital Purposes And They**
8 **Contracted With MERS In The First Place.**

9 Plaintiffs accuse Defendants of hatching a deliberate plan to harm their own customers,
10 the centerpiece of which was use of MERS as beneficiary on their Deeds of Trust. Their
11 injunction is addressed solely to MERS, which they seek to paint as a mechanism to hide alleged
12 lending misconduct by Countrywide, Wells Fargo, and thousands of other lenders. As explained
13 below, dozens of courts and federal regulators have approved of MERS' involvement in the
14 lending process. That is because MERS serves legitimate purposes that seek to reduce costs in
15 the lending process. MERS simply is not designed for illegitimate purposes and does not serve
16 to "hide" anything from Plaintiffs.

17 MERSCORP, Inc. and MERS were formed in 1993 to play an integral part in a federally
18 established free-market system created to increase liquidity in the market for home loans. The
19 purpose of MERS is to track ownership interests and servicing rights in mortgage loans.⁴ To
20 understand how it serves that purpose, requires a brief explanation of mortgage lending and the
21 secondary mortgage market.

22 When a mortgage loan is made, the borrower executes a promissory note, agreeing to
23 repay the funds provided, and executes a security instrument (a deed of trust or mortgage,

24 ⁴ Numerous articles and cases have described MERS' salutary role in the lending process.
25 The information about MERS set forth above is drawn from such sources, including Phyllis
26 Slesinger & Daniel McLaughlin, Mortgage Electronic Registration System, 31 IDAHO L.
27 REV. 805 (1995) (copy attached as Exhibit 7), Mortgage Elec. Registration Sys. v.
28 Revoredo, 955 So.2d 33 (Fla. Dist. Ct. App. 2007), as well as MERS' briefs in this case (and
materials cited therein).

1 depending on the State). The secured instrument is recorded in the public land records. The
2 purpose of the recording system is to protect creditors' rights, and so there is no obligation to
3 record.

4 Promissory notes are often sold by the lender after a loan closes. Prior to 1993, if a loan
5 was sold there would be a written assignment to the assignee which then usually would be
6 recorded in the chain of title. This process often caused difficulty when the loan was sold
7 multiple times, leading to assignments recorded out of order or not recorded at all, or delays in
8 sales due to the necessity of recording prior assignments or otherwise addressing issues with the
9 chain of the mortgage title.

10 MERS was created in order to facilitate the sale process. It is a voluntary electronic
11 registry of loan ownership for parties that participate in the MERS system. For lenders interested
12 in using the system, the deeds of trust or mortgage for the loan uses MERS as the named
13 beneficiary or mortgagee, as the case may be. The lender registers the loan with MERS, and,
14 upon sale of the note, the details of the sale (most notably for our purposes, the identity of the
15 assignee), as well as subsequent sales, are tracked on the MERS system. MERS remains
16 beneficiary or mortgagee of record. This system eliminates the need to process and record
17 assignments in the county records, thereby removing one of the practical impediments to the sale
18 of mortgage loans.

19 This simple design, and its operation, supports and serves the secondary mortgage market
20 for loans – because it makes them easier to sell. As the Court is doubtless aware, the ability to
21 sell a loan is a central feature of maintaining a strong flow of money to lend; a lender that sells
22 the loan on the secondary market is able to use the proceeds to make another loan. For this
23 reason, the federal government has long fostered a robust secondary mortgage market in many
24 ways, including through the chartering of Fannie Mae and Freddie Mac. MERS supports the
25 secondary market also, and was created in line with these important public purposes.

26 Not surprisingly, federal lending regulatory agencies have repeatedly approved use of
27 MERS by lenders, and noted its benefits to lenders and consumers alike. The Office of
28

1 Comptroller of the Currency, which regulates national banks, has published a guide about MERS
2 and its operations. The guide explains that consumers (and others) benefit from use of MERS
3 because it “streamlines the mortgage process by using electronic commerce to eliminate paper.”
4 Office of the Comptroller of the Currency – Guide to MERS (July 7, 2009) at p. 1 (attached as
5 Exhibit 8).⁵ Likewise, the Office of Thrift Supervision, which regulates federal thrifts,
6 commented favorably on the increasing use of MERS, noting that it “sav[es] considerable time
7 and money.” Regulatory Bulletin 37-28 (Nov. 13, 2008) at pp. 750.18-750.19 (relevant pages
8 attached as Exhibit 9).

9 The United States Department of Housing and Urban Development has gone further, and
10 required use of MERS for certain loans. HUD recently sent a letter to lenders who make
11 government-insured loans under the Hope for Homeowners Program, which Congress passed
12 this year in part to assist borrowers avoid foreclosures. In that letter, HUD required that lenders
13 making loans under the program “must register the . . . first mortgage in the Mortgage Electronic
14 Registration System (MERS) as a MERS Original Mortgage.” HOPE for Homeowners
15 Origination and Servicing Guideline Supplement, U.S. Dep’t of Housing and Urban
16 Development (Jan. 6, 2008) at 7 (attached as Ex. 10).

17 Each of the deeds of trust given by the Plaintiffs is one that names MERS as the
18 beneficiary. MERS is a party to the deeds of trust, and so each Plaintiff contracted with MERS
19 when they signed that document. The deeds of trust each clearly identify MERS and its role,
20 identifying itself in the operative clause that actually grants the security that it is the “beneficiary
21 of this Security Instrument (solely as nominee for Lender and Lender’s successors and assigns).”
22 E.g., Graves Deed of Trust at 2 (attached as Ex. 11). The suggestion that MERS is a stranger to
23 the transaction, or that Plaintiffs somehow were unaware of MERS, is without foundation.

24
25
26 ⁵ The guide also explains how a consumer may use the MERS website to obtain information
27 about a loan. Id. at 1-4.
28

1 As with any entity that is serving as a nominee for another, MERS will convey its
2 recorded interest to the lender or note holder or other interested party when necessary. One such
3 occasion is when the property is being foreclosed, and the lien realized upon. But this transfer is
4 of no consequence to the borrower, who always knew that MERS was acting as nominee and
5 consented to that arrangement. Any transfer to MERS has no effect on the debt owed.

6 Plaintiffs make a series of accusations about MERS and the MERS system, including that
7 it was designed to obfuscate and hide alleged predatory lending practices that Plaintiffs contend
8 harmed them and others who obtained loans in 2004 or afterwards. Defendants reject the
9 assumption that Plaintiffs have any claim in this case. But the concept that MERS is intended to
10 hide lending conduct plainly is an invention – as MERS was created more than a decade before
11 the alleged conduct Plaintiffs contend MERS was designed to hide. Instead, as reflected in the
12 actual history, design and operation of MERS, and the numerous cases discussed in this brief and
13 other briefs in this case which have rejected challenges to MERS’ activities, MERS is a
14 legitimate and useful enterprise.

15 **GOVERNING STANDARD**

16 A preliminary injunction “is an extraordinary and drastic remedy, one that should not be
17 granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v.
18 Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original). See Veterans for Peace Greater
19 Seattle, Chapter 92 v. City of Seattle, No. C09-1032 RSM, 2009 WL 2243796, at *6 (W.D.
20 Wash. July 24, 2009) (preliminary injunction may not issue unless “the movant’s right to relief
21 [is] clear and unequivocal”). Plaintiffs ask this Court to engage in the “exercise of a very far
22 reaching power never to be indulged except in a case clearly warranting it.” Sierra Club v.
23 Hickel, 433 F.2d 24, 33 (9th Cir. 1970). Because it is an equitable remedy, this Court has
24 discretion to deny a preliminary injunction for a wide variety of reasons available to a court of
25 equity. See Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1097 (9th Cir. 1985) (unclean hands).

ARGUMENT

When judged under the appropriate standards, Plaintiffs' Motion must be denied. As discussed below, Plaintiffs have not demonstrated their entitlement to a preliminary injunction under the familiar four-factor test that examines likelihood of success, balances the parties' competing harms, and considers adverse impacts on the public interest. However, even before considering that test, there are multiple reasons why Plaintiffs are not entitled to the extraordinary remedy of a preliminary injunction, and which require denial of the Motion.

I. NO INJUNCTION MAY ISSUE BECAUSE CLASS CERTIFICATION IS INAPPROPRIATE.

The Court should deny the Motion, first and foremost, because no class can be certified under Rule 23, as detailed in the Opposition to Class Certification also filed today. When a plaintiff seeks injunctive relief, the district court "must . . . tailor the injunction to affect only those persons over which it has power." Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1985). If a lawsuit is not certified as a class action, any putative class members are strangers to the action and cannot be given any relief by the court. Saleh v. Titan Corp., 353 F. Supp. 2d 1087, 1091 (S.D. Cal. 2004) ("putative class members are not parties to an action prior to class certification"). Thus, "[w]ithout a properly certified class, a court cannot grant relief on a class-wide basis," which dooms Plaintiffs' request for a multi-state preliminary injunction. Zepeda, 753 F.2d at 728 n.1. See also Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003); Brown v. Trustees. of Boston Univ., 891 F.2d 337, 361 (1st Cir. 1990); Nat'l Ctr. for Immigrants Rights, Inc. v. INS, 743 F.2d 1365, 1371 (9th Cir. 1984).

II. PLAINTIFFS ARE NOT ENTITLED TO SEEK OR OBTAIN ANY INJUNCTION.

A. All But One Of The Plaintiffs Lack Standing Because of the Stipulations Already Entered on Their Behalves.

Most fundamentally, every Plaintiff except Graves lacks standing to seek a preliminary injunction against foreclosure of the properties of putative class members, or to seek class certification on their behalf, because they do not face the prospect of foreclosure themselves.

1 In response to Plaintiffs' individual motions for a temporary restraining order,
 2 Defendants stipulated as to the Casas, Lopez, Peternell, and the Evensons, and other defendants
 3 stipulated as to Plaintiffs Gray and Frankowski, that they —

4 will not initiate or advance any foreclosure sale, take possession of,
 5 or in any other manner interfere with the peaceful enjoyment and
 6 possession of the [named Plaintiffs' properties] pending a trial on
 7 the merits in the above-captioned matter . . .

8 Docket Nos. 59-63. The Court approved the
 9 parties' Stipulations on the ground that "the parties
 10 agree [the Stipulations] moot[] all issues contained
 11 in the Plaintiffs' Second Motion for Temporary
 12 Restraining Order." Minutes of the Court (May 18,
 13 2009). As the Stipulations provided each of those
 14 Plaintiffs with the injunctive relief sought by the
 15 Motion, they lack standing to prosecute their motion
 16 for a preliminary injunction.⁶

17 While these Plaintiffs will doubtlessly complain about this result, it is of their own
 18 making. Each of them made a choice to pursue and obtain injunctive relief for their personal
 19 benefit before they sought injunctive relief for strangers, and to insist on a personal injunction
 20 that lasted the entire case rather than one only long enough to give them a chance to move for an

21 ⁶ There is a narrow exception to the mootness doctrine, under which standing exists if
 22 Plaintiffs demonstrate that they are "realistically threatened by a repetition of [the alleged
 23 wrongdoing]," City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983), and that there is a
 24 "reasonable expectation" that the alleged wrongful conduct will reoccur, "triggering the
 25 alleged harm." Truth v. Kent Sch. Dist., 542 F.3d 634, 642 (9th Cir. 2008) (internal
 26 quotation and citations omitted). No such threat exists when a court-approved stipulation is
 27 in effect. See Cody v. Hillard, 599 F. Supp. 1025, 1048 (D.S.D. 1984) (mootness exists
 28 when defendant forbears from action "by consent or stipulation of the parties which is
 entered in the record and so decreed by the court"); S.D. v. St. Johns County Sch. Dist., No.
 3:09-cv-250-J-20 TEM, ___ F. Supp. 2d ___, 2009 WL 1024683, at *11 (M.D. Fla. Apr. 15,
 2009)(stipulation to injunctive relief would "guarantee" cessation of allegedly wrongful
 conduct).

1 injunction for others. Their decision to enter into Stipulations deprived them of the ability to
2 pursue the same relief now. Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 732-33 (9th
3 Cir. 2007) (mootness applies when “plaintiff had standing when he or she filed suit but due to a
4 changed circumstance his or her claim became moot”).

5 **B. Plaintiff Graves Has No Standing Because He Does Not Face Foreclosure.**

6 Plaintiff Graves did not file a motion for a temporary restraining order or a preliminary
7 injunction, and so did not enter into a Stipulation. He also lacks standing to seek an injunction,
8 because he testified that he has not received any foreclosure notices from Countrywide, (Graves
9 Dep. at 146), and because Plaintiffs have offered no evidence that he faces any threat of
10 foreclosure. City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (injunction not permissible
11 unless plaintiff faces a real threat of harm). In a similar situation, this Court initially denied
12 Plaintiff Peternell’s request for a temporary restraining order because “it does not appear that
13 there is a threat of irreparable injury as no notice has been given that a judicial foreclosure is
14 contemplated or imminent with respect to his house.” Docket No. 41 at 4. Similarly, Judge
15 Teilborg of the United States District Court for the District of Arizona recently denied a
16 preliminary injunction in similar circumstances, in which the same counsel representing the
17 Plaintiffs here moved for a preliminary injunction even though a foreclosure sale had been
18 cancelled. Cervantes v. Countrywide Home Loans, Inc., No. CV 09-517-PHX-JAT, 2009 WL
19 1636169, at *4 (D. Ariz. June 10, 2009) (“[t]he mere future threat of foreclosure and eviction . . .
20 fails to satisfy [the plaintiff]’s burden that he will suffer irreparable harm if the Court fails to
21 grant . . . the preliminary injunction he seeks”).⁷ Graves is in no position to seek an injunction
22 either for his own account, or for others.

23
24 ⁷ Other courts have reached similar conclusions. See Muhammad v. HSBC Bank USA, N.A.,
25 No. 09-53, 2009 WL 256275, at *1 (S.D. Ala. Feb. 3, 2009) (“In light of the temporary
26 cancellation of the foreclosure sale, plaintiff does not state a prima facie case for preliminary
27 injunctive relief. Specifically, plaintiff is unable to adequately show the presence of
28 immediate, irreparable harm”); Mandrigues v. World Sav., Inc., No. C 07-4497 JF
(RS), 2009 WL 160213, at *4 (N.D. Cal. Jan. 20, 2009) (chance that foreclosures might
occur in future “provides an inadequate basis” for injunction).

1 **C. Certain Plaintiffs' Conduct Precludes Equitable Relief.**

2 Plaintiffs come to the Court seeking a preliminary injunction. Because injunctions are
3 equitable remedies the movant's improper or inequitable conduct is a full and sufficient reason to
4 deny relief. Precision Instrument Mfg. Co v. Auto Maint. Mach. Co., 324 U.S. 806, 815 (1945)
5 (“Any willful act [which] transgress[es] equitable standards of conduct is sufficient cause” to
6 deny an injunction”); First Global Communications, Inc. v. Bond, 413 F. Supp. 2d 1150 (W.D.
7 Wash. 2006) (denying injunction based on unclean hands). Although only limited discovery has
8 occurred, the record that Defendants have been able to adduce reveals that certain Plaintiffs have
9 engaged in conduct that calls into question their entitlement to an injunction, for two reasons.

10 First, had Plaintiffs been truly interested in seeking equity during this dispute, they would
11 have placed the amounts of their required loan payments into escrow, or at least made some
12 partial payments to Defendants (or into escrow). Other courts have found that when a home loan
13 borrower comes to federal court seeking equitable relief, but has been unwilling to “do equity”
14 and make some payments on an ongoing basis, the denial of an injunction against foreclosure is
15 wholly appropriate. See, e.g., Alcaraz v. Wachovia Mortgage FSB, 592 F. Supp. 2d 1296, 1305
16 (E.D. Cal. 2009) (denying injunction against lender; plaintiff made no loan payments for over a
17 year); Evans v. J.P. Morgan Chase Bank, No. 06-13973, 2007 WL 2049254, at *6 (E.D. Mich.
18 July 17, 2007) (plaintiff who stopped paying loan barred from equitable claims).

19 Second, discovery so far has revealed that several of the Plaintiffs made
20 misrepresentations and took other actions that call into question whether they could be entitled to
21 receive equitable relief. Plaintiff Graves admitted at his deposition that when applying for his
22 loan with Countrywide Bank, he had overstated his income by almost 300%, and misrepresented
23 that he would live in the \$1.2 million house that secured his Countrywide loan. Graves Dep. at
24 52-57. Like Plaintiff Graves, Plaintiffs Peternell and Mr. Evenson each signed a loan application
25 indicating that his income was far higher than it actually was. Peternell Dep. at 45-46; Evenson
26
27
28

1 Dep. at 131.⁸ Similarly, Plaintiff Lopez now states that she had no income at the time she
2 applied for her mortgage, but one of her loan applications states that she had held a job for three
3 years. Lopez Dep. at 51, 54–55. In each instance, a material misrepresentation made at the time
4 of loan origination is a breach of the deeds of trust, and permits foreclosure. See Plaintiffs’
5 Deeds of Trusts (attached as Exs. 11 to 15); Pac. Maxon, Inc. v. Wilson, 619 P.2d 816 (Nev.
6 1980) (intentional material misrepresentation merits rescission of the contract). These
7 circumstances undermine the very factual basis on which Plaintiffs induced Defendants to make
8 them a loan and, with that, the equitable basis on which they seek to enjoin foreclosure.

9 **III. PLAINTIFFS HAVE NOT MET THEIR HEAVY BURDEN OF**
10 **DEMONSTRATING THAT THE REQUIREMENTS FOR ISSUANCE OF**
11 **PELIMINARY INJUNCTIVE RELIEF ARE SATISFIED.**

12 Even if they could overcome the obstacles described above, the Motion should be denied
13 because Plaintiffs have not met their burden of demonstrating they are entitled to a preliminary
14 injunction. To obtain that relief, Plaintiffs must show that: (1) they are likely to succeed on the
15 merits; (2) they or the putative class face an imminent threat of irreparable injury without relief;
16 (3) the balance of hardships favors an injunction; or (4) the injunction would be in the public
17 interest. Winter v. Natural Resources Defense Council, 129 S. Ct. 365, 374 (2008); American
18 Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009); South Fork
19 Band v. Dep’t of Interior, No. 3:08-CV-00616-LRH-RAM, 2009 WL 249711, at *3 (D. Nev.
20 Feb. 3, 2009).

21 As an initial matter, the Court should reject Plaintiffs’ request that the Court consider
22 their Motion under more-lenient standards that appear in pre-Winter cases. Motion at 13-14
23 (urging Court to enter injunction on proof of “probable” success on the merits and the
24 “possibility” of irreparable injury, or where “serious” questions of liability exist and the balance
25 of hardships “tip sharply” in their favor). The Ninth Circuit recently held that all non-traditional

26 ⁸ Peternell speculated that he had not read the document before he signed it, and Evenson
27 tried to claim that he was not sure if the signature on his loan application was his. Peternell
28 Dep. at 45-47; T. Evenson Dep. at 117-20. When counsel asked Evenson to write his name
on a piece of paper so that a comparison could be made, he refused. Id. at 120-27.

1 tests for an injunction were overruled by the Supreme Court in Winter. American Trucking, 559
2 F.3d at 1052. The Court of Appeals stated: “[t]o the extent that our cases have suggested a
3 lesser standard” than the traditional four-factor test set forth in Winter, “they are no longer
4 controlling, or even viable.” Id.; see also Cervantes, 2009 WL 1636169, at *1 & n.1 (D. Ariz.
5 June 10, 2009) (rejecting alternative formulation). Thus, either the Motion meets the traditional
6 four-part test or it must be denied.

7 **A. Plaintiffs Have Failed To Demonstrate A Likelihood Of Success On The**
8 **Merits.**

9 Plaintiffs base their request for an injunction on the assertion that “MERS holds no
10 beneficial interest in any deed of trust on which it is named as a ‘beneficiary,’ and indicates that
11 Plaintiffs are likely to prevail on the merits.” Motion at 9. Plaintiffs go on to discuss several
12 cases that they contend show that MERS does not have standing to pursue foreclosure in its own
13 name and that the deeds of trust allegedly cannot be enforced because the notes are held by a
14 party different from the one foreclosing. Id. at 9-12. Separately, the Motion seems to contend
15 that the injunction can be based on proof of the alleged industrywide conspiracy to create MERS,
16 as alleged in the Fifth Claim for Relief. Motion at 4. None of these alternative bases are likely
17 to succeed in establishing that Plaintiffs cannot be subject to nonjudicial foreclosure, for multiple
18 reasons.

19 ***1. Plaintiffs Are Not Likely To Succeed On Their Challenge To MERS’***
20 ***Status As Beneficiary.***

21 Plaintiffs have not shown that they are likely to succeed on the merits of the basic
22 premise of their entire lawsuit — that MERS may not be the nominal beneficiary under a Deed
23 of Trust. The overwhelming weight of judicial authority — from this Court, in Nevada state
24 court, and elsewhere — upholds the presence of MERS as a beneficiary who is the nominee of
25 the lender.

26 In an unrelated case, this Court recently granted a motion to dismiss filed by MERS, and
27 rejected as “without merit” the plaintiff’s argument that MERS had no right to confer upon the
28 trustee under a Deed of Trust the power to sell a property through non-judicial foreclosure on

1 behalf of the lender. Ramos, No. 2:08-CV-1089-ECJ-RJJ, slip. op. at 6 (D. Nev. Mar. 5, 2009).
2 Citing Nev. Rev. Stat. Ann. § 107.080(b), the Court noted that Nevada law “explicitly grants the
3 power to commence foreclosure proceedings to ‘the beneficiary, the successor in interest of the
4 beneficiary or the trustee,’” and that the plaintiffs’ deed of trust “names MERS ‘the beneficiary
5 under this Security Instrument.’” Id. at 6-7. The Court also quoted a provision of the deed of
6 trust which stated that MERS “has the right to exercise any or all” of the lender’s interests,
7 including “the right to foreclose and sell the Property,” and a separate provision which
8 authorized the lender (and MERS acting on its behalf) to remove the trustee and appoint a
9 successor trustee. Id. at 7. The Court held that “under the deed of trust, MERS was empowered
10 to foreclose on the property and to appoint [another defendant] as substitute trustee for purpose
11 of conducting the foreclosure.” Id.

12 Similarly, in Khalil v. Fidelity National Default Solutions Tustin, No. A560582, slip. op.
13 at 3 (Dist. Ct. Clark County, Nev. Nov. 24, 2008) (attached as Exhibit 16), a Nevada state court
14 recently found that “MERS, as a lender’s nominee and the named beneficiary [on the Deeds of
15 Trust], ha[d] standing to foreclose on the Deeds of Trust” and that “a lender’s nominee has
16 standing to act as beneficiary under a deed of trust.” Id. at 3; see also Elias v. HomeEQ
17 Servicing, No. 2:08-CV-1836 JCM (PAL), 2009 WL 481270, at *1 (D. Nev. Feb. 25, 2009)
18 (recorded deeds of trust confirmed the standing of MERS as the nominee beneficiary to seek
19 foreclosure). As set forth in the margin, federal courts in this District and courts in multiple
20 states have reached the same or similar conclusions that MERS’ status as beneficiary of the
21 nominee of the lender does not get in the way of foreclosure, by MERS or by other parties.⁹

22 _____
23 ⁹ See Dunlap v. Mortgage Elec. Registration Sys., Inc., No. 2:08-cv-00918-RCJ-GWF, slip
24 op. at 1 (D. Nev. Jan. 5, 2009) (granting motions to dismiss filed by MERS and ReconTrust
25 because MERS “does have standing and the authority to initiate foreclosure proceedings on
26 the subject property under the language of the Deed of Trust”) (attached as Exhibit 17);
27 Trent v. Mortgage Elec. Registration Sys., Inc., 288 Fed. App’x 571, 572 (11th Cir. 2008)
28 (“Under the mortgage contracts, [MERS] has the legal right to foreclose on the debtors’
property” and “is the mortgagee.”); Farahani v. Cal.-Western Reconveyance Corp., No. C
09-194 JF (RS), 2009 WL 1309732, at *2–3 (N.D. Cal. May 8, 2009) (upholding MERS’
role in initiating a non-judicial foreclosure under California law); Mansour v. Cal.-Western

1 This authority is not surprising given that, in many states, nominees or representatives are
 2 expressly permitted — either by statute or judicial precedent — to initiate foreclosure
 3 proceedings. For example, just among those jurisdictions in which the Plaintiffs seek an
 4 injunction, Alabama, California, the District of Columbia, Hawaii, and Mississippi expressly
 5 permit by statute agent-initiated foreclosures.¹⁰ Missouri, North Carolina, and West Virginia
 6

7
 8 Reconveyance Corp., No. CV-09-37-PHX-DGC, 2009 WL 1066155, at *4 (D. Ariz. Apr.
 9 21, 2009) (granting motion to dismiss and dismissing complaint to stop foreclosure
 10 proceedings where MERS named as defendant); Elias, 2009 WL 481270, at *1 (holding that
 11 the recorded deeds of trust confirmed the standing of the loan servicer, the loan owner, and
 12 MERS as the nominal beneficiary to seek foreclosure); Lumzy v. Mortgage Elec.
 13 Registration Sys., Inc., No. 2:08-CV-23-KS-MTP, 2008 WL 3992671, at *2–3 (S.D. Miss.
 14 Aug. 21, 2008) (dismissing plaintiff’s claim that “the note holder ha[d] isolated itself from
 15 the borrower by virtue of the MERS registration” and recognizing MERS’ authority to
 16 foreclose as agent for the lender); Farner v. Countrywide Home Loans, No. 08cv2193
 17 BTM(AJB), 2009 WL 189025, at *2 (S.D. Cal. Jan. 26, 2009) (holding that MERS’ agents
 18 had standing to foreclose); Smith v. Bank of New York, 366 B.R. 149, 151 (Bankr. D. Colo.
 19 2007) (defendant loan owner had the right to foreclose where MERS was named as the
 20 beneficiary on the deed of trust, because “MERS is the designated nominee for whomever
 21 the Note is assigned to”); Mortgage Elec. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33,
 22 34 (Fla. Dist. Ct. App. 2007) (citing “the clear majority of cases” to hold that “no
 substantive rights, obligations or defenses are affected by the use of the MERS device”)
 (citing cases); Sulak v. Mortgage Elec. Registrations Sys., Inc., No. E038916, 2006 WL
 3514873, at *2, *10 (Cal. Ct. App. Dec. 7, 2006) (“Nothing [MERS and the other
 defendants] did, by way of assignment, endorsement, or transfer of the deed of trust or the
 note injured plaintiffs in any discernible or conceivable way.”); Peyton v. Recontrust Co.,
 No. TC021868, Notice of Ruling, at 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 Exhibit 18);
Mortgage Elec. Registrations 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).

23 ¹⁰ Ala. Code § 35-10-1; Cal. Civ. Code § 2924a(e); D.C. Code § 42-815; Haw. Rev. Stat.
 24 § 667-5; Miss. Code Ann. § 89-1-63(2). These statutes are supplemented by judicial
 25 authority. E.g., Union Bank & Trust Co. v. Royall, 148 So. 399 (Ala. 1933) (mortgagee’s
 26 agent conducted foreclosure proceedings); Adams v. SCME Mortgage Bankers, Inc., No.
 27 CV F 09-0501 LJO SMS, 2009 WL 1451715, at *7 (E.D. Cal. May 22, 2009) (pursuant to
 28 California law, a trustee, beneficiary, mortgagee, or any of their agents, may conduct
 foreclosure); Apao v. Bank of New York, 324 F.3d 1091, 1095 (9th Cir. 2003) (implicitly
 recognizing use of foreclosure agent to carry out process); Lumzy, 2008 WL 3992671, at *2
 (recognizing agent’s authority to foreclose on behalf of lender).

1 have statutes that impliedly recognize this authority.¹¹ In many of the remaining states, case law
2 permits a noteholder's agent to initiate foreclosure.¹² There is thus no question that, in many of
3 the states where the Plaintiffs seek to enjoin nonjudicial foreclosures, they are exceedingly
4 unlikely to establish that MERS may not take steps to support and ultimately initiate foreclosures
5 in the capacity as nominee of the noteholder.

6 Similarly, from the foregoing and related principles, it is plain that Plaintiffs have not
7 shown that they are likely to succeed in proving that naming MERS on the Deed of Trust
8 invalidates the lender's security interest. The above-cited are antithetical to a contention that
9 MERS' presence as a beneficiary voids the deed of trust. As the Florida Court of Appeals has
10 noted, MERS serves a "salutary" purpose and "no substantive rights, obligations or defenses are
11 affected by the use of the MERS device." Revoredo, 955 So. 2d at 34.

12 Against this wall of judicial and legislative authority, Plaintiffs cite just three decisions
13 and contend the cases show they are likely to win their claim, as to all twenty-nine jurisdictions'
14 laws. Motion at 9–12 (citing In re Hawkins, No. BK-S-07-13593-LBR, 2009 WL 901766
15 (Bankr. D. Nev. Mar. 31, 2009); In re Jacobson, No. 08-45120, 2009 WL 567188 (Bankr. W.D.
16 Wash. Mar. 10, 2009); Mortgage Elec. Registration Sys., Inc. v. Southwest Homes of Ark., No.

17
18 ¹¹ Mo. Rev. Stat. § 443.290; N.C. Gen. Stat. § 45-7; W.Va. Code § 38-1-4. Again, these
19 statutes are supplemented by judicial authority. E.g., Dunn v. Watson, 566 S.E.2d 305,
20 308 (W.Va. 2002) (citing West Virginia statute recognizing role of "beneficiary's agent or
21 assignee" in foreclosure proceedings); Black v. Adrian, 80 S.W.3d 909, 910 (Mo. Ct. App.
22 2002) (implicitly recognizing appointment of substitute trustee to pursue foreclosure).

23 ¹² See, e.g., In re Webb, 308 B.R. 357, 361 (Bankr. E.D. Ark. 2004) (recognizing that a
24 lender's agent may initiate foreclosure); Prentice v. Bank of New York Trust Co., No.
25 283789, 2009 WL 1139332, at *1 (Mich. Ct. App. Apr. 28, 2009) (appointment of agent to
26 initiate foreclosure complies with Michigan's statutory foreclosure regime); First Nat'l Bank
27 in Bozeman v. Powell, 689 P.2d 255, 256 (Mont. 1984) (implicitly recognizing that a
28 trustee's agent may initiate non-judicial foreclosure); UMLIC VP LLC v. T & M Sales &
Envtl. Sys., Inc., 176 S.W.3d 595, 615 (Tex. App. 2005) (implicitly recognizing that a
beneficiary's agent may initiate foreclosure proceedings); cf. also Bevins v. Peoples Bank &
Trust Co., 671 P.2d 875, 878 (Alaska 1983) (upholding provision in deed of trust allowing
beneficiary to collect money owed "either in person, by agent, or by a receiver . . .");
McLaughlin v. Mut. Bldg. & Loan Ass'n of Las Vegas, 60 P.2d 272, 275 (Nev. 1936)
(recognizing that a beneficiary may appoint an agent to attend a foreclosure sale)

1 08-1299, 2009 WL 723182 (Ark. Mar. 19, 2009)). As an initial matter, it is important to
 2 understand that none held that the mere fact that MERS was named on the deed of trust means
 3 either that the deed of trust is void or that no foreclosure action could be brought on a deed of
 4 trust on which MERS appears. Instead, they at most concern whether MERS is a real party in
 5 interest for certain purposes, under federal bankruptcy law, Bankr. R. 17, or a few states' laws.¹³
 6 The cases are not persuasive because these issues are not presented here. First, it appears that
 7 MERS is not foreclosing on the named Plaintiffs whose loans were being serviced by
 8 Countrywide or Wells Fargo at the time of default; instead, the foreclosure notices were from the
 9 trustees under their deeds of trust, not MERS. See Notices of Default and Election to Sell for
 10 Plaintiffs Casas, Evensons, and Peternell, attached as Exhibit 19. Second, this is not a
 11 bankruptcy case and the "real party in interest" concept arises in judicial actions, not nonjudicial
 12 foreclosures. The point is especially important with respect to the only Nevada case Plaintiffs
 13 cite, Hawkins, where the lynchpin of the decision concerned whether MERS met the real party in
 14 interest standards embodied in Rule 17. Third, if the Hawkins case, on which Plaintiffs'
 15 principally rely, means what Plaintiffs say, it is not consistent with this Court's Ramos opinion
 16 or with other Nevada-law cases (Khalil and Elias).

17 Plaintiffs also rely on their purported "expert" Garfield, whose raft of opinions include
 18 several related ones to the effect that MERS has no interest, it is not a real party in interest, it is
 19 not a holder in due course, and the deed of trust is void. See Affidavit of Neil F. Garfield, Esq.,
 20 ¶¶ 5-6 (Ex. 5 to Motion). The Court should ignore them. Garfield and Plaintiffs' counsel,¹⁴ and
 21 the case law,¹⁵ all confirm that an "expert" should not be proffering legal opinions – and that is

22
 23 ¹³ See In re Hawkins, 2009 WL 901766, at *4 (MERS can foreclose if it can "establish [that]
 24 there has been a sufficient transfer of both the note and deed of trust, or that it has the
 authority under state law to act for the note's holder.")

25 ¹⁴ Garfield Dep. Vol. I at 28-29, 105; Vol. II at 96 (attached as Ex. 20).

26 ¹⁵ See United States v. Brodie, 858 F.2d 492, 495-96 (9th Cir. 1988) ("Taxpayers attempted to
 27 call an accountant to testify that he had examined their business records . . . and had
 determined that they owed no taxes. . . . This ultimate conclusion was the very question the
 28 jury had to answer from the law and evidence. It was not subject to a so-called expert's
 opinion"); see also 33A Fed. Proc., L. Ed. § 80:283, Expert and Opinion Testimony (2008)

1 all these are. Moreover, as explained at length in Defendants' opposition to the motion for class
2 certification, Garfield is no expert at all.

3 Plaintiffs' theory also is unlikely to support a finding that the deeds of trust are invalid,
4 because each of them contracted with MERS, consented to MERS' appearance as nominal
5 beneficiary, and plainly intended to grant a security interest on the loans. Each Plaintiff's Deed
6 of Trust confirms his or her agreement that MERS is to be the beneficiary "acting solely as a
7 nominee for Lender and Lender's successors and assigns." See e.g., Graves Deed of Trust at 2.
8 These provisions in the deeds of trust, enforceable in contract,¹⁶ show that Plaintiffs, Defendants,
9 and the putative class all agreed to create a secured instrument and align the parties as they did,
10 intending to give legal effect to the contracts. Khalil, slip op. at 2-3 (rejecting misrepresentations
11 claims concerning MERS because "MERS' role as lender's nominee and beneficiary [was] fully
12 disclosed on the face of the Deeds of Trust" and because plaintiff "expressly consented to
13 MERS' role"); Lumzy v. Mortgage Elec. Registration Sys., Inc., No. 2:08 cv 23 KS-MTP, 2008
14 WL 3992671, at *2-3 (S.D. Miss. Aug. 21, 2008) (there were no facts to support a claim of false
15 representations or deceptive acts to collect a debt where MERS was listed as nominee
16 beneficiary on the deed of trust).¹⁷ Indeed, the Arkansas case Plaintiffs rely on confirms that a

18 ("Generally, the Federal Rules of Evidence do not permit the admission of legal conclusions
19 by a witness. . . . Expert testimony which consists of legal conclusions which will determine
20 the outcome of the case . . . is not admissible because it is generally outside the witness' area
21 of expertise. . . and cannot properly assist the trier of fact either in understanding the
22 evidence or in determining a fact in issue.") (internal citations omitted).

21 ¹⁶ See, e.g., United States v. Residence on Grand Ave., No. CV-N-665-ECR, 1992 WL
22 246912, at *1 (D. Nev. Sept. 10, 1992) (treating deed of trust as a contractual agreement and
23 enforcing provision in "deed of trust agreement" obligating the trustor to pay the reasonable
24 attorney's fees incurred by lienholder); In re 268 Ltd., 75 B.R. 37, 38-39 (Bankr. D. Nev.
25 1987) (enforcing attorney's fee provision contained in deed of trust as a contractual
26 provision); Wellington Co. Profit Sharing Plan & Trust v. Shakiba, 952 A.2d 328, 337 (Md.
27 Ct. Spec. App. 2008) (deed of trust is a separate, enforceable contract); S. Trust Mortgage
28 Co. v. K & B Door Co., 763 P.2d 353, 355 (1988) (explaining that the deed of trust
contractually obligated appellant to perform by paying advances to non-party developer).

¹⁷ Contrary to Plaintiffs' assertions, MERS does not "make it virtually impossible" for a
borrower to learn the identity of the beneficial owner of his mortgage loan. Motion at 6.
Borrowers may obtain this information from their loan servicer under the Real Estate

1 deed of trust is enforceable, with the lender the effective (though unnamed) beneficiary.
2 Southwest Homes of Ark., 2009 WL 723182, at *1.

3 Finally, even if Plaintiffs were right that MERS cannot be a beneficiary, on their deeds of
4 trust, they are not likely to succeed on the merits of their claims because Plaintiffs have not
5 shown that they could avoid reformation and, instead will convince the Court to void them. A
6 contract is void only where there is a “total absence of legal effect.” 1 CORBIN ON CONTRACTS §
7 1.7, at 20 (1993). Such is not the case here. The essence of the Deeds of Trust is to secure the
8 loan by a pledge of real property in the event of default to the lender and its successors. The
9 essential nature of the contract is not altered by naming of MERS as the beneficiary to act as the
10 nominee of the lender and its successors. Plaintiffs have not named a single state statutory or
11 common law ground for voiding or cancelling their Deeds of Trust. And none exists. See Allen
12 v. Hernon, 328 P.2d 301 (Nev. 1958) (technical defects of acknowledgment and did not render
13 deed of trust void as between the parties to the instrument; revocation of mortgage company’s
14 charter did not render assignment from mortgage company of beneficial interest void).

15 If the naming of MERS presents a substantial issue (which Defendants deny), the remedy
16 of legal modification of the contract likely would be available and entered, as conforming the
17 instrument, is always preferable to invalidation. Roman v. Superior Court, 172 Cal. App. 4th
18 1462, 1477 (Cal. Ct. App. 2009); see also NOLM, LLC v. County of Clark, 100 P.3d 658, 663

19
20 Settlement Procedures Act, 12 U.S.C. § 2605(e). That statute requires a loan servicer to
21 respond to a written request for information from the borrower. The loan servicer must then
22 conduct an investigation, and provide the borrower with a written explanation or
23 clarification that includes— (i) information requested by the borrower or an explanation of
24 why the information requested is unavailable or cannot be obtained by the servicer; and (ii)
25 the name and telephone number of an individual employed by, or the office or department
26 of, the servicer who can provide assistance to the borrower. 12 U.S.C. § 2605(e)(2)(C).
27 Plaintiffs’ argument that MERS “hides” information from borrowers has been tried and
28 failed. Sulak, 2006 WL 3514873, at *2, *10 (affirming dismissal of plaintiff’s complaint
alleging that “MERS [had] conspire[d] with [the loan servicer] to conceal which entity in
fact held the original note” and stating that “[n]othing [MERS and the other defendants] did,
by way of assignment, endorsement, or transfer of the deed of trust or the note injured
plaintiffs in any discernible or conceivable way”).

1 (Nev. 2004) (reformation available to give effect to the intent and agreement of the parties);
 2 Grappo v. Mauch, 887 P.2d 740, 741 (Nev. 1994) (upholding district court’s decision to reform
 3 deed of trust to amend boundaries; “Deeds may be reformed in accordance with the intention of
 4 parties when that intention is frustrated by a mutual mistake.”). Here, where the parties intended
 5 that the borrowers would grant a security interest in the properties to ensure repayment of their
 6 obligations, Plaintiffs cannot both seek equity – an injunction – and avoid reformation, if they
 7 are right that there is any substantial issue with the contracts. At a minimum, Plaintiffs have not
 8 shown that they and every single class member are likely to be able to have their cake and eat it
 9 too.

10 **2. *Plaintiffs Are Not Likely To Prevent Nonjudicial Foreclosures Because***
 11 ***The Deeds of Trust Do Not Require Any Act By The Beneficiary In***
 12 ***Order For Foreclosure To Proceed.***

13 Plaintiffs also are unlikely to succeed in proving a right to stop nonjudicial foreclosures
 14 based on MERS’ role because, under Plaintiffs’ Deeds of Trust, the lender has the power to
 15 instruct the trustee to foreclose if default occurred. See supra at 16. Thus, even if MERS were
 16 somehow prevented from initiating foreclosure as a real party in interest, that would not prevent
 17 a foreclosure from being commenced under the contract.¹⁸ See id.; Adams v. SCME Mortgage
 18 Bankers, Inc., No. CV F 09-0501 LJO SMS, 2009 WL 1451715, at *7 (E.D. Cal. May 22, 2009)
 19 (a trustee, beneficiary, mortgagee, or any of their agents, may conduct foreclosure in California).
 20
 21

22 ¹⁸ See Elias, 2009 WL 481270, at *1 (recorded deeds of trust confirmed the standing of the
 23 loan servicer to seek foreclosure); Bankers Trust (Del.) v. 236 Beltway Inv., 865 F. Supp.
 24 1186, 1191 (E.D. Va. 1994) (both lender and servicer have standing to foreclose even if
 25 servicer is not the holder of the mortgage); cf. In re Woodberry, 383 B.R. 373, 379 (Bankr.
 26 D.S.C. 2008) (“The general rule is that a mortgage servicer has standing by virtue of its
 27 pecuniary interest in collecting payments under the terms of the note and mortgage[.]”)
 28 (citing In re Tainan, 48 B.R. 250, 252 (Bankr. E.D. Pa. 1985) (mortgage servicer a party in
 interest in a relief from stay proceeding)); Mortgage Elec. Registration Sys., Inc. v. Azize,
 965 So. 2d 151, 153 (Fla. Dist. Ct. App. 2007) (“[S]tanding [to foreclose] is broader than
 just actual ownership of the beneficial interest in the note”).

1 **3. *The Theory Based On The Alleged “Split” Of The Note And Deed Of***
2 ***Trust Is Unlikely To Succeed.***

3 Plaintiffs also have not shown that they are likely to show that all nonjudicial
4 foreclosures nationwide are improper because they are being pursued by an entity different from
5 the one with rights in the note. Dispositively, it is well-established that the lender’s security
6 interest would not be invalidated, as the assignment of the note would automatically carry with it
7 the security interest. *See, e.g., Hill v. Favour*, 84 P.2d 575, 578 (Ariz. 1938) (“An assignment of
8 the note carries the mortgage with it”); *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543,
9 553 (Cal. Ct. App. 1969) (“[A]n assignment of the debt carries with it the security”) (internal
10 quotations omitted); *Bellistri v. Ocwen Loan Servicing*, 284 S.W.3d 619, 623 (Mo. Ct. App.
11 2009) (“When the holder of the promissory note assigns or transfers the note, the deed of trust is
12 also transferred.”) (emphasis added).¹⁹ Moreover, as explained above, a number of states permit
13 nonjudicial foreclosures to be commenced and prosecuted by agents and representatives. It is
14 quite obvious, then, that the party enforcing the deed of trust need not have physical possession
15 of or an interest in the note, at least in some states. Compare *Motion* at 11 (citing *Hawkins* for
16 the proposition that a note is enforceable only by a holder “based on Nevada law”) (emphasis
17 added).

18 In the *Ramos* case, this Court rejected the argument that the party conducting a non-
19 judicial foreclosure must possess the original note in order to do so; the Court held:

20 There is . . . no requirement in Nev. Rev. Stat. § 107.080, nor any
21 other provision of Nevada law, that either the beneficiary or trustee
22 possess such a document.

23 *Ramos*, slip op. at 6. Likewise, the Minnesota
24 Supreme Court just recently held that MERS need

25 ¹⁹ A bankruptcy judge reached the opposition conclusion in a case cited by Plaintiffs, *In re*
26 *Hawkins*. The decision should not be followed, because federal courts are bound to apply
27 state court decisions on matters of state law, and the bankruptcy judge cited only the
28 Restatement of Property to support his conclusions. 2009 WL 901766, at * 4. As noted
above, judges interpreting state laws have regularly held that an assignment of the note
carries the security instrument with it.

1 not hold or record the assignment of a note in order
2 to foreclose under Minnesota law. Jackson v.
3 Mortgage Elec. Registration Sys., Inc., No. A08-
4 397, 2009 WL 2461257 (Minn. Aug. 13, 2009).

5 The Court held that under Minnesota law

6 it is possible for a party to hold legal title in the security
7 instrument—title that evidences apparent ownership but does not
8 necessarily signify a beneficial interest—without holding an
9 interest in the promissory note.

10 Id. at *11.

11 In contrast, Plaintiffs have not offered any case law suggesting they could win their novel
12 claim that the entity seeking to foreclose must also be a holder or possessor of the note or an
13 interest in the note in order to do so. Much of their argument appears to be based on the opinions
14 of their “expert,” who has professed a belief that nonjudicial foreclosures may not occur on any
15 securitized mortgage loan (he says, based on unidentified “information filed with the [SEC],” 94-
16 95% of all loans) because the note and deeds of trust securing its repayment somehow became
17 “split” after origination. Garfield Depo. Vol. 1 at 109, 120-21; Garfield Aff. at 5-9. According
18 to Garfield, the notes are held by the owners of the mortgage-backed securities (“MBS”) or
19 perhaps by the federal government, having purchased them through the TARP program.
20 Garfield Depo. Vol. 1 at 94-96, 121.²⁰

21 ²⁰ These musings need not detain the Court long because Garfield was unable to provide any
22 basis — other than interviews with unknown “Wall Street” insiders whose names he does
23 not recall. Garfield Depo. Vol. 1 at 127-28. In a mortgage-backed security, the note is
24 assigned to the trustee, not the trust investors. See, e.g., Pooling & Service Agreement for
25 Asset-Backed Certificates, Series 2006-22, at 56 (attached as Exhibit 21) (“Immediately
26 upon the conveyance of the . . . Mortgage Loans . . . , the Depositor sells, transfers, assigns,
27 sets over and otherwise conveys to the Trustee for benefit of the [investors], without
28 recourse, all right, title and interest in and to the . . . Mortgage Loans.”). And, apparently
unbeknownst to Garfield, the TARP program, despite announced intentions, has not
purchased loans. See Office of the Special Inspector General for the Troubled Asset Relief
Program (“SIGTARP”), Quarterly Report to Congress, at 85 (July 21, 2009), available at
http://www.sig tarp.gov/reports/congress/2009/July2009_Quarterly_Report_to_Congress.pdf
(attached as Ex. 22) (stating that the program to “purchase hard-to-value real estate-related

1 Plaintiffs have not even established that their novel theory applies to all of the Plaintiffs
2 and all of the members of the putative class. It does not. Many loans are not securitized at all.
3 Graves's loan was made by the same lender that still owns the loan. Declaration of Erin Abugow
4 ¶ 3 (filed herewith). The original trustee is still the trustee. The notion that all notes are
5 somehow "split" from the deeds of trust, and so a nationwide injunction is justified, is simply
6 wrong.

7 **4. *The Conspiracy Claim Cannot Support the Requested Injunction.***

8 In seeking a preliminary injunction, Plaintiffs also rely upon their Fifth Claim for Relief,
9 which alleges a conspiracy to commit fraud relating to the MERS system. Motion at 4.
10 Defendants already have moved to dismiss this cause of action. As they have not stated a
11 plausible claim for relief, Plaintiffs are, of course, unlikely to succeed on the merits of their
12 claim. See Frost v. Lutz, No. 92-16053, 1992 WL 367739, at *2 (9th Cir. Dec. 11, 1992) (where
13 plaintiff's allegations are insufficient to state a claim "it is unlikely that [the plaintiff] could
14 succeed on the merits").

15 Apart from its legal insufficiency, Plaintiffs are unlikely to succeed because their Motion
16 offers nothing concrete to support their farfetched claim. Once again, the sole support they offer
17 comes from Garfield. But Garfield has no facts, only surmise. As noted above at 7, MERS in
18 fact had several beneficial effects and the government itself has approved its use. MERS
19 eliminated delays and confusion involved in the transfer of mortgages and related recording of
20 those transfers in county records. As a result, MERS reduced the cost of lending and maintained
21 a strong flow of money to lend.

22 **B. The Balance of Hardships Militates Against An Injunction.**

23 Plaintiffs' failure to demonstrate that they are likely to succeed on the merits of their
24 claims requires that the Motion be denied. However, review of the impact on the parties if an
25 injunction were granted or denied further militates against issuance of the relief Plaintiffs seek.

27 loans from financial institutions" had been "postponed indefinitely"; the Treasury will still
28 invest in asset-backed securities supported by a pool of real estate-related loans).

1 The requested injunction would cause immediate and far-reaching financial harm to
2 Defendants. An injunction would affect a very substantial number of loans—for just these two
3 sets of Defendants, tens of thousands of loans in Nevada and hundreds of thousands
4 nationwide.²¹ Of these loans, Countrywide Bank, F.S.B.’s successor owns approximately 7,790
5 affected loans in all twenty-nine jurisdictions. Condra Decl. ¶ 5.

6 The Motion, if granted, would prevent nonjudicial foreclosures and thereby cause
7 significant financial losses to Countrywide and to Wells Fargo. When Countrywide and Wells
8 Fargo service a loan that is in default, they each incur substantial costs and expenses: (a) they
9 advance payments for taxes and insurance; (b) they inspect and maintain the properties (many of
10 which are vacant); and (c) they repair damages on those properties. Declaration of Mark Acosta
11 (“Acosta Decl.”) ¶¶ 14-15 (filed herewith); Declaration of Kim Miller (“Miller Decl.”) ¶¶ 14-15
12 (filed herewith). Defendants make these payments against an expectation of being reimbursed,
13 by the borrower or investor typically, but even if reimbursed they rarely are paid interest. Acosta
14 Decl. ¶ 16. Stopping nonjudicial foreclosures will not stop these expenses, they will only pile
15 up. For each additional month that Countrywide cannot foreclose, Countrywide estimates that it
16 would be forced to advance approximately \$95,385,888 in tax and insurance payments for loans
17 in the putative class. Condra Decl. ¶ 7. Wells Fargo estimates it would expend up to
18 \$12,716,750 monthly for these payments in California and Nevada alone. Golden Decl. ¶¶ 9, 11.

19 The size of these figures is enough to demonstrate the substantial amounts at issue, but
20 they do not begin to tell the entire story. Many of the properties in foreclosure are vacant
21 (because they are investment properties, or because the borrowers moved out), and as a result
22 experience fires, vandalism, theft and other similar problems; stopping foreclosures would

23
24 ²¹ Countrywide services approximately 12,424 loans in Nevada alone that are now in
25 foreclosure and originated between 2004 and 2008, Declaration of Michael J. Condra
26 (“Condra Decl.”) Ex. 1 (filed herewith); Wells Fargo is servicing approximately 5,107 of
27 such loans, Declaration of Tamara Golden (“Golden Decl.”) ¶ 9 Ex. 1 (filed herewith). The
28 total number of affected loans when the remaining twenty-eight jurisdictions (which
includes California) are included reaches approximately 145,184 for Countrywide and
80,315 for Wells Fargo.

1 increase the costs of such items, which Countrywide and Wells Fargo must bear. Acosta Decl.
2 ¶¶ 15; Miller Decl. ¶¶ 15. Also, in many states, property values are currently declining (in Nevada,
3 the decline is approximately 2-3% each month); an injunction delaying foreclosures will,
4 therefore, reduce the amounts obtained at any sales. Finally, if an injunction is entered and later
5 lifted, tens of thousands of properties likely would be placed on the market simultaneously,
6 further eroding values.

7 Plaintiffs may respond by asserting that these losses are not significant, for one of two
8 reasons. They may claim that, at most, Defendants will only experience a delay in payment.
9 While that is in part true, the amounts deferred are very large and the deterioration of properties
10 and declines in value present very real losses that arise precisely because of the delay. And in
11 most instances, if Defendants receive reimbursement, it is almost always without interest.

12 Plaintiffs may also contend that Defendants may simply pursue judicial foreclosures in
13 these states. While that is also true, judicial foreclosures are bound to be much lengthier than the
14 typical nonjudicial foreclosure and will involve substantial additional outlays for attorneys' and
15 court fees that must be accounted for as a significant cost of an injunction. See Acosta Decl. ¶¶
16 8-10; Miller Decl. ¶¶ 8-10; Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage*
17 *Default: Policies and Practices to Prevent Home Loss and Lower Costs* 35 (March 2008)
18 (attached as Exhibit 23) (stating that the "average expected timeline [for foreclosure] based on
19 legislated legal process" is 93 days in non-judicial foreclosure states, but 206 days in judicial
20 foreclosure states). In sum, there is very real hardship faced here by Defendants.

21 Plaintiffs contend that the balance of hardships favors the injunction for two reasons—
22 because "[t]he Class Members will irrevocably lose their homes and be rendered homeless" and
23 their "credit ratings will be significantly diminished as a result of" foreclosure. Motion at 13.
24 Defendants of course recognize that a nonjudicial foreclosure can result in a significant loss for
25 individuals and families who are living in the house that is sold. But in balancing the hardships,
26 the Court should recognize several factors that lessen – and in some instances eliminate – these
27 hardships.

1 It should not be overlooked that the underlying default on the loan is the cause of the
2 foreclosure and of any problem with credit ratings – not any issue with MERS appearing on the
3 deed of trust or any other of Plaintiffs’ alleged bases for relief. As the named Plaintiffs’
4 situations demonstrate, the defaults by and large are an unfortunate result of the economic
5 downturn and life’s unexpected turns. Graves Dep. at 95, 109, 140-41; Peternell Dep. at 116; J.
6 Casas Dep. at 15-16, 26-27, 56-57. This is consistent with industry trends, where
7 unemployment, death, divorce, illness, and other loss of income are the leading causes of serious
8 loan defaults. See Acosta Decl. ¶ 6; Miller Decl. ¶ 6; Cutts & Merrill, at 25 & Table 4. Plaintiffs
9 surely would argue that their loans were “predatory,” and that is why they defaulted, but the
10 argument for the injunction (and the factual record) simply do not provide that as a basis to
11 support an injunction.

12 Plaintiffs’ showing on this factor is also factually inadequate. The requested injunction is
13 to stop all “nonjudicial foreclosures on properties,” Motion at 2, so there are many more loans
14 than just single-family residences involved. For example, Graves owns two homes and does not
15 currently reside in the million-dollar mortgaged property at issue, and the Casases have two
16 homes in the same community. Graves Dep. at 10; J. Casas Dep. at 11-12. There are many
17 loans in the alleged class that are investor properties and second homes. The balance of harms
18 for loans such as those tips in favor of Defendants, and those loans cannot be swept into an
19 injunction with comments directed to different borrowers’ situations. The same is true of
20 borrowers who are subject to defenses or counterclaims.

21 There is no basis to conclude that a classwide remedy is appropriate because of the
22 balance of hardships because putative class members may not even want the injunction being
23 sought. The most common reasons for foreclosure are those very unfortunate life events that
24 lead to curtailment of income. Acosta Decl. ¶ 6; Miller Decl. ¶ 6. It is not surprising that, at the
25 time foreclosure begins, many of the properties are already vacant, and more become vacant as
26 time goes on. Acosta Decl. ¶ 12; Miller Decl. ¶ 12. Historically, many homeowners in financial
27 distress soberly realize their circumstances might not be remediable; a large number of those
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1 simply do not contest the foreclosure. Acosta Decl. ¶ 13; Miller Decl. ¶ 13. Others sell the
2 property in exchange for a forgiveness of the debt. Acosta Decl. ¶ 13; Miller Decl. ¶ 13. These
3 circumstances are certainly prevalent with respect to investment properties or second homes.

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

10 For these reasons, many members of the putative class actually are likely not to object to
11 the nonjudicial foreclosure process. A classwide remedy that requires everyone to hold onto
12 their property is not clearly in everyone's interest and, in many instances, actually will cause a
13 hardship rather than prevent one.

14 Without more of a factual showing, Plaintiffs have not shown the balance of hardships
15 plainly favors relief here. The Motion should be denied, because the harm to Defendants from
16 an injunction far outweighs possible harms that could occur if it is denied. See Golden Gate
17 Rest. Ass'n v. City & County of San Francisco, 512 F.3d 1112, 1125 (9th Cir. 2008) (denying
18 preliminary injunction where balance of hardships favored defendants); Trust Co. Bank v.
19 Putman Publ'g Group, Inc., No. CV 87 07393 AHS (JRX), 1988 WL 62755, at *8 (C.D. Cal.
20 Jan. 4, 1988) (same); Brewer v. Skolnik, No. 3:07-CV-00622 LRH (RAM), 2009 WL 653003, at
21 *3 (D. Nev. Mar. 10, 2009); Protech Diamond Tools, Inc. v. Liao, No. C 08-3684 SBA, 2009
22 WL 1626587, at *7 (N.D. Cal. June 8, 2009); see also Kass v. Arden-Mayfair, Inc., 431 F. Supp.
23 1037, 1041 (C.D. Cal. 1977).

24 **C. There is No Showing The Alleged Harm Is Imminent and Irreparable.**

25 Plaintiffs have not demonstrated and cannot demonstrate that either they or putative class
26 members face any presently existing threat of imminent harm.

1 Anything less than a clear threat of immediate and irreparable harm will not support a
2 preliminary injunction. As the Supreme Court recently admonished, “[i]ssuing a preliminary
3 injunction based only on a possibility of irreparable harm is inconsistent with our
4 characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a
5 clear showing that the plaintiff is entitled to such relief.” Winter, 129 S. Ct. at 365, 375–76.
6 Plaintiffs must therefore demonstrate not only that they face harm which is irreparable, but also
7 that the harm is presently existing and imminent—not merely a future possibility. Associated
8 Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1410 (9th Cir.
9 1991); Caribbean Marine Servs. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988); Miller v.
10 McDaniel, No. 3:06-CV-00077-KJD-VPC, 2007 WL 396996, at *8 (D. Nev. Feb. 1, 2007) (“[c]ourts generally do look at the immediacy of the threatened injury in determining whether to
11 grant preliminary injunctions”).²²

13 As discussed above, none of the named Plaintiffs is in danger of immediate foreclosure.
14 Thus, they face no threat of irreparable harm, and cannot obtain any further preliminary relief.
15 See Calence, LLC v. Dimension Data Holdings, PLC, 222 F. App’x 563, 566 (9th Cir. 2007).

16 Plaintiffs also do not show, nor could they, that each and every person for whose benefit
17 the injunction is sought faces imminent, irreparable harm. This precludes an award of a
18 preliminary injunction. Id. at 566 (due to lack of evidence of potential irreparable harm that rises
19 above mere allegations, the court is “not required to reach the likelihood of success on the
20 merits” once it concludes that “there was no evidence of irreparable harm”); Medgar Evers
21 Houses Associates., L.P. v. Carro, No. 01-CV-6107, 2001 WL 1456190, at * 4 (E.D.N.Y. Nov.

23 ²² Recent cases in the Ninth Circuit have repeated this rule in the foreclosure context. See,
24 e.g., Hernandez v. Downey Sav. & Loan Ass’n, No. 08 cv 2336-IEG (LSP), 2009 WL
25 704381, at *9 (S.D. Cal. Mar. 17, 2009) (denying injunctive relief and stating that
26 “[e]stablishing a risk of future harm is insufficient, the harm must be imminent”);
27 Mandrigues, 2009 WL 160213, at *3 (“It is not enough that the claimed harm be irreparable;
28 it also must be imminent”); Avila v. Stearns Lending, Inc., No. CV 08-0419-AG (CTx),
2008 WL 1378231, at *1 (C.D. Cal. Apr. 7, 2008) (stating that, “in any situation,” the
movant must show “that there is some threat of an immediate irreparable injury”).

1 6, 2001) (“[W]hether real property loss creates irreparable injury is a fact-sensitive inquiry, and
2 that such loss cannot be said to constitute irreparable harm as a matter of law.”).

3 What facts there are in the record, and common knowledge, make it clear Plaintiffs have
4 not borne their burden on this point. The injunction purports to apply to all persons with “deeds
5 of trust listing MERS as a purported beneficiary.” Motion at 3. Hundreds of thousands, if not
6 millions, of borrowers within this scope face no harm at all because they are not even in the
7 foreclosure process. This is true, inter alia, because they have a good payment history or they are
8 involved in a bankruptcy or other court case.

9 Even many borrowers whose loans are involved in the foreclosure process do not face
10 imminent harm. Defendants, like most lenders, are engaged in very substantial workout efforts
11 with borrowers involved in foreclosure. Acosta Decl. ¶¶ 4-5; Miller Decl. ¶¶ 4-5. Those persons
12 do not face imminent action in their cases. Further, foreclosures frequently are delayed
13 substantially or canceled for a variety of reasons. Acosta Decl. ¶ 5; Miller Decl. ¶ 5. Those
14 persons, too, do not face harm (foreclosure) that is both imminent and irreparable.

15 Plaintiffs argue that “real property is considered unique,” and suggest that a
16 determination that an injunction had been improperly denied could not later be compensated by
17 money damages. Motion at 13. They support their argument, however, solely with a single
18 contractual enforcement case that involved neither a request for preliminary injunction nor the
19 issue of irreparable harm. Woliansky v. Miller, 661 P.2d 1145 (Ariz. Ct. App. 1983) Rather,
20 Woliansky dealt only with the specific performance of a sale of the real property in question.
21 Specific performance does not embody the same legal standard as that of a preliminary
22 injunction, as irreparable harm is not a prerequisite for a court to award specific performance as a
23 contractual remedy. See Laker v. Soverinsky, 27 N.W.2d 600, 601 (Mich. 1947) (an inadequate
24 remedy at law, not irreparable harm, is what must be alleged and proven in a claim for specific
25 performance).

26 In contrast, courts frequently have denied preliminary injunctions to stop foreclosure on
27 property for a variety of reasons, and rejected the assertion that foreclosure necessarily poses
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1 irreparable harm. Alcaraz v. Wachovia Mortgage FSB, No. CV F 08-1640 LJO SMS, 2009 WL
2 30297, at *4 (E.D. Cal. Jan. 6, 2009) (denying preliminary injunction because while the “loss of
3 a home is a serious injury[,] . . . the record suggests that [Plaintiff] sought a loan beyond her
4 financial means and expectation of job loss[,] . . . [and the] resulting harm does not alone entitle
5 her to injunctive relief”); Holweg v. Accredited Home Lenders, Inc., No. 2:09-CV-1 TS, 2009
6 WL 29703, at *1 (D. Utah Jan. 5, 2009) (denying preliminary injunction because “[w]hile the
7 sale of [Plaintiffs’] residence would clearly be disruptive to Plaintiffs’ lives, such a disruption
8 and any accompanying injuries are not irreparable, in that they could be quantified with relative
9 ease, and an effective monetary remedy granted”); Parker v. United States Dep’t of Agriculture,
10 879 F.2d 1362 (6th Cir. 1989) (denying preliminary injunction against foreclosure because
11 foreclosure did not constitute irreparable harm where the borrower declined to avail itself of
12 remedies offered by the lender); Mitchell v. Century 21 Rustic Realty, 233 F. Supp. 2d 418, 431
13 (E.D.N.Y. 2002) (“[l]oss of an interest in real property is not presumed to be irreparable harm”).
14 At a minimum, Plaintiffs have not demonstrated that each jurisdiction would treat the claims of
15 the borrowers in their state as irreparable by money damages.

16 **D. The Public Interest Disfavors A Preliminary Injunction.**

17 While first suggesting that the “public interest” factor may be ignored, Plaintiffs assert,
18 with no analysis, that the public interest favors an injunction because their relief would “protect
19 consumer rights.” Motion at 14. In point of fact, an injunction against foreclosures for all
20 borrowers with MERS deeds of trust would likely have deleterious public impacts, providing
21 another ground for denying the Motion.

22 If the Court entered a preliminary injunction, there would be putative class members who
23 take advantage of the order and live in their properties while paying nothing. This is
24 fundamentally unfair, and contrary to the public interest which should not shift onto Defendants
25 the adverse effect the economy has had on the individual homeowners. It is particular unjust
26 because, when foreclosures are commenced, many borrowers historically recognize their
27 inability to repay their debt and do not contest the foreclosure, either leaving the property or
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1 selling the property to the lender prior to the scheduled foreclosure sale. Acosta Decl. ¶ 13;
2 Miller Decl. ¶ 13. The injunction would present the perverse situation where a theoretical
3 dispute about the legality of MERS holds up default remedies where the defaults have nothing to
4 do with that dispute.

5 The public interest is also greatly disserved by the breadth and scope of the relief sought
6 from this federal court. The request for this Court to take the extraordinary step of issuing an
7 injunction that would halt statutorily authorized foreclosure proceedings in 28 states plus the
8 District of Columbia raises serious comity and federalism concerns. One concern are the
9 conflicts the injunction would create with state laws. To take just one example, in California –
10 where Plaintiffs want to halt foreclosures – MERS has indisputable statutory authority to take
11 any and all steps in the nonjudicial foreclosure process. California Civil Code section 2924(a)²³
12 specifically provides that the foreclosure process may be conducted by the “trustee, mortgagee or
13 beneficiary or any of their authorized agents.” Cal. Civ. Code § 2924(a) (emphasis added).
14 Thus, courts in California have routinely upheld MERS’ role in non-judicial foreclosure
15 proceedings.²⁴ Similarly, Texas—another state on Plaintiffs’ list—specifically authorizes any
16 “book entry system” to act as a mortgagee on property; that term is defined with the precise
17 intention of authorizing MERS to be a nominal beneficiary on Texas deeds of trust. Tex. Prop.
18 Code § 51.0001(1), (4).

21 ²³ California Civil Code Sections 2924 – 2924i constitute the “[t]he comprehensive statutory
22 framework established to govern nonjudicial foreclosure sales” which framework “is
23 intended to be exhaustive.” Moeller v. Lien, 25 Cal. App. 4th 822, 834 (1994). (Cal. Ct.
App. 1994).

24 ²⁴ See Farahani, 2009 WL 1309732, at *2 (upholding MERS’ role in initiating a non-judicial
25 foreclosure under California law); Farner, 2009 WL 189025, at *2 (MERS’ agents had
26 standing to foreclose); Sulak, 2006 WL 3514873, at *2, *10 (affirming dismissal of
27 plaintiff’s complaint alleging that “MERS [had] conspire[ed] with [the loan servicer] to
28 conceal which entity in fact held the original note” and stating that “[n]othing [MERS and
the other defendants] did, by way of assignment, endorsement, or transfer of the deed of
trust or the note injured plaintiffs in any discernible or conceivable way”).

1 An order granting Plaintiffs' requested injunction also would amount to a collateral attack
2 on decisions entered by judges in other jurisdictions that have upheld foreclosures where MERS
3 was named as the beneficiary under the deed of trust and otherwise sanction MERS' role. It also
4 would specifically unwind many litigated decisions in many states, where judges have refused to
5 enjoin nonjudicial foreclosures of the very persons who fall within the alleged class. See e.g.,
6 Farner v. Countrywide Home Loans, No. 08cv2193 BTM(AJB), 2009 WL 189025, at *2 (S.D.
7 Cal. Jan. 26, 2009) (plaintiffs' request for a preliminary injunction of non-judicial foreclosure
8 was denied because plaintiffs could not show that their argument – that MERS lacked standing to
9 initiate foreclosure – was likely to succeed on the merits); Dubois v. Ass'n of Apartment Owners
10 of 2987 Kalakaua, No. 26129, 2006 WL 1109763, at *1 (Haw. Ct. App. Apr. 27, 2006)
11 (upholding lower court's order denying plaintiff's request to enjoin nonjudicial foreclosure sale);
12 G & D Furniture, LLC v. SFD Enters., Inc., No. 04-08-00541-CV, 2009 WL 398262, at *1 (Tex.
13 App.-San Antonio Feb. 18, 2009) (same).

14 As the Ninth Circuit recently warned in reversing a district court's grant of an injunction
15 that enjoined activity in 18 different states, "a trial court abuses its discretion by fashioning an
16 injunction which is overly broad." United States v. AMC Entm't, Inc., 549 F.3d 760, 768 (9th
17 Cir. 2008). In AMC, the district court had enjoined the defendant in states that included ones
18 within the territory of the Fifth Circuit, even though that court had approved the defendant's
19 conduct. Although recognizing the permissibility, in certain limited circumstances, of a
20 nationwide injunction, the Court of Appeals cautioned the district court to

21 be mindful of any effect its decision might have outside its
22 jurisdiction. Courts ordinarily should not award injunctive relief
23 that would cause substantial interference with another court's
24 sovereignty.

25 Id. at 770. The Ninth Circuit reversed the sweeping
26 injunction on comity grounds, even though it
27 disagreed with the Fifth Circuit's holding as to the
28 legality of the defendant's conduct.

1 Nowhere are these concerns more pronounced than in the context of an injunction issued
2 solely on the basis of a state law cause of action.²⁵ The interpretation of state law is the
3 exclusive province of each state’s judiciary. Thus, federal courts ought to tread lightly in
4 considering injunctions based on state law claims where the legal issues extend beyond the
5 court’s home state. See Keener v. Convergys Corp., 342 F.3d 1264, 1269 (11th Cir. 2003)
6 (where enforceability of a contract varied from state to state, district court abused its discretion in
7 issuing nationwide injunction rather than one covering only the forum state); Herman Miller, Inc.
8 v. Palazzetti Imports & Exports, Inc., 270 F.3d 298, 327 (6th Cir. 2001) (district court abused its
9 discretion in issuing a multi-state injunction because “[i]t would be unjust to impose [the forum
10 state’s] law on [the defendant]’s operations in . . . other states that have explicitly refused to
11 recognize [the claim at issue]”); Blue Ribbon Feed Co., Inc. v. Farmers Union Cent Exch.,
12 Inc., 731 F.2d 415, 422 (7th Cir. 1984) (upholding geographically limited injunction and stating
13 that “considerations of comity among the states favor limited out-of-state application of
14 exclusive rights acquired under [state] law, and a district court does not err when it takes a
15 restrained approach to the extra-territorial application of such rights.”); cf. BMW of N. Am. v.
16 Gore, 517 U.S. 559, 572 (1996) (citing “principles of state sovereignty and comity” in holding
17 that “a State may not impose . . . sanctions on violators of its laws with the intent of changing the
18 tortfeasors’ lawful conduct in other States”).

19 Given these precedents, it is not surprising that the Ninth Circuit has admonished that
20 “[t]he issuance of an injunction under state law prohibiting otherwise lawful conduct in another
21 state [would] raise[] serious concerns.” AMC, 549 F.3d at 772 (quoting Herman Miller, 270
22 F.3d at 327)). Yet, such an injunction is precisely what Plaintiffs here demand. They seek to
23 enjoin conduct in other states that has already been deemed lawful by the courts of those states.

24
25 ²⁵ Indeed, the dissenting judge in AMC, while disagreeing with his colleagues on the necessity
26 of judicial comity between the circuits, nevertheless recognized that where (as here) an
27 injunction “dictate[s] behavior in other states on the basis of one state’s tort law,” special
28 “federalism and state sovereignty concerns” arise, and federal courts should be “wary” of
issuing such injunctions. Id. at 780–81 (Wardlaw, J., dissenting).

1 Whatever this Court may decide about MERS in connection with Plaintiffs' loan, an injunction
2 extending to other non-parties would create the kinds of "serious concerns" and "substantial
3 interference with . . . sovereignty" that the Ninth Circuit has admonished federal courts to avoid.
4 AMC, 549 F.3d at 770, 772.²⁶ Respect for legislative enactments and judicial orders entered by
5 sovereign states militates against the injunction Plaintiffs have requested.

6 Though this Court may be able to issue a nationwide injunction, it would not serve the
7 public interest for this Court to do so. As noted above, Plaintiffs' requested remedy would stop
8 approximately 225,499 foreclosures in twenty-nine jurisdiction just for loans that Countrywide
9 or Wells Fargo own or service; the total class size will be far higher. In the absence of an
10 injunction, the sales of these properties would occur as scheduled from time to time, with
11 qualified buyers appearing to purchase the properties in the ordinary course. If an injunction is
12 issued, however, the supply of available properties will be artificially reduced, at least
13 temporarily, and persons who wish to buy the properties will be deprived of that opportunity
14 during the pendency of the injunction. When such an injunction is eventually terminated or the
15 foreclosures are completed, the properties on which sales had been enjoined may well flood the
16 market at virtually the same time. This is likely to depress the market price for the sales of the
17 properties, as well as for surrounding properties belonging to persons having no connection to
18 the litigation.

19 The public interest is also adversely affected by the relief requested because it likely will
20 cause losses to third party loan investors and securities holders who are not present before the
21 Court. "The public interest inquiry primarily addresses impact on non-parties rather than
22 parties." Sammartano v. First Jud. Dist. Court, 303 F.3d 959, 974 (9th Cir. 2002). As must be

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24 ²⁶ Indeed, some courts have gone so far as to conclude that, in certain circumstances,
25 injunctions based on state law claims cannot constitutionally extend beyond the forum state.
26 See CIBA-GEIGY Corp. v. Bolar Pharmaceutical. Co., 747 F.2d 844, 854 n.6 (3d Cir. 1984)
27 (violation of New Jersey laws against unprivileged imitation and passing off permit only an
28 injunction within New Jersey under the Full Faith and Credit Clause); Hyatt Corp. v. Hyatt
Legal Services., 610 F. Supp. 381, 383 (N.D. Ill. 1985) (nationwide injunction arising out of
Illinois anti-dilution statute would violate the Commerce Clause).

1 acknowledged, the very purpose of the injunction is to stop all nonjudicial foreclosures –
2 proceedings that are being prosecuted for the benefit of the ultimate owners of the loans – and to
3 prevent MERS from transferring its interest to the ultimate owners of the loans. Investor and
4 owners of the loans already stand at risk for financial losses occasioned by a borrower’s default.
5 An injunction that halts non-judicial foreclosures would significantly increase those losses. This
6 impact, especially in these days of economic distress in the financial markets, weighs heavily
7 against a blanket injunction that affects these third parties.

8 **IV. THE RELIEF REQUESTED IS UNRELATED TO THE PRACTICE**
9 **CHALLENGED.**

10 The Court should deny the Motion because it seeks relief wholly divorced from—and far
11 broader than necessary to address—the claim they raise. An injunction may be no more
12 burdensome than necessary to address the harm asserted by the plaintiff. Califano v. Yamasaki,
13 442 U.S. 682, 702 (1979). The Ninth Circuit has reversed trial courts repeatedly where the order
14 enjoin conducts broader than needed to redress the Plaintiffs’ claims. See, e.g., National Center
15 for Immigrants Rights, Inc., 743 F.2d at 1371; Meinhold v. United States Department of
16 Defense, 34 F.3d 1469 (9th Cir. 1994); United States v. Holtzman, 762 F.2d 720 (9th Cir. 1985).

17 Plaintiffs violate this basic rule of equity jurisprudence. Plaintiffs’ entire Motion is
18 premised on their allegation that MERS is not properly listed as beneficiary on their Deeds of
19 Trust. They make extensive allegations about MERS and its supposed purposes, Motion at 5-8,
20 and they allege that they are likely to prevail on the merits because they believe that MERS
21 “holds no beneficial interest in any deed of trust on which it is named as “beneficiary.” Id. at 9.

22 Although Plaintiffs are proceeding primarily under this specific theory relating to the
23 legal status of MERS, they seek an injunction far broader. Plaintiffs want to enjoin not only
24 MERS, but also anyone who may be “associated with or acting in concert with” MERS. Motion
25 at 3. And, the acts to be enjoined are not limited to restraining Defendants from naming MERS
26 as a beneficiary under a Deed of Trust, or from having MERS conduct foreclosures. Rather,
27 Plaintiffs would bar Defendants “from commencing, conducting, instituting or effectuating any
28 trustee’s sale pursuant to non-judicial foreclosures” and, separately, “from transferring any

1 purported beneficial interest and/or assignment of rights in, deeds of trust listing MERS as the
2 purported beneficiary.” Motion at 3.

3 The Court should deny this injunction. As discussed above, under the Deeds of Trust, the
4 lender has a right to foreclose that is not tied in any way to the status of MERS. E.g., Graves
5 Deed of Trust ¶ 22 (if the default not cured, “Lender, at its option, and without further demand,
6 may invoke the power of sale” and “Lender shall execute or cause Trustee to execute written
7 notice of the occurrence of an event of default and of Lender’s election to cause the property to
8 be sold”) (emphasis added). If Plaintiffs are correct that MERS is not a proper beneficiary –
9 which Defendants strenuously deny – Plaintiffs have no basis to enjoin activities by lenders and
10 trustees in pursuing foreclosures of defaulted loans. The Motion should be denied because it is
11 unrelated to the harm about which Plaintiffs complaint. Califano, 442 U.S. at 702.

12 The request for an injunction that prevents MERS from transferring any interests in the
13 deeds of trust has absolutely no relation to the claims in the suit or to the stated grounds for an
14 injunction. It would have the effect of freezing the state of the title on millions of loans when
15 there is no harm to any class member if the title to those loans changes. These are negotiable
16 instruments, in states which each support – through enactment of the UCC and otherwise – the
17 free alienability of loans.

18 Plaintiffs agreed that MERS could act as nominee for their lenders and can hardly be
19 heard to complain if MERS transfers its interest to the lenders or their successors. Indeed, that
20 seems to be exactly what Plaintiffs want – for the lenders and noteholders, not MERS, to be on
21 the title. Plaintiffs have made no showing that any of the four injunction standards are met with
22 respect to this aspect of the requested relief. The Court should not order it.

23 Stopping MERS from transferring its interests in loans in which it is a named beneficiary
24 also is inconsistent with Plaintiffs’ stated legal theory. They assert that there was a “fraudulent
25 designation of MERS as a sham ‘beneficiary’ under millions of deeds of trust” and that MERS
26 “holds no beneficial interest in any deed of trust on which it is named as ‘beneficiary.’” Motion
27 at 9. Plaintiffs nowhere take issue with the fact that the deed of trust secures repayment of their
28

1 loans and that there must be an “appropriate” beneficiary under the deeds of trust, however; they
2 claim only that MERS was not such an “appropriate” entity. Assuming that Plaintiffs are correct
3 that MERS was not a proper beneficiary, the fact remains that MERS was actually named as
4 beneficiary on their deeds of trust when the loans were originated. If Plaintiffs prevail on their
5 Motion, MERS should be allowed to transfer whatever interests it possesses in the deeds of trust
6 to achieve Plaintiffs’ goal of assuring that only a “proper” or “appropriate” beneficiary is named
7 on the deeds of trust. Otherwise, the very entity whose existence Plaintiffs decry would remain
8 as an entity with an outstanding interest in their deeds of trust.

9 **V. IF THE MOTION IS GRANTED, ALL BORROWERS WHO WANT TO ACCESS
10 THE RELIEF SHOULD BE REQUIRED TO KEEP THEIR LOAN CURRENT,
11 AND PLAINTIFFS MUST POST A SUBSTANTIAL BOND.**

12 If the sought-for injunction is granted, the Court should provide it only on two
13 conditions—the borrowers should be required to keep their loans current, and they should post a
14 bond.

15 **A. The Loans Should Be Paid Currently.**

16 All borrowers who seek to stop nonjudicial foreclosure on their properties should be
17 required to keep their loans up to date and pay taxes and insurance due. Even Garfield admits
18 that, despite all of the alleged voiding of notes and security instruments he imagines, the loan is
19 still due and owing. Garfield Dep. Vol. III at 28-29. To do equity, those amounts should be paid
20 currently. This is particularly appropriate with respect to taxes and insurance and loan interest,
21 which in most instances are due to be paid over by Defendants to a third party taxing authority,
22 insurance provider, or loan investor. There is no reason in equity why Defendants should be
23 required to shoulder those expenses on the borrowers’ behalf.

24 **B. A Substantial Bond Is Required.**

25 The Court also should order Plaintiffs and their counsel to post a bond. Fed. R. Civ. P.
26 65(c). Except in rare circumstances not presented here, posting of a bond is a mandatory
27 requirement for every injunction issued under the Rules. Alternatively, the Court should deny
28 the Motion if Plaintiffs are unwilling to protect Defendants against the damages they will incur if

1 an injunction is improvidently granted. See Nichols v. Alcatel USA, Inc., 532 F.3d 364, 379 (5th
2 Cir. 2008) (where plaintiffs stated they were unable to post bond, district court properly denied
3 motion for preliminary injunction).

4 **1. Rule 65(c) Requires A Bond.**

5 Federal Rule of Civil Procedure 65(c) states that “[t]he court may issue a preliminary
6 injunction ... order only if the movant gives security in an amount that the court considers proper
7 to pay the costs and damages sustained by any party found to have been wrongfully enjoined or
8 restrained.” (emphasis added). The purposes behind the bond requirement are “(1) to discourage
9 parties from requesting injunctions based on tenuous legal grounds; and (2) to assure judges that
10 defendants will be compensated for their damages if it later emerges that the defendant was
11 wrongfully enjoined.” Sionix Corp. v. Moorehead, 299 F. Supp. 2d 1082, 1086 (S.D. Cal. 2003)
12 (citing Newspaper & Periodical Drivers’ & Helpers’ Union, Local 921 v. San Francisco
13 Newspaper Agency, 89 F. 3d 629, 631 (9th Cir. 1996), see also Nintendo of Am., Inc. v. Lewis
14 Galoob Toys, Inc., 16 F.3d 1032, 1036–37 (9th Cir. 1994) (“By [requiring imposition of a bond]
15 the party enjoined will usually recover damages, thus discouraging parties from requesting
16 injunctions based on tenuous legal grounds”). Indeed, should a wrongful injunction enter, the
17 only protection defendants may have is the execution of an injunction bond. See e.g., id. The
18 cases cited by the Plaintiffs support this general proposition. See Coquina Oil Corp. v
19 Transwestern Pipeline Co., 825 F. 2d 1461, 1462–63 (10th Cir. 1987) (preliminary injunction not
20 enforceable as trial court had not yet contemplated the imposition of an injunction bond);
21 Tancogne v. Tomjai Enters. Corp., 408 F. Supp. 2d 1237, 1253 (S.D. Fla. 2005) (requiring
22 plaintiffs to post \$10,000 bond).

23 **2. A Bond is Required Because Issuance of An Improvident Injunction**
24 **Would Cause Significant Damage To Defendants, and a Substantial**
25 **Bond Should be Imposed.**

26 Plaintiffs’ Motion only addresses potential harms to MERS from a preliminary injunction
27 suggesting that a bond should be waived because “the potential damage to MERS, if any, is
28 likely to be de minimis given the fact MERS has no financial interest in the property.” Motion at

1 15. That is a strawman, because the proposed injunction would also operate to preclude
2 nonjudicial foreclosures by persons associated with or acting in concert with MERS – which
3 Plaintiffs will no doubt assert includes the Defendants. In addition, the injunction seeks to
4 preclude MERS from transferring its beneficial interest, an order that intended to have the effect
5 of grinding foreclosures to a halt. Whatever the harm is to MERS – a matter that MERS is
6 addressing in its papers being filed today – the potential harm to Defendants justifies a
7 substantial bond.

8 The Court shall impose a bond to protect Defendants from the harm an injunction would
9 cause. As discussed above, an injunction against non-judicial foreclosures is likely to cause
10 substantial expense to Defendants, which either will never be recovered or which Defendants
11 will face substantial delays and uncertainties in recovering. These amounts include millions of
12 dollars in tax advances and payments of insurance premiums. Acosta Decl. ¶ 14; Condra Decl.
13 ¶¶ 6-7; Miller Decl. ¶ 14; Golden Decl. ¶¶ 6-11. While these amounts are owed or will be owed
14 by the borrower, under the terms of the note and deeds of trust, an injunction against nonjudicial
15 foreclosure will, at a minimum, delay that recovery. When sums run into many millions of
16 dollars, even bare delay causes million dollar losses.

17 Defendants also face substantial additional costs that they are unable to estimate with
18 precision. Those costs include increased expenses to maintain vacant properties, to repair
19 vandalized properties, and to hire attorneys to protect their interests. Acosta Decl. ¶¶ 14-17;
20 Miller Decl. ¶¶ 14-17. These costs can reasonably be expected to occur, and would continue to
21 incur, if an injunction is issued and allowed to remain in place.

22 A bond should be imposed in a substantial amount. “[T]he amount [of the bond] will
23 generally be what the court deems sufficient to cover losses and damages incurred by the party
24 enjoined if it is later determined that the injunction should not have issued.” American Trucking
25 Ass’ns v. City of Los Angeles, No. CV 08-4920 CAS (CTx), 2009 WL 1808451, at *2 (C.D.
26 Cal. June 23, 2009) (citing Walczak v. EPL Prolong, Inc., 198 F.3d 725, 733 (9th Cir. 1999)).
27 Because the requested injunction would, if granted, impose staggering financial impacts on
28

1 Defendants, the bond should be substantial. Alexander v. Primerica Holdings, Inc., 811 F.
2 Supp. 1025, 1038-39 (D.N.J. 1993) (imposing \$7.7 million bond in connection with preliminary
3 injunction in putative class action).

4 Alternatively, the Court should continue its existing practice and require every person
5 who wants to take advantage of the injunction to post a \$500 nominal bond before an injunction
6 should issue. See, e.g., Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1126 (9th Cir. 2005).
7 Such a bond is appropriate even in the absence of a showing of harm to the defendant. See, e.g.,
8 Barahona-Gomez v. Reno, 167 F.3d 1228 (9th Cir. 1999) (approving requirement of nominal
9 bond of \$1000 per plaintiff where the defendant tendered no evidence of costs of wrongful
10 injunction and the vast majority of plaintiffs were “very poor”).

11 **3. Plaintiffs Have Not Demonstrated The Bond Requirement Should Be**
12 **Waived.**

13 Citing three decisions from other Circuits, Plaintiffs state that they are unwilling to post a
14 bond – which would leave Defendants with no protection. Motion at 15. The Court should
15 reject this argument outright.

16 Plaintiffs ignore entirely the law in this Circuit, which holds that Rule 65(c) imposes a
17 presumption that a bond will issue and that any “exceptions are rare.” Taylor v. Chiang, No. S-
18 01-2407, WBS CGH, 2007 WL 1628050, at *4 (E.D. Cal. June 1, 2007), vacated on other
19 grounds by 2007 WL 3049645 (E.D. Cal. Oct 18, 2007). This Court has recognized the virtual
20 mandatory nature of the bond requirement; when Plaintiffs moved for a temporary restraining
21 order, it required them to post a nominal bond in the amount of \$500. Exhibit 8 to Motion, at 3.

22 Plaintiffs first contend that a bond may be dispensed with because Defendants will not
23 suffer any harm from an injunction. Motion at 15 (“[m]ost class members are just as unlikely to
24 dispose of their homes as MERS would be to sell if after a foreclosure sale”). Defendants have
25 demonstrated the financial harms they will incur if foreclosures are halted. A bond is therefore
26 required. American Trucking Ass’ns, Inc., 2009 WL 1808451, at *5.

27 Plaintiffs also claim that a bond should be waived based on “financial hardship that
28 would accrue to class members.” Motion at 15. In this Circuit, however, alleged financial

1 hardship is no grounds for waiving a bond requirement unless a bond “would effectively deny
2 access to judicial review.” Save Our Sonoran, Inc., 408 F.3d at 1126. Plaintiffs have not offered
3 any evidence to meet this extremely high standard. And it is highly unlikely that Plaintiffs could
4 do so had they tried. To take just one example, Plaintiff Lyndon Graves owns two homes; one is
5 valued at over \$1 million dollars and comes with a six-car garage filled with antique cars.
6 Graves Dep. 10-11, 13-15. Mr. Graves is a half owner of a printing business, and has been a real
7 estate speculator. *Id.* at 18, 24-25. Many alleged class members are also persons for whom
8 posting even a large bond would pose no financial burden whatsoever. Plaintiffs have not made
9 any showing that the members of the putative class could not afford to post a bond.

10 **CONCLUSION**

11 For these reasons, Defendants Countrywide Home Loans, Inc., Countrywide Financial
12 Corporation, Bank of America, N.A., ReconTrust, and Wells Fargo Bank, N.A. respectfully
13 request that the Court deny Plaintiffs’ Motion for Preliminary Injunction.

14 DATED this 21st day of August, 2009.

15 Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/

/s/ Linda M. Kapcia
An employee of
BALLARD SPAHR ANDREWS & INGERSOLL, LLP

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