

1 Richard Patrick G. Byrne (Nevada Bar No.
7636)
2 SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway
3 Suite 1100
Las Vegas NV 89169
4 Telephone (702) 784-5200
Email: pbyrne@swlaw.com

5
6 Robert M. Brochin (Admitted *Pro Hac Vice*)
MORGAN, LEWIS & BOCKIUS LLP
5300 Wachovia Financial Center
7 200 South Biscayne Boulevard
Miami FL 33131-2339
8 Telephone (305-415-3456
Email: rbrochin@morganlewis.com

9
10 *Attorneys for Defendants MERSCORP, INC.*
and MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13
14 JOSEFA S. LOPEZ, JOSE TRINIDAD
CASAS, MARIA C. CASAS, LYNDON B.
15 GRAVES, TYRONE EVENSON,
MICHELLINA EVENSON, BRYAN GRAY,
16 HELEN GRAY, PATRICK FRANKOSKI, and
CHRISTOPHER PETERNELL, individually
17 and on behalf of a class of similarly situated
individuals,

18 Plaintiffs,

19 vs.

20 EXECUTIVE TRUSTEE SERVICES, LLC.;
21 COUNTRYWIDE HOME LOANS, INC., a
New York corporation; MERSCORP, INC., a
22 Virginia corporation; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
23 INC., a subsidiary of MERSCORP, Inc., a
Delaware corporation; RECONTRUST
24 SAXON MORTGAGE SERVICES, INC.,
GALE GROUP dba T.D. FINANCIAL
25 SERVICES dba T.D. SERVICE COMPANY,
SECURITY UNION TITLE INSURANCE
26 COMPANY, CAPITAL ONE dba CHEVY
CHASE BANK, NATIONAL DEFAULT
27 SERVICING CORPORATION, FEDERAL
HOME LOAN MORTGAGE
28 CORPORATION, A Virginia corporation;

No. 3:09-cv-00180-ECR-VPC

**DEFENDANTS MERS AND
MERSCORP, INC.'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION AND
MEMORANDUM OF
POINTS AND AUTHORITIES**

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

Defendants.

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1 Mortgage Electronic Registration Systems, Inc. (“MERS”) and MERSCORP, Inc.,
2 (“MERSCORP”, together the “MERS Defendants”) oppose Plaintiffs’ Josefa Lopez (“Lopez”),
3 Jose Casas and Maria C. Casas (together, the “Casas Plaintiffs”), Lyndon B. Graves (“Graves”),
4 Tyrone Evenson and Michellina Evenson (together, the “Evenson Plaintiffs”), Bryan Gray and
5 Helen Gray (together, the “Gray Plaintiffs”), Patrick Frankoski (“Frankoski”), and Christopher
6 Peternell (“Peternell”, collectively, all Plaintiffs as, “the Borrowers” or “Plaintiffs”) Motion for
7 Preliminary Injunction as to the Borrowers’ proposed class, as follows.

8 **I. INTRODUCTION**

9 The Borrowers have made no showing of any wrongdoing or illegal conduct by the
10 MERS Defendants. The Borrowers have made no showing that they have been injured by any
11 wrongdoing or illegal conduct by the MERS Defendants. And yet, on behalf of millions of
12 putative class members, the Borrowers seek to preliminarily enjoin the transfer and enforcement
13 of millions of deeds of trust contracts, which name MERS as the holder of legal title in certain
14 secured interests. These millions of deeds of trust are governed by the differing laws and
15 procedures of some twenty-nine separate states. Here, seven named Plaintiffs, all from Reno,
16 Nevada, are asking this Court to interfere with the rights and obligations contained in written and
17 duly signed contracts—deeds of trust—that were entered into among millions of borrowers,
18 lenders, trustees and the MERS Defendants over a four-year time period, from 2004 through
19 2008.

20 The Borrowers’ request for injunctive relief involves issues that are fundamental to
21 a state’s right to regulate the transfer of real property located within its borders, and to a state’s
22 right to enforce the rights and obligations involving the transfer of such real property. The
23 Borrowers have not met their burden to show that they are entitled to the issuance of such
24 extraordinary relief, affecting millions of contracts and effectively preventing the enforcement of
25 real estate laws and procedures enacted by the legislatures of twenty-nine separate states.

26 As a predicate to injunctive relief, the Borrowers are asking this Court to declare
27 “void *ab initio*” all deeds of trust in which MERS has been designated to hold legal title in the
28

1 secured interests for real property located in a given state. This entity is usually referred to as the
2 “beneficiary” in a deed of trust or a “mortgagee” in a mortgage. On the basis of the Borrowers’
3 claim that *all* MERS’ deeds of trust contracts are void, the Borrowers seek to enjoin all non-
4 judicial foreclosures and all transfers of these deeds of trust—regardless of whether foreclosure
5 actions have been initiated; regardless of whether any of the borrowers are in default on their
6 respective loans; regardless of whether the deeds of trusts have been, or will be, transferred;
7 regardless of applicable state laws in favor of the free alienation of property; and regardless of
8 whether the contracts themselves provide for the right to transfer or assign the respective deeds of
9 trust.

10 The Borrowers’ Motion for Preliminary Injunction is legally defective for myriad
11 reasons—each of which provides an independent basis for summarily denying their request.
12 First, the Borrowers’ Amended Complaint fails to allege any wrongdoing or illegal conduct by
13 the MERS Defendants, or by any of the other Defendants. In the most basic manner, the
14 underlying complaint fails to state any facts that could form the basis of a plausible theory for
15 recovery, which is required in the wake of the Supreme Court’s decisions in *Twombly* and *Iqbal*.
16 Here, the Borrowers make precisely the “unadorned” conclusory allegations of wrongdoing
17 prohibited by *Iqbal*, stating only that the MERS Defendants perpetrated a wrong and participated
18 in a “conspiracy” resulting in “illegal profits,” while failing to plead any facts showing that the
19 MERS Defendants committed a tort or a statutory violation, and failing to demonstrate any injury
20 resulting from the conduct of the MERS Defendants. Having stated no valid claims, the
21 Borrowers are precluded, as a matter of law, from obtaining a preliminary injunction.

22 Second, the seven named Plaintiffs do not seek a preliminary injunction on their
23 own behalf, but on behalf of millions of putative class members who entered into deeds of trust.
24 Injunctive relief on behalf of a class cannot be obtained until the class has been duly certified.
25 Pending before this Court is the Borrowers’ Motion for Class Certification, which also fails for
26 multiple reasons. Among other reasons, the Borrowers’ class action claims involve the real estate
27 laws and procedures of twenty-nine separate states, requiring that differing state laws be applied
28 to different plaintiffs’ claims, which results in claims that are neither common nor typical for

1 purposes of class certification. Additionally, the underlying premise for the Borrowers' arbitrary
2 "conspiracy" theories against the MERS Defendants is fraud, and it is axiomatic that fraud-based
3 claims cannot meet the Rule 23 requirements of commonality or typicality because they
4 necessarily involve individual reliance by each of member of the putative class. Nor do the
5 Borrowers demonstrate any injury suffered as a result of the MERS Defendants' alleged conduct;
6 absent any such injury, the named Plaintiffs have no standing to pursue claims on behalf of
7 others. As a result, the Borrowers fail to demonstrate that they will adequately represent the
8 proposed class. Finally, the Borrowers seem to base their request for class certification on the
9 fact that "MERS lacks standing" to foreclose. But as amply demonstrated in MERS's Opposition
10 to the Borrowers' Motion for Class Certification, a party's standing in a particular lawsuit cannot
11 be the predicate for the commonality or typicality of class claims among millions of borrowers.
12 Moreover, throughout the country, Courts that have reviewed the MERS deeds of trust—
13 including this Court in *Ramos* and *Elias*—have concluded that MERS does, in fact, have standing
14 to foreclose. For these and the reasons stated in the Defendants' Opposition to Class
15 Certification, the Borrowers' Motion for Class Certification should be denied; and, in turn, the
16 Borrowers' request for preliminary injunctive relief must be denied.

17 Third, the Borrowers lack standing to pursue a preliminary injunction on behalf of
18 the class. The Borrowers have not, and cannot, show that the claims alleged in the underlying
19 complaint are in any way linked to, or with, any specific actions allegedly taken by the MERS
20 Defendants that would justify the issuance of injunctive relief. In other words, the Borrowers
21 seek to enjoin "wrongful foreclosures" in twenty-nine states, yet their Amended Complaint
22 alleges no claims for "wrongful foreclosure," and, thus, there is no link between the preliminary
23 injunctive relief sought and the claims in the Amended Complaint. The Borrowers' theory for
24 any wrongful foreclosure appears to be their claim that all deeds of trust designating MERS to
25 hold certain legal titles are "void." But the Amended Complaint seeks no determination that
26 these MERS deeds of trust are void, and it makes no claim (nor is there a viable claim) that could
27 serve as the basis to reform or rescind what the Borrowers assert are "void" deeds of trust.
28 Absent such claims, and absent any link between the injunctive relief requested and the claims

1 alleged in the Amended Complaint, the Borrowers lack standing.

2 Fourth, the Borrowers fail to demonstrate *any*, much less each, of the four factors
3 required to obtain the extraordinary and drastic remedy of a preliminary injunction. The law
4 places the burden on the Borrowers to demonstrate that each of the four requirements for a
5 preliminary injunction has been met. It is telling that the Borrowers rely on the wrong standard in
6 order to justify their request for an injunction, and that they ignore the Supreme Court's recent
7 decision in *Winter*. In overruling the preliminary injunction standard relied upon by the
8 Borrowers, the Supreme Court reiterated that courts must strictly adhere to the traditional four
9 factors for granting a preliminary injunction: imminent and irreparable harm; a likelihood of
10 success on the merits; that greater harm would result to the Borrowers from the denial of the
11 injunction than would result to the Defendants from the issuance of the injunction; and that the
12 issuance of the preliminary injunction be in the public interest. The Court may no longer render a
13 preliminary injunction, as suggested by the Borrowers, based on the "sliding scale" that permitted
14 injunctive relief with only a "possibility" of irreparable harm.

15 With regard to the requirement that plaintiffs suffer imminent and irreparable
16 harm, the Borrowers do not seek to enjoin foreclosures only on properties that are currently
17 subject to, or are under an immediate threat of, foreclosure. Instead, the Borrowers seek to enjoin
18 all non-judicial foreclosures in twenty-nine states, and the transfer of all deeds of trust in those
19 twenty-nine states, provided only that an individual borrower has entered into a deed of trust that
20 names MERS as the beneficiary. The Borrowers are asking this Court to enjoin the transfers of
21 interest in real property, and foreclosures on those properties, even where a borrower is not in
22 default, or the property is not currently subject to foreclosure. This is hardly the imminent,
23 irreparable harm necessary for the issuance of a preliminary injunction on behalf of a class, and
24 for this reason alone the Motion should be denied.

25 There is also no likelihood that the Borrowers will succeed on the merits of their
26 claims; indeed, the Borrowers will not. The crux of the Borrowers' contention that they will
27 succeed on the merits appears to be that all MERS deeds of trust are void. But deeds of trust are
28 contracts entered into among the lender, the trustor, the trustee, and the beneficiary. In this case,

1 the trustors (or the Borrowers and members of the putative class) contractually agreed that MERS
2 would serve as the beneficiary, holding legal title to the interests in the properties that were
3 securing the repayment of the loans. This contractual agreement is evidenced by written deeds of
4 trust that were entered into and signed by the Borrowers. As contracts, the deeds of trust are
5 governed by the contract laws of the twenty-nine states in which the subject properties are
6 situated. There are simply no facts or allegations showing that these contractual agreements
7 should be declared void, rescinded, or reformed under the laws of any one of the twenty-nine
8 states at issue. The deeds of trusts state that MERS was, and is, the beneficiary, and there are no
9 facts that indicate otherwise.

10 The Borrowers suggest that the deeds of trust are void *ab initio* because the
11 beneficiary on a deed of trust must be the lender (or the entity with an interest in the promissory
12 note.) The Borrowers surmise that lenders are legally prohibited by state law from designating
13 any entity other than the lender to serve as the beneficiary on any deed of trust, and that such
14 designation is not permitted even if the lender and the borrower *contractually agree* otherwise.
15 There is no case law or statute that supports this groundless theory; nor do the Borrowers cite any
16 such case law or statute. In fact, the law is to the contrary; it is entirely permissible for an entity
17 to have an interest in the note and for that party to designate another to stand in its place to hold
18 the title to the interests that secure that note. Every court to consider this question has concluded
19 that a beneficiary or mortgagee may stand in the stead of the lender, and such a legal structure
20 certainly does not render a deed of trust or mortgage void. The most recent court to consider this
21 question—the Minnesota Supreme Court in *Jackson v. MERS*—held that MERS can hold legal
22 title to the security instrument without holding any interest in the loan or the promissory note.
23 The State of Minnesota is one of the twenty-nine states that permit non-judicial foreclosures, in
24 which the Borrowers seek a preliminary injunction on the grounds that MERS cannot hold legal
25 title to the security instrument without holding an interest in the promissory note.

26 If the Court were to grant the requested injunctive relief, the harm to the MERS
27 Defendants would be significant. The business of the MERS Defendants relies on the validity of
28 deeds of trust and mortgages that name MERS as the beneficiary. An injunction that immediately

1 halts the assignment and enforcement of millions of deeds of trust in the MERS® System, and
2 impliedly questions the validity of such contracts, would be devastating to the MERS Defendants’
3 core business, resulting in irreparable harm to their goodwill and business. The loss of revenue
4 would amount to millions of dollars, and the loss of their established goodwill cannot be
5 measured or quantified. The requested injunction would irreparably undermine the very
6 legitimacy of the MERS Defendants.

7 Finally, the injunction requested by the Borrowers is in direct conflict with the
8 public interest in the free alienation of property, and the freedom to contract and abide by the
9 terms of contracts. The Borrowers’ request ignores the due process afforded citizens under the
10 property laws of twenty-nine states, and it would prevent the free transfer and alienation of
11 property, a right protected by state laws. The requested injunction, if granted, would effectively
12 circumvent states’ rights to legislate regarding property situated within their borders and to
13 employ the very procedures that govern the non-judicial foreclosure process. In doing so, the
14 injunction would thwart the decisions of state courts that interpret the laws and statutes of the
15 separate states surrounding their differing non-judicial foreclosure processes. For these reasons,
16 the issuance of the requested injunction would contravene the public interest.

17 **II. PLAINTIFFS’ FIRST AMENDED COMPLAINT AND MOTION FOR**
18 **PRELIMINARY INJUNCTION AND CLASS CERTIFICATION**

19 On April 8, 2009, the Borrowers filed a class action complaint naming some
20 twenty-three Defendants and alleging ten claims for relief from state foreclosure actions that they
21 allege were brought regarding their properties (“*Lopez Action*”). (D.E. 1.) The Borrowers also
22 filed a Motion for Temporary Restraining Order and Preliminary Injunction seeking to prevent
23 the foreclosures of their individual homes. (D.E. 3.) On May 4, 2009, the Borrowers amended
24 their class action Complaint (“Amended Complaint”). (D.E. 35.) Simultaneously with the filing
25 of their Amended Complaint, the Borrowers filed another Motion for Temporary Restraining
26 Order and Preliminary Injunction as to their individual homes. (D.E. 36.) In the class action
27 complaint, the named Plaintiffs are borrowers who obtained loans to purchase or refinance
28 residential homes; after receiving the borrowed monies and making some monthly payments, all

1 the Borrowers stopped making payments and defaulted on their loans.¹

2 The Court issued a Temporary Restraining Order the following day as to those
 3 plaintiffs against whom foreclosure proceedings had commenced, but the Court refused to render
 4 a restraining order as to Plaintiff Peternell because there was no pending foreclosure action
 5 against his property and, thus, there was no threat of irreparable injury to him. (D.E. 41 (“The
 6 motion (#36) is denied as to Plaintiff Chris Peternel; it does not appear that there is a threat of
 7 irreparable injury as no notice has been given that a judicial foreclosure is contemplated or
 8 imminent with respect to his house”).) The Court set a hearing on the merits of the preliminary
 9 injunction, (D.E. 41) and the parties then entered into stipulated temporary restraining orders by
 10 which the Defendants agreed to refrain from initiating or advancing any foreclosure sales and to
 11 refrain from transferring rights in the loan agreements or deeds of trust related to the property
 12 owned by the Casas Plaintiffs, the Evenson Plaintiffs, the Gray Plaintiffs, the Peternell Plaintiff,
 13 and the Frankoski Plaintiff pending a resolution on the merits of the claims in the Borrowers’
 14 Complaint. The stipulations were entered with a complete reservation of the parties’ rights to
 15 assert any defense or claim, and permit the parties to resolve the merits of the lawsuit, including
 16 the merits of the Borrowers requests for class certification and preliminary injunction. (D.E. 63.)
 17 These stipulations were approved by the Court, entered as temporary restraining orders, and
 18 remain in effect. (D.E. 69.)

19 Not until May 22nd, some six weeks after the filing of the initial Complaint, did
 20 the Borrowers seek injunctive relief for the class they purport to represent, and seek certification

21 _____
 22 ¹ See, e.g., Graves Dep. 94:23-95:14, attached as Ex. H, (“Q: Did you pay monthly payments
 23 every month since you obtained the loan? A: I did for about the first five, six months, seven
 24 months. Q: And at some point you stopped. A: Yes.”); Lopez Dep. 256:18-21, attached as
 25 Ex. I, (“Q: Do I understand it then correctly that from 2005 to sometime in 2007 or maybe
 26 2008 you were making a monthly payment in the amount of 1200 plus dollars? A: Yes.”);
 27 Peternell Dep. 110:24-116:15, 121:1-5, attached as Ex. J, (“Q: But you continued to make
 28 payments? A: Yes. Q: When was the last payment that you—when was the last time you
 made a payment? A: October, November of 2008.”); J. Casas Dep. 26:16-27:1, July 23, 2009,
 attached as Ex. E, (“Q: And you sent the monthly payment to Wells Fargo? A: Yes. Q: And
 you were able to make the monthly payments during 2007? A: Yes. Q: And you were able to
 make the payments for most of 2008? A: Yes. Q: And then at some point you started to
 encounter financial problems? A: Yes. November.”).

1 of that class. (D.E. 75 & 77.) In short, the Borrowers now seek injunctive relief in states where
2 “non-judicial foreclosures are available” in which MERS is named as a beneficiary on a deed of
3 trust.² (D.E. 75.)

4 The Borrowers’ Amended Complaint fails to allege any claims upon which relief
5 can be granted; it fails to identify any wrongful or illegal conduct by the MERS Defendants. As it
6 relates to the Borrowers’ request for a preliminary injunction on behalf of their proposed class,
7 the Amended Complaint fails to allege any facts upon which an injunction relating to the
8 assignments and foreclosures in twenty-nine states can be issued. In the Amended Complaint, the
9 Borrowers allege claims for violations of the Fair Housing Act, the Fair Debt Collection Practices
10 Act, and the Nevada Uniform Lending Practices Act. They also allege common law claims
11 involving an undefined “conspiracy” involving the MERS® System: conspiracy to commit fraud
12 and conversion, conspiracy to commit fraud, unjust enrichment, intentional infliction of
13 emotional distress, and fraudulent inducement. The Borrowers, however, recently acknowledged
14 that their Amended Complaint states no claims against the MERS Defendants for any statutory
15 violations, nor does it state claims against the MERS Defendants for unjust enrichment,
16 intentional infliction of emotional distress, or fraudulent inducement. (D.E. 239 at 2-3 (“As to the
17 MERS defendants, Plaintiffs are not making claims related to the violation of the Fair Housing
18 Act, the Fair Debt Collection Practices Act, or the Nevada Uniform Lending Practices Act.
19 Additionally, the Borrowers are not making claims against the MERS Defendants for unjust
20 enrichment, intentional infliction of emotional distress, or fraud in the inducement. Plaintiffs are
21 making claims against MERS related to conspiracy to commit fraud and conversion and
22 conspiracy to commit fraud related to the MERS System”).) While the Borrowers’ Ninth Claim
23 is for “injunctive relief,” this is pled as a remedy for conversion and fraud, and does not amount
24

25 ² The Borrowers’ Motion for Preliminary (Class) Injunction refers to twenty-nine such states
26 where non-judicial foreclosures are available and list those states at Exhibit 1. (D.E. 75, Ex.
27 1.) The list of states proffered by the Borrowers contains twenty-eight states and the District
28 of Columbia (hereinafter referred to as the “twenty-nine states”), and it includes the State of
Iowa where non-judicial foreclosures are not available, but fails to list the State of Nebraska,
where such non-judicial foreclosures are available.

1 to an independent claim for relief. (D.E. 239 at 16.) See *I.C.C. v. Transcon Lines*, 115 S. Ct. 689,
2 694 (1995); *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 490 F. Supp. 2d 1091,
3 1130 (D. Nev. 2007) (holding that a claim for “injunctive relief” is not a “separate cause of
4 action” and “not an independent ground for relief”). Thus, the only claims that remain alleged
5 against the MERS Defendants are those for conspiracy to commit fraud and conversion and
6 conspiracy to commit fraud related to the MERS® System. But the Amended Complaint does
7 not allege any facts that state a plausible theory for conspiracy; and that alone is sufficient to deny
8 the Borrowers’ request for class wide injunctive relief.³

9 In the Amended Complaint, the Borrowers originally sought to certify a class
10 composed of “victims of the Defendants who originated, funded, serviced, securitized, sold,
11 transferred, insured, or guaranteed residential real estate loans in the United States from 2004 to
12 2008, and/or whose loans were serviced, securitized, sold, insured or guaranteed by the
13 Defendants, between October 2004 and present, and were damaged or are faced with risk of
14 damage by the origination, servicing, sale, transfer, foreclosure, sale, and/or acquisition of these
15 loans.” (D.E. 35 at 44.) In significant contrast, the Borrowers’ Motion for Class Certification
16 seeks to certify a class—different from the one described in the Amended Complaint—consisting
17 of residential homeowners in all states where non-judicial foreclosure is available, and who
18 obtained residential mortgages secured by a deed of trust designating MERS as the beneficiary
19 between the years 2004 and 2008.⁴ In their motion, the Borrowers seek a preliminary injunction
20 prohibiting the MERS Defendants, and their successors, assignees, agents, representatives, and
21 anyone associated with them from commencing, conducting, instituting or effectuating any
22 trustee’s sales pursuant to non-judicial foreclosure on properties encumbered by, or from, the
23 transfer of any beneficial interest and/or assignment of rights in deeds of trust listing MERS as
24

25 ³ All Defendants seek to dismiss the Amended Complaint for failing to state any claim, and all
26 Defendants’ Motions have been fully briefed and are ripe for decision by this Court.

27 ⁴ Presumably the Borrowers seek an injunction relating to MERS’ deeds of trust dated from
28 January 1, 2004 through December 31, 2008, thereby excluding deeds dated after 2008, or
those dated earlier than January 1, 2004. The Borrowers offer no explanation for this
seemingly arbitrary choice of dates for deeds of trust that they believe are void.

1 the beneficiary. (D.E. 75 at 4, 16.) In other words, the Borrowers seek to enjoin foreclosures on
 2 property involving deeds of trust that designate MERS as the beneficiary in twenty-nine states,
 3 and to enjoin the MERS Defendants from assigning or transferring any such deeds of trust. For
 4 the relevant time period of 2004 through 2008, more than six million such deeds of trust were
 5 registered on the MERS® System.

6 The facts submitted by the Borrowers in support of their motions for class
 7 certification and preliminary injunction are limited to a handful of documents and the affidavit of
 8 Neil Garfield, who the Borrowers proffer as an “expert.” The Court allowed the Defendants
 9 certain discovery of the Borrowers and their so-called expert, resulting in the depositions of
 10 named Plaintiffs Josefa Lopez, Lyndon Graves, Tyrone Evenson, Christopher Peternell, Jose
 11 Casas, Maria Casas, and the purported expert, Mr. Garfield, along with the production of certain
 12 documents by them. As explained below, there is a complete absence of any factual basis to grant
 13 the extraordinary, and drastic, requested relief of imposing an injunction relating to foreclosures
 14 that span twenty-nine states, and involve millions of transactions involving unknown parties.⁵

15 _____
 16 ⁵ The Borrowers proffered the Affidavit of Neil Garfield with their Motion for Preliminary
 17 Injunction, as “evidence” of their entitlement to a preliminary injunction. Mr. Garfield’s
 18 “Affidavit,” however, contains merely his legal opinion, which is rendered without any
 19 factual support or citation. Garfield Dep. Vol I, 111:13-17; 130:11-131:7; Vol. III, 74:6-16,
 20 attached as Ex. G. It is well-established that expert witnesses cannot provide opinions as to
 21 legal conclusions. *See Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th
 22 Cir. 2008) (“an expert witness cannot give an opinion as to a legal conclusion . . .”); *Aguilar*
 23 *v. Int’l Longshoremen’s Union Local #10*, 966 F.2d 443, 447 (9th Cir. 1992) (matters of law
 24 are “inappropriate subjects for expert testimony”); *Crow Tribe of Indians v. Racicot*, 87 F.3d
 25 1039, 1045 (9th Cir. 1996) (experts may “interpret and analyze factual evidence,” but they
 26 may “not testify about the law”). This testimony is particularly inappropriate in the context of
 27 a preliminary injunction, where Courts are required to disregard ultimate facts or legal
 28 conclusions that appear in affidavits. *ACLU of Nev. v. City of Las Vegas*, 13 F. Supp. 2d
 1064, 1071 (D. Nev. 1998).

24 In utter disregard of these standards, the Borrowers seek to qualify Mr. Garfield as an expert
 25 on the basis of his legal “expertise.” *See Millenkamp v. Davisco Foods, Int’l, Inc.*, 562 F.3d
 26 971, 979 (9th Cir. 2009). Mr. Garfield is unqualified by training, education, and experience to
 27 provide an expert opinion under the standards articulated in *Daubert v. Merrell Dow*
 28 *Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S.
 137 (1999). He provided no evidence of any actual qualifications, training, education, or
 experience in any field related to this case that would permit him to be qualified as an expert.
 Ex. G, Garfield Dep. Vol I, 30:2-84:24. Incredibly, he has not spoken or attempted to speak

(continued)

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III. FACTS

To properly analyze the Borrowers' request for injunctive relief, it is critical to accurately explain what the MERS Defendants do and the role they play in the real estate loans and the deeds of trust in which MERS is named as a beneficiary, and to describe the relationship among MERS, MERSCORP, lenders, servicers of loans, and borrowers.⁶

A. Lenders and the Residential Mortgage Market

When a mortgage lender loans money to a home buyer, two documents are obtained from a borrower: (1) a promissory note; and (2) a mortgage instrument granting secured interests in the property as collateral to repay the note. The promissory note is a negotiable instrument under Article 3 of the Uniform Commercial Code, and as such, it is often bought and sold.⁷ The deed of trust or secured instrument, as distinguished from the note, establishes a lien on the property that secures the repayment of the loan. It is the deed of trust or mortgage, not the note that is recorded in the public, local land records.

Two aspects of the loan are then usually bought and sold—the servicing rights and the beneficial rights.⁸ The servicing rights include the right to collect monthly escrow, principal, and interest payments from the borrower, and the beneficial rights include the right to receive the repayment of the loan itself.⁹ For its part, MERS *only* serves as the mortgagee or beneficiary of

to the named Plaintiffs in this case, on whose behalf he attempts to render an “expert” opinion, nor did he even review their loan documents. Ex. G, Garfield Dep. Vol II, 77:9-19; Vol. III, 90:12-92:9. His opinion is so flawed that it is not admissible and should not be relied on by the Court. *Parkinson v. Hyundai Motor Am.*, --- F.R.D. ---, No. SA CV 06-345 AHS (MLGX), 2008 WL 5233200, at *1 (C.D. Cal. Dec. 12, 2008).

⁶ The named Plaintiffs, who seek to represent millions of putative class members in twenty-nine states, show no understanding of what MERS does and they have not undertaken any investigation to determine the business of MERS. *See, e.g.*, Ex. J, Peternell Dep. 74:22-76:21, 78:10-24; Ex. I, Lopez Dep. 259:20-261:18.

⁷ *See* Declaration of MERS, by William Hultman, attached as Ex. A; *see also Jackson v. Mortgage Elec. Reg. Sys., Inc.*, No. A08-397 (Minn. Aug. 13, 2009), at 3-4, attached as Ex. T; *In re MERSCORP, Inc., RESPA Litig.*, MDL No. 1810, 2008 U.S. Dist. LEXIS 40473 at *14 (S.D. Tex. May 16, 2008).

⁸ Ex. A, Hultman Dec.

⁹ Ex. A, Hultman Dec.

1 record on behalf of, or as the nominee for, the lender and the lender's successors and assigns. In
 2 the mortgage loan transaction, MERS serves no other function and acts in no capacity other than
 3 to serve as the beneficiary or mortgagee of record, and, thus, to hold (on behalf of the lender or its
 4 assigns) title to, and in, the secured interests of the property that has been conveyed as security for
 5 the repayment of the loan.

6 **B. How MERS Works**

7 When MERS is involved in a mortgage transaction, the lender¹⁰ takes possession
 8 of the note (and becomes the holder of the note), and the borrower and lender designate MERS
 9 (as the lender's nominee or designee) to serve as the mortgagee or beneficiary such that the
 10 lender's secured interests in the property are held by MERS.¹¹ At the time of the loan origination,
 11 the borrower contractually agrees in the deed of trust (or mortgage) that it is MERS who will
 12 serve as the beneficiary or mortgagee, and in the event of a default on the repayment of the loan,
 13 MERS, as the beneficiary or mortgagee, is authorized to foreclose on the property.¹² After the
 14 borrower signs the deed of trust, it is recorded in the public, local land records with MERS as the
 15 named beneficiary. The deed of trust is recorded in the public, local land records so that the

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 17 ¹⁰ See D.E. 35 ¶ 65 (Plaintiff Lopez's lender was The Mortgage Store), ¶ 75 (the Casas Plaintiffs'
 18 lender was Pinnacle Financial Corporation), ¶ 83 (Plaintiff Graves' lender was Countrywide
 19 Bank), ¶ 91 (the Evenson Plaintiffs' lender was Countrywide Home Loans), ¶ 102 (the Gray
 20 Plaintiffs' lender was First Magnus), ¶ 106 (Plaintiff Frankoski's lender was First National
 21 Bank of Nevada), ¶ 112 (Plaintiff Peternell's lender was Accredited Home Lenders, Inc.).

22 ¹¹ MERS is not involved in the loan origination process—that is, the process by which a
 23 borrower applies for a new loan, generally including all the steps from accepting a loan
 24 application through the disbursement of funds (or declining the application). The Amended
 25 Complaint does not allege MERS to be involved in the origination of the loans. Rather,
 26 MERS' single role in the Borrowers' mortgage transactions was to serve as the "beneficiary"
 27 under the deeds of trust, acting "solely as nominee for Lender and Lender's successors and
 28 assigns." See, Exs. K - Q, Pls.' Deeds of Trust, at 2.

¹² See, Exs. K - Q, Pls.' Deeds of Trust, at 1-3, which contain the following contractual
 provisions: "MERS is a separate corporation that is acting solely as a nominee for Lender and
 Lender's successors and assigns. MERS is the beneficiary under this Security Instrument... .
 Borrower understands and agrees that MERS holds only legal title to the [secured] interests
 granted by Borrower in this Security Instrument, but, if necessary to comply with law or
 custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to
 exercise any and all of those interests, including but not limited to the right to foreclose and
 sell the Property... ."

1 secured parties may establish the priority on their liens; it is not recorded because the lender or
2 MERS has any statutory or contractual legal obligation to do so.

3 MERSCORP, Inc. then tracks the beneficial and servicing rights to the mortgage;
4 neither MERS nor MERSCOPRP services the loan, nor does either have an interest in receiving
5 the proceeds from the repayment of the loan.¹³ When the note is sold by the original lender to
6 others, the various sales of the note are tracked on the MERS® System by MERS members
7 reporting to MERSCORP, Inc. the sale of such notes. Any notes and deeds of trust that are
8 maintained on the MERS® System are identified by a mortgage identification number or “MIN,”
9 and any transactions related to these notes and deeds of trust are reported on the MERS® System.
10 As long as the sale of the note involves MERS members, MERS remains the named beneficiary
11 or mortgagee of record, and continues to act as the beneficiary or mortgagee, as the nominee for
12 the new beneficial owner of the note (and MERS member). The seller of the note does not, and
13 need not, assign the deed of trust or mortgage in order to protect the priority of the recorded,
14 secured interest because MERS remains the beneficiary or mortgagee as the nominee for the
15 purchaser of the note. The purchaser of the note is the lender’s successor and assign referred to in
16 the Deed of Trust.

17 The result is that the deed of trust or mortgage need not be assigned each time the
18 note is sold to a MERS member; thus, the recording fees associated with an assignment are not
19 incurred, while the lien retains its priority.¹⁴ This relationship is memorialized in the security
20 instrument, which the borrower signs and is a party to, as well as in the MERS membership
21 agreements that are entered into between MERS and its members (who are the lenders and
22

23 ¹³ (D.E. ¶ 73 (Countrywide and GMAC Mortgage LLC serviced the Lopez loan), ¶ 103 (Chevy
Chase Bank serviced the Gray loan), ¶ 113 (Countrywide serviced the Peternell loan).)

24 ¹⁴ The Office of Comptroller of the Currency, which regulates national banks, published a guide
25 regarding MERS, attached as Ex. C, which explains that “consumers” benefit from the use of
26 MERS because it “streamlines the mortgage process by using electronic commerce to
27 eliminate paper.” The Department of Housing and Urban Development (“HUD”) currently
28 requires lenders who make government-insured loans under the Hope for Homeowners
Program to use MERS, stating in a letter that lenders making loans under the program “must
register the ... first mortgage in the Mortgage Electronic Registration System (MERS) as a
MERS Original Mortgage.” Ex. D, at pg. 7.

1 servicers); a copy of a typical agreement between MERS and its members is attached as Exhibit
2 B.¹⁵ If, however, a MERS member is no longer involved with the note after it is sold, an
3 assignment from MERS to the non-MERS member is provided by MERS, and that assignment is
4 recorded in the county where the real estate is located, and the mortgage is “deactivated” from the
5 MERS® System.

6 Here, the Borrowers, intentionally obtained loans for the purchase (or refinancing)
7 of residential property, and those loans were secured by the property which was purchased (or
8 refinanced) with the loans.¹⁶ To that end, the Borrowers signed a promissory note
9 unconditionally obligating them to repay the borrowed monies to the lender, and they
10 simultaneously—in the deeds of trust—conveyed title of the secured interests in the properties to
11 MERS, as the nominee for the lender. The Borrowers signed the deeds of trust (and in many
12 cases initialed each page of the deeds of trust), and none of the Borrowers complained at the time
13 of signing, nor do they so allege in the Amended Complaint, that they were under any duress or
14 subject to coercion when they each signed the subject deeds of trust. There are no claims that the
15 MERS Defendants made any representations or communicated with the Borrowers in any way
16

17 ¹⁵ The MERS membership agreement and the rules and procedures for MERS which contain the
18 contractual agreements between MERS and the lenders or servicers, are available on the
19 MERS website at www.mersinc.com.

20 ¹⁶ Ex. H, Graves Dep. 219:14-221:14; Ex. J, Peternell Dep. 90:21-91:11; Ex. I, Lopez Dep.
21 247:23-248:5. For example, Plaintiff Peternell testified that at the time he made the loan he
22 agreed that if he could not make the payments on the loan, his house could be foreclosed to
23 satisfy the outstanding amount on the loan. Ex. G, Peternell Dep. 91:4-11 (“Q: And when you
24 got the loan did you agree that, if you did not make payments on the loan, that your house
25 could be foreclosed upon to satisfy the outstanding amount on the loan? A: Yes. Q: You
26 agreed to that at the time you made the loan. Correct? A: Yes.”). Plaintiff Graves testified
27 that it was his intention upon taking out the loan to secure the repayment of the loan with the
28 house. Ex. H, Graves Dep. 220:9-221:5 (“Q: So you understood in December of 2007 that if
you couldn’t pay it back, some entity could come get that house and use and sell that house
and take the proceeds of that house—A: Yes. Q:—to retire the debt that you took— A: Yes.
Q:—of \$98,000? A: Yes. Q: That was your intention in making the transaction— A: Yes.
Q:—in December of 2007? A: It was my understanding. Q: Well— A: My intent wasn’t to
be foreclosed on, my intent wasn’t to have to get to that point. My intent was to pay them off
and then—in three to five years if the market was strong I would sell the house. Q: But it
was your intent to secure the repayment of your loan with the house? A: Absolutely.”)

1 except for what is contained in the deeds of trust that each Borrower signed. In fact, the named
 2 Plaintiffs have never had any other contact with the MERS Defendants, nor have they ever
 3 attempted to contact or communicate with the MERS Defendants.¹⁷

4 **IV. MEMORANDUM OF POINTS AND AUTHORITIES**

5 The Borrowers seek a preliminary injunction to halt both (1) all residential
 6 foreclosures in non-judicial foreclosure states for all borrowers whose deeds of trust securing
 7 their loans for the purchase of the property names MERS as the beneficiary; and (2) all
 8 assignments of deeds of trust designating MERS as the beneficiary where the deed of trust
 9 secures a residential loan in a non-judicial foreclosure state. (D.E. 75 at 3.) The Borrowers seek
 10 this injunctive relief on behalf of a proposed class that consists of all “residential homeowners in
 11 Nevada, Arizona, and California and in other states in the United States wherein non-judicial

12 ¹⁷ Ex. I, Lopez Dep. 261:23-262:13 (“Q: Ms. Lopez, have you ever had any conversations with
 13 any person who was a representative of MERS? A: No. Q: Have you ever attempted to
 14 contact anyone at MERS? A: No. Q: To the best of your knowledge has anyone at MERS ever
 15 attempted to contact you? A: No. Q: Have you ever received any written communication,
 16 whether it be a letter, an e-mail or other document from MERS? A: No. Q: Have you ever
 17 sent any written communication to MERS? A: No.”); Evenson Dep. 26:18-27:3, attached as
 18 Ex. F, (“Q: Have you ever had any discussion with any person representing MERS? A: No. Q:
 19 Have you ever received any written communication from MERS? A: No. Q: Have you ever
 20 sent any written communication to MERS? A: No. Q: Have you ever attempted to contact
 21 MERS? A: Nope.”); Ex. E, J. Casas Dep. 49:1-8 (“Q: Did you—or have you ever spoken to
 22 anyone who represented that they were from MERS? A: No. Q: Have you ever tried to call
 23 anyone at MERS? A: No. Q: Have you received any written communication from MERS? A:
 24 No.”); Ex. H, Graves Dep. 236:2-24 (“Q: Have you ever had any conversation with any
 25 person that held themselves out representing to be MERS? A: No. Q: Did you ever have a
 26 conversation with anyone who you thought was an employee or agent of MERS? A: No. Q:
 27 Did you ever make any attempt to call anyone or discuss your deed of trust with anyone
 28 representing MERS? A: No, and for good reason. Q: Have you ever received any written
 communication from MERS? A: No, I have not personally. Q: Have you ever received any
 written communication from anybody who held themselves out as being representing MERS?
 (sic) A: No. Have you ever sent any written communication to MERS? A: No. Q: Have you
 ever sent any written communication to anyone who you thought was representing MERS? A:
 No.”); Ex. J, Peternell Dep. 84:22-85:13 (Q: . . . Have you received any written
 communication—a letter, email, any written document—from anyone who is holding
 themselves out as a representative of MERS? A: No. Q: Have you received any written
 communication from MERS? A: No. Q: Have you sent any written communication to MERS?
 A: No. Q: Have you had any conversation with any person who was a representative of
 MERS? A: No. Q: Have you spoken to any person at MERS? A: No. Q: Have you attempted
 to speak to any person at MERS? A: No, I have not.”).

1 foreclosure procedures exist, who obtained residential mortgages secured by a deed of trust listing
 2 MERS, Mortgage Electronic Registration Systems, or MERSCORP as the purported beneficiary
 3 between the years 2004 and 2008.” (D.E. 78 at 3.)

4 **A. The Borrowers Do Not Meet Their Burden to Demonstrate Their Right to an**
 5 **Injunction.**

6 A preliminary injunction “is an extraordinary and drastic remedy,” *Mazurek v.*
 7 *Armstrong*, 520 U.S. 968, 972 (1997) that is “never awarded as of right.” *Winter v. Nat. Res. Def.*
 8 *Council, Inc.*, 129 S. Ct. 365, 376 (2008) (citing *Munaf v. Geren*, 553 U.S. ___, 128 S. Ct. 2207
 9 (2008) (slip op. at 12)). As an extraordinary remedy, it is the Borrowers who bear the burden to
 10 demonstrate their right to a preliminary injunction. *See Mazurek*, 520 U.S. at 972. A preliminary
 11 injunction should not be granted if any doubt exists or is created in the record regarding the merits
 12 of a plaintiff’s claim. *See Sid Berk, Inc. v. Uniroyal, Inc.*, 425 F. Supp. 22, 29 (C.D. Cal. 1977)
 13 (“The existence of any debate or doubts on the record as to the merits of the claim or the power of
 14 the court to act will ordinarily bar the granting of a preliminary injunction.” (citing *Fowler v.*
 15 *United States*, 258 F. Supp. 638, 644 (C.D. Cal. 1966))).

16 Here, the Borrowers ask this Court to enjoin foreclosures and transfers in twenty-
 17 nine states, on behalf of a proposed class in the millions, most of whom are not threatened by
 18 foreclosure, others of whom are at various stages in the foreclosure process. The Borrowers are
 19 asking a federal court to prevent, and thus interfere with, the transfer of real property, which is
 20 governed by the law of twenty-nine separate states, and which varies both in substance and
 21 procedure.¹⁸ Thus, the Borrowers not only seek the extraordinary and drastic remedy of an
 22 injunction, but the injunction they seek is itself extraordinary, both in its scope and as to its
 23 consequences. The Borrowers have failed to allege valid claims; they have failed to show that
 24 their claims have any merit; and they have failed to show they have been injured by any alleged
 25 acts of the MERS Defendants. Before the Borrowers obtain injunctive relief that affects millions

26
 27 ¹⁸ The transfer of real property is a quintessential question of state law. *See, e.g.*, 59A C.J.S.
 28 MORTGAGES § 698 (2009); 7 FLETCHER CYC. CORP; IN REM JURISDICTION § 3234 (2008);
Nat’l Wildlife Fed’n v. Espy, 45 F.3d 1337, 1343 (9th Cir. 1994).

1 of contracts, they must meet their burden to show the Court that they are entitled to the
 2 extraordinary and drastic remedy they request. They cannot meet this burden, nor are there any
 3 circumstances under which they could meet this burden, to establish a right to an injunction with
 4 such extreme consequences.

5 **B. A Preliminary Injunction May Not Issue on Behalf of a Class That is Not**
 6 **Certified**

7 As a threshold matter, a Court may not determine the rights of third parties not
 8 before it by way of a preliminary injunction.¹⁹ *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir.
 9 1984)(“A federal court . . . may not attempt to determine the rights of persons not before the
 10 court.”). As a matter of law, no preliminary injunction may issue on behalf of a class that has not
 11 been certified, because the uncertified class is not yet before the Court. *Mack v. HH Gregg, Inc.*,
 12 No. 08-664-DFH-WTL, 2008 U.S. Dist. LEXIS 65444, at *1 (S.D. Ind. Aug. 21, 2008) (“Because
 13 no plaintiff class has been certified at this point, plaintiffs lack standing to seek—and the district
 14 court therefore lacks authority to grant—relief that benefits third parties. A wrong done to
 15 plaintiff in the past does not authorize prospective, class-wide relief unless a class has been
 16 certified.”) Here, the Borrowers seek injunctive relief on behalf of a class that has not yet been
 17 certified. (D.E. 78.) Until, and unless, the proposed class is certified and, thus, made a party to
 18 this action, this request for injunctive relief necessarily fails. *Baxter v. Palmigiano*, 425 U.S. 308
 19 n.1 (1976) (“Because a class has not been certified the only interests at stake are those of the
 20 named plaintiffs.”); *see Zepeda*, 753 F.2d at 727 (vacating and remanding the District Court grant
 21 of an injunction on behalf of a non-certified class of plaintiffs, directing that the injunction “must
 22 be limited to apply only to the individual plaintiffs unless the district judge certifies a class of
 23 plaintiffs”).²⁰

24 ¹⁹ *McKenzie*, 118 F.3d at 555 (7th Cir. 1997) (“Injunctions may not be issued to provide relief
 25 for third parties”); *Goldstein v. Home Depot U.S.A., Inc.*, 609 F. Supp. 2d 1340, 1349 (N.D.
 Ga. 2009) (“Injunctions may not be issued to provide relief for non-parties.”).

26 ²⁰ *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997); *Saleh v. Titan Corp.*, 353
 27 F.Supp.2d 1087, 1091 (S.D. Cal. 2004) (finding that “the Ninth Circuit in *Zepeda* made clear
 28 that where an action has not been certified as a class action, a district court may not issue an
 injunction as to putative class members, *even where, unlike here, the injunction is sought for
 their benefit.*”); *see Nat’l Center for Immigrants Rights, Inc. v. U.S. I.N.S.*, 743 F.2d 1365,

(continued)

1 The Borrowers are seeking class certification so that they may obtain injunctive
 2 relief. For many reasons, the Borrowers’ pending Motion for Class Certification is fundamentally
 3 flawed and should be denied. A class cannot be certified where—as here—no valid claims have
 4 been stated, or where the claims alleged are not common and typical among the named Plaintiffs.
 5 Upon the denial of the Borrowers’ Motion for Class Certification, this Motion for Preliminary
 6 Injunction must be denied, and the Court need not consider any further issues relating to the
 7 Borrowers’ request for issuance of a preliminary injunction.²¹

8 **C. The Borrowers’ Do Not Have Article III Standing to Seek Injunctive Relief.**

9 Prior to examining the merits of their request for injunctive relief, the Borrowers
 10 must first demonstrate that they have the requisite constitutional standing to seek injunctive relief.
 11 They do not. Article III of the Constitution limits the jurisdiction of federal courts to “cases” or
 12 “controversies.” *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian*
 13 *Coll. v. Am. United for Sep. of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982)); *Summers v.*
 14 *Earth Island Inst.*, 129 S. Ct. 1142, 1148-49 (2009) (“In limiting the judicial power to ‘Cases’ and
 15 ‘Controversies,’ Article III of the Constitution restricts it to the traditional role of Anglo-
 16 American courts, which is to redress or prevent actual or imminently threatened injury to persons

17
 18 1371 (9th Cir. 1984) (“INS asserts that in the absence of class certification, the preliminary
 19 injunction may properly cover only the named plaintiffs. We agree.”); *Payton v. County of*
 20 *Kane*, 308 F.3d 673, 680 (7th Cir. 2002); *Goldstein*, 609 F. Supp. 2d at 1349; *Frankle v. Best*
 21 *Buy Stores, LP*, No. 08-5502, 609 F. Supp. 2d 841, 848 (D. Minn. 2009); *Mack*, 2008 U.S.
 22 Dist. LEXIS 65444, at *1.

21 ²¹ The Defendants, including MERS, oppose class certification, and MERS hereby incorporates
 22 by reference Defendants’ Memorandum of Law opposing Plaintiffs’ Motion for Class
 23 Certification (in which MERS joins), and MERS’ Joinder and Supplement Memorandum of
 24 Law opposing class certification, which are being filed concurrently with this Opposition.

24 Additionally, the Borrowers’ seek a preliminary injunction against individuals and entities
 25 that are not before the Court. Specifically, the Motion seeks to enjoin “anyone associated
 26 with MERS or acting in concert with it,” which is an undefined set of individuals and entities
 27 that are not parties to this lawsuit. (D.E. 75 at 3.) It is axiomatic that preliminary injunctions
 28 may not issue against persons not before the Court, over whom personal jurisdiction has not
 yet been established through proper service. *Zepeda*, 753 F.2d at 727 (“A federal court may
 issue an injunction if it has personal jurisdiction over the parties and subject matter
 jurisdiction over the claim.”). As such, even if class certification is obtained, any preliminary
 injunction may only enjoin parties to this action.

1 caused by private or official violation of law The doctrine of standing is one of several
2 doctrines that reflect this fundamental limitation.”). The limitations of Article III, have given rise
3 to the standing doctrine, which requires that plaintiffs demonstrate their standing to sue for each
4 type of relief sought. *See United States v. Hays*, 515 U.S. 737, 742 (1995); *Bates v. UPS, Inc.*,
5 511 F.3d 974, 985 (9th Cir. 2007) (“Standing is a threshold matter central to our subject matter
6 jurisdiction. We must assure ourselves that the constitutional standing requirements are satisfied
7 before proceeding to the merits.”); *id.* at 985 (“Standing must be shown with respect to each form
8 of relief sought, whether it be injunctive relief, damages, or civil penalties.” (citing *Friends of the*
9 *Earth, Inc. v. Laidlaw Envt’l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000))). In a class action,
10 such questions of Article III standing must be resolved before the question of class certification,
11 and before the Court analyzes whether all the factors for issuance of a preliminary injunction are
12 met. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) (“The district court correctly
13 addressed the issue of standing before it addressed the issue of class certification.”); *Lee v. State*
14 *of Or.*, 107 F.3d 1382, 1390 (9th Cir. 1997) (“standing is a jurisdictional element that must be
15 satisfied prior to class certification”); *see also Steel Co v. Citizens for a Better Env’t*, 523 U.S. 83,
16 93-101 (1998) (holding that federal courts may not presume the existence of Article III
17 jurisdiction to address merits questions).

18 Article III standing in a class action examines the standing of each class
19 representative requiring that “at least one named plaintiff must have standing in his [or her] own
20 right to assert a claim against each named defendant before he [or she] may purport to represent a
21 class claim against that defendant.” *Henry v. Circus Circus Casinos*, 223 F.R.D. 541, 544 (D.
22 Nev. 2004); *see also In re W. States Wholesale Natural Gas Antitrust Litig.*, 619 F. Supp. 2d
23 1062, 1071 (D. Nev. 2008) (same). This intractable rule of Article III standing ensures that
24 plaintiffs do not “establish standing through the back door of a class action.” *Henry*, 223 F.R.D.
25 at 544 (“Consequently, a plaintiff who lacks Article III standing to sue a defendant may not
26 establish standing ‘through the back door of a class action.’” (quoting *Allee v. Medrano*, 416 U.S.
27 802, 828-829 (1974) (Burger, C.J., concurring in part and dissenting in part))). As outlined
28 below, the Borrowers do not have Article III standing.

1 Here, the Borrowers seek injunctive relief on behalf of a proposed class as to their
2 “claims for injunctive relief and declaratory judgment” contained in Counts IX and X of the
3 Amended Complaint. (D.E. 78 at 3; D.E. 35 at 40-43.) As such, the request for injunctive relief,
4 on behalf of the proposed class, is limited to Counts IX and X of the Amended Complaint, the
5 only claims on which class certification is sought. Standing to seek injunctive relief in a class
6 action requires that each proposed class representative show *all* of the following: (1) the class
7 representatives are “under threat of suffering ‘injury in fact’ that is concrete and particularized;”
8 (2) the threat to the class representative is “actual and imminent, not conjectural or hypothetical;”
9 (3) the threat to the class representative is “fairly traceable to the action of the defendant;” and (4)
10 it is “likely that a favorable judicial decision will prevent or redress the injury.” *Summers*, 129 S.
11 Ct. at 1149 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 180-81); *Lujan v. Defenders of*
12 *Wildlife*, 504 U.S. 555, 560-61 (1992); *Bates*, 511 F.3d at 985 (same).

13 **1. Borrowers Do Not Have Standing Because the Injury Alleged by**
14 **Borrowers is Not Traceable to the MERS Defendants.**

15 At the heart of Article III standing is the requirement that the harm a plaintiff
16 alleges be traceable to the alleged actions of the defendant. *See County of Riverside v.*
17 *McLaughlin*, 500 U.S. 44, 51 (1991) (“At the core of the standing doctrine is the requirement that
18 a plaintiff ‘allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct
19 and likely to be redressed by the requested relief.’” (quoting *Allen v. Wright*, 468 U.S. 737, 751
20 (1984)) (citing *Valley Forge Christian College*, 454 U.S. at 471 (1982))); *Simon v. E. Ky. Welfare*
21 *Rights Org.*, 426 U.S. 26, 38 (1971)). This requires that a plaintiff demonstrate that the causes of
22 action for which he seeks the remedy of injunctive relief are *linked* with the specific actions
23 allegedly taken by the defendant. *See Easter v. Am. West Fin.*, 381 F.3d 948, 961 (9th Cir. 2004)
24 (upholding the denial of a preliminary injunction because “‘plaintiffs have failed to link their
25 causes of action with specific actions of the 39 Trust Defendants’ and therefore lack standing to
26 sue”). The Borrowers seek injunctive relief on behalf of a proposed class that would be certified
27 as to Counts IX and X of the Amended Complaint. But the Borrowers’ Motion for Injunctive
28 Relief identifies Count V, for conspiracy to commit fraud through the creation of the MERS®

1 System, as the claim on which they have a probability of success on the merits. (D.E. 75 at 4.)

2 There is not a single allegation in the Amended Complaint that the MERS
3 Defendants have taken any action—a necessary first step in showing that the Borrowers’ injuries
4 are traceable to the MERS Defendants. Nor do the Borrowers proffer any evidence that the
5 MERS Defendants took any action with relation to them. In fact, the Borrowers each testified at
6 their depositions that the MERS Defendants had taken *no* actions with relation to them.²²

7 Without an allegation that the MERS Defendants have taken any action with relation to the
8 Borrowers, the Borrowers cannot show that any of their alleged injuries are traceable to the
9 MERS Defendants.

10 Count V alleges that the Defendants conspired to “develop a system of earning
11 profits” by “creat[ing], manag[ing], operat[ing], and controll[ing] the Defendant MERS for the
12 specific purpose of MERS being designated as a sham ‘beneficiary’ in the original deeds of trust
13 securing those loans.” (D.E. 35 at 166.) The Borrowers attempt to assert that this conspiracy
14 centers on the creation of invalid deeds of trust in which “MERS is identified as the nominee and
15 purported ‘beneficiary,’” although “there is no actual ‘beneficiary’ under the deed of trust.”²³
16 (D.E. 78 at 26-27.) The Borrowers then allege that the creation of the invalid deeds of trust
17 renders the promissory notes “unsecured.” (D.E. 35 at 33-34; D.E. 78 at 26-27.) The Borrowers’
18 fundamental problem is that the allegation that Defendants somehow created invalid deeds of
19 trust has no relationship to the injury that Borrowers allege they suffer, and thus there is no
20 standing to seek injunctive relief.

21 In the Borrowers’ claim for injunctive relief, the injury that the Borrowers allege
22 they are suffering is the loss of their properties through foreclosure, and it is foreclosures that the
23 Borrowers seek to enjoin here. (D.E. 75 at 3.) But these foreclosures are not related to the
24 alleged wrong, which is the creation of invalid deeds of trust. (D.E. 35, 75, 78.) Even if the
25 allegations regarding the deeds of trust were true, a deed of trust that is invalidly formed

26 ²² See *supra* note 17.

27 ²³ The merits of these allegations, or the likelihood that the Borrowers will succeed on the merits
28 of their claims, are discussed *infra*, at Part F.

1 (allegedly because it designates MERS as a beneficiary) would not render a loan “unsecured” and
2 permit a borrower to avoid foreclosure for non-payment of the note. Thus, the action alleged to
3 cause the harm—wrongly designating MERS as a beneficiary on the deed of trust—would not
4 give rise to the foreclosure of the Borrowers’ properties. The foreclosure of the Borrowers’
5 properties—their alleged injury—through the non-judicial foreclosure process does not follow
6 from the creation of “invalid” deeds of trust—rather, the foreclosures follow from the Borrowers’
7 continued failure to pay the monies owed on their promissory notes.

8 The Borrowers’ request for an injunction to halt foreclosures seeks the remedy
9 associated with a wrongful foreclosure—the prevention of a foreclosure that they allege is, or
10 would be, wrongful. But the Borrowers do not allege that Defendants are wrongfully foreclosing
11 on the Borrowers’ properties. And, as to the class as a whole, there are absolutely no facts
12 suggesting that the properties of the potential class members were, or are, in foreclosure or at risk
13 of foreclosure—wrongfully or otherwise. Instead, the Borrowers allege only that the deeds of
14 trust securing their promissory notes were improperly formed. (D.E. 35 at 33-34; D.E. 78 at 26-
15 27.) The remedy for an improperly formed deed of trust is not a wrongful foreclosure action, but,
16 more usually, a quiet title action. *See, e.g., Neumann v. McMillan*, 97 Nev. 340, 341 (Nev. 1981)
17 (identifying an action filed to void a deed of trust as a quiet title action). Similarly, the result of
18 an improperly formed deed is not its invalidation, but its reformation in accord with the original
19 intentions of the parties. *See First Fed. Sav. & Loan Ass’n v. Racquet Club Condos.*, 106 Nev.
20 758, 761 (Nev. 1990) (“Courts in this state will reform contracts and deeds in accordance with the
21 true intention of the parties when their intentions have been frustrated by a mutual mistake.”).
22 Here the Borrowers do not allege any claims that seek to reform the deeds of trust they claim are
23 invalid; they do not even allege “wrongful foreclosures” by the MERS Defendants or by any of
24 the other Defendants. Instead, the Borrowers seek only to enjoin the foreclosures of their homes,
25 caused by their own failures to pay the monies they owe, by alleging that the Defendants
26 conspired to improperly form the deeds of trust.

27 Seen in this way, it becomes evident that there is simply no connection between
28 the actions alleged to be wrongful—namely, the creation of invalid deeds of trust—and the

1 alleged injury of wrongful foreclosures, which the Borrowers seek to enjoin. Traceability
2 requires “that there be ‘a causal connection between the injury and the conduct complained of—
3 the injury has to be fairly traceable to the challenged action of the defendant.’” *Jordan v. Paul*
4 *Fin., LLC*, No. C 07-04496 S1, 2009 U.S. Dist. LEXIS 7592, at *12 (N.D. Cal. Jan. 27, 2009)
5 (citing *Easter*, 381 F.3d at 961); *Dash v. FirstPlus Home Loan Owner Trust 1996-2*, 248 F. Supp.
6 2d 489, 503 (M.D.N.C. 2003). The necessary line of causation between the alleged wrongful
7 conduct and the alleged injury is absent here. *See Allen*, 468 U.S. at 757 (finding the traceability
8 requirement of standing was not satisfied where the line of causation between the alleged conduct
9 and the alleged injury was attenuated and indirect (citing *E. Ky. Welfare Rights Org.*, 426 U.S. at
10 42)). Without such a line of causation, the Borrowers do not have the requisite Article III
11 standing to seek the extraordinary remedy of a preliminary injunction.

12 **2. The Borrowers’ Injury Will Not Be Redressed by the Relief Sought.**

13 The Borrowers’ Motion also fails for lack of Article III standing because there is
14 no showing that the alleged injury will be redressed by the relief they seek. Standing to seek
15 injunctive relief requires that the requested relief is likely to redress the injury alleged to have
16 occurred in the Amended Complaint. *Allen*, 468 U.S. at 751; *Valley Forge Christian Coll.*, 454
17 U.S. at 472; *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989). Here, the Borrowers
18 state only that their injuries occurred because their deeds of trust were invalidly formed. (D.E.
19 35, 75, 78.) But even assuming that the deeds of trust were, in fact, invalidly formed, halting
20 foreclosures on their homes does not remedy the “invalidity” of such deeds of trust, which were
21 intentionally created.

22 There is not a single allegation that the Borrowers did not intend to execute their
23 promissory notes, nor is there a single allegation that the Borrowers did not intend to secure the
24 payment of those promissory notes with the properties they purchased with the proceeds of the
25 loans. Instead, according to the Amended Complaint, and corroborated by the Borrowers’
26 deposition testimony, the Borrowers intended to execute promissory notes secured by deeds of
27
28

1 trust on the residential properties they were purchasing.²⁴ Where, as here, there is a clear intent
2 by all parties to form a deed of trust to secure a promissory note, the remedy for an invalidly
3 formed deed of trust is not to void the deed of trust, or to render the promissory note unsecured,
4 but to reform the deed of trust. As such, the injury that the Borrowers allege on behalf of the
5 proposed class would not be redressed by halting foreclosures of class members' homes, and the
6 Borrowers have no standing to seek relief on this basis. *See Welsh v. United States*, 398 U.S. 333,
7 361 (1970); *Coakley v. Sunn*, 895 F.2d 604, 606-607 (9th Cir. 1990) (citing *E. Ky. Welfare Rights*
8 *Org.*, 426 U.S. at 45); *Hays v. Potlatch Forests*, 465 F.2d 1081, 1083 (8th Cir. 1972)). In
9 essence, the redressability inquiry fails for the inverse of the reason that the traceability inquiry
10 fails—there is simply no logical connection between the cause of action alleged and the injury
11 alleged. Even if the Court were to render the requested injunctive relief, it would not be effective
12 to cure the harm alleged. *See Coakley*, 895 F.2d at 607-608 (finding that “[Plaintiffs’] injury is
13 not one which can be redressed by a remedy we are able to provide. As a consequence,
14 appellants have failed to satisfy the Article III standing requirement of redressability.”).

15 The Borrowers bear the burden to show their standing to seek the relief they seek;
16 having failed to demonstrate traceability or redressability, their Motion fails for lack of standing.

17 **D. Borrowers Have Not Met the Standard for Issuing a Preliminary Injunction.**

18 After examining the Borrowers' lack of Article III standing, the analysis turns to
19 whether the Borrowers meet the requirements for issuance of a preliminary injunction. Because
20 preliminary injunctions are an extraordinary remedy a court may only issue them when the
21 plaintiff, by a clear showing, carries his or her burden of persuasion on *each* of the required
22 factors. *See Mazurek v. Armstrong*, 520 U.S. at 972; *Weinberger v. Romero-Barcelo*, 456 U.S.
23 305 (1982); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994); *Saini v. Int'l Game*
24 *Tech.*, 434 F. Supp. 2d 913, 919 (D. Nev. 2006). There are four factors that must be established
25 before the injunction may issue: (1) the plaintiff is likely to succeed on the merits of his or her
26 claim; (2) without the preliminary relief the plaintiff is likely to suffer irreparable harm; (3) the

27 ²⁴ D.E. 35 at ¶¶ 60, 75, 79, 90, 97, 105, and 110; Ex. J, Peternell Dep. 90:21- 93:1; Ex. H,
28 Graves Dep. 219:12 – 220:22.

1 balance of equities tips in the plaintiff's favor; and (4) issuance of the requested injunction is in
2 the public interest. *See Winter*, 129 S. Ct. at 374; *Am. Trucking Ass'ns v. City of Los Angeles*,
3 559 F.3d 1046, 1053 (9th Cir. 2009); *Knight v. Metro. Police*, 2:08-cv-00308-RCJ-GWF, 2009
4 U.S. Dist. LEXIS 19986, at *8 (D. Nev. Mar. 4, 2009). On each factor, the Borrowers' Motion
5 fails.

6 The Borrowers' Motion wrongly states that there are two methods for evaluating
7 whether a preliminary injunction should issue. (D.E. 78 at 9.) This, however, overlooks the
8 recent Supreme Court decision in *Winter v. Natural Resources Defense Council, Inc.*, and the
9 subsequent Ninth Circuit decision in *American Trucking Associations, Inc. v. City of Los Angeles*,
10 which followed *Winter*. *Winter*, 129 S. Ct. at 374; *Am. Trucking*, 559 F.3d at 1053; *Knight*, 2009
11 U.S. Dist. LEXIS 19986, at *8. In *Winter*, the Supreme Court decided that the Ninth Circuit's
12 sliding scale for granting injunctive relief was "too lenient." 129 S. Ct. at 374. The Supreme
13 Court reiterated that plaintiffs seeking a preliminary injunction must presumptively establish *each*
14 of the four required factors: (1) the likelihood of success on the merits; (2) irreparable harm to the
15 plaintiff; (3) the balance of equities is in the plaintiff's favor; and (4) public interest supports the
16 injunction. *Id.* Following the Supreme Court's decision in *Winter*, the Ninth Circuit explicitly
17 held in *American Trucking* that district courts should no longer employ the preliminary injunction
18 standard that the Borrowers now urge. *Am. Trucking*, 559 F.3d at 1053 (overruling the use of the
19 so-called sliding standard, "[t]o the extent that our cases have suggested a lesser standard [than
20 that articulated in *Winter*], they are no longer controlling, or even viable"); see also *Knight*, 2009
21 U.S. Dist. LEXIS 19986, at *8; *Scentsy, Inc. v. Perf. Mfg.*, Case No. CV08-553-S-EJL, 2009 U.S.
22 Dist. LEXIS 33958, at *6-8 (D. Idaho, Apr. 16, 2009) ("This Court will apply the standard
23 articulated in *Winter* and recognized in this Circuit."); *Jacobsen v. Katzer*, CV 06-01905-JSW,
24 2009 WL 29881, at *8 (N.D. Cal. Jan. 5, 2009) (applying four-factor test).

25 In ruling on the Borrowers' Motion, the Court "is not bound to decide doubtful
26 and difficult questions of law or disputed questions of fact." *Int'l Molders' & Allied Workers'*
27 *Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) (citing *Dymo Indus., Inc. v.*
28 *Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964)). Applying the four-factor test for the

1 issuance of injunctive relief to the facts of this case, and analyzing it in light of the general
2 predisposition against the issuance of injunctive relief, shows that no preliminary injunction
3 should issue.

4 **E. The Borrowers Have Made No Showing of Irreparable Harm.**

5 A finding of irreparable harm is the preliminary requirement for an entitlement to
6 injunctive relief. *See Winter*, 129 S. Ct. at 375-6 (“Issuing a preliminary injunction only on a
7 possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an
8 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled
9 to such relief.”); *Inspection Mgmt. Sys. v. Open Door Inspections, Inc.*, No. 2:09-cv-00023-MCE-
10 GGH, 2009 U.S. Dist. LEXIS 23524, at *9-10 (E.D. Cal. Mar. 26, 2009); *Dominion Video*
11 *Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260-61 (10th Cir. 2004); *Prairie Band*
12 *of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). As a general principle,
13 irreparable harm is an injury that cannot be adequately remedied by the imposition of money
14 damages. *See Prairie Band*, 253 F.3d at 1250. Irreparable harm is generally found where
15 compensatory damages are unsuitable or where an injury will be incapable of remedy following a
16 final determination on the merits. *See Prairie Band*, 253 F.3d at 1246 (10th Cir. 2001); *Am.*
17 *Hosp. Ass’n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1998); *Wildmon v. Berwick Universal*
18 *Pictures*, 983 F.2d 21, 24 (5th Cir. 1992). For an injury to constitute irreparable harm, the injury
19 “must be both certain and great, and it must not be merely serious or substantial.” *See Prairie*
20 *Band*, 253 F.2d at 1250 (internal citation and quotations omitted). Moreover, irreparable harm is
21 never presumed; instead the burden is on the Borrowers to demonstrate its existence. *See, e.g.,*
22 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Amoco Prod. Co. v. Village of Gambell*,
23 480 U.S. 531 (1987); *MGM Studios, Inc. v. Grokster, Ltd.*, 581 F. Supp. 2d 1197, 1213-1214
24 (C.D. Cal. 2007).

25 The Borrowers conclusorily assume that the proposed class will be irreparably
26 harmed because the “loss of real property results in irreparable harm.” (D.E. 75 at 13.) This
27 ignores the fact that while a foreclosure may constitute irreparable harm if it is wrongful, the
28 foreclosures in this lawsuit are not in themselves wrongful. *See, e.g., Mesde v. Am. Brokers*

1 *Conduit*, Case No. C 09-02418 JF (RS), 2009 U.S. Dist. LEXIS 59632, *6 (N.D. Cal. June 30,
2 2009) (finding that “[f]oreclosure may constitute irreparable harm”). Essentially, the Borrowers
3 seek injunctive relief on the grounds that foreclosure is an irreparable harm, even where the
4 foreclosures involved have no relationship to the wrong that the Borrowers allege that the MERS
5 Defendants have committed.

6 The Borrowers obtained home loans, used the monies loaned to them to purchase
7 properties, which secured their repayment of the loans, and then defaulted on those loans by
8 failing to make their monthly payments.²⁵ The loss of real property in such a situation is not
9 wrongful, nor, by corollary, is it irreparable. *See Ernestburg v. Mortgage Inv. Group*, 2:08-cv-
10 01304-RCJ-RJJ, 2009 U.S. Dist. Lexis 4560, at *16-17 (D. Nev. Jan. 22, 2009) (“An action for
11 the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time
12 the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of
13 performance existed on the mortgagor’s or trustor’s part which would have authorized the
14 foreclosure or exercise of the power of sale.” (citing *Collins v. Union Fed. Sav. & Loan Ass’n*, 99
15 Nev. 284 (Nev. 1983) (citations omitted))). Significantly, the MERS Defendants are not involved
16 in the foreclosures, or the attempted foreclosures, of any of the named Plaintiffs’ properties, nor
17 do the Borrowers claim that the MERS Defendants are involved in the foreclosure actions. But
18 the Borrowers maintain that the MERS Defendants should be enjoined from foreclosing when the
19 irreparable harm that would be caused from such foreclosures is not being caused, actually or
20 allegedly, by the MERS Defendants. As such, and as to the MERS Defendants, even if a
21 foreclosure did constitute an irreparable harm, the Borrowers have made no showing that the
22 MERS Defendants are causing this harm, which they must show before injunctive relief is
23 available to them.

24 Moreover, it is not sufficient to simply allege that the resulting injury will be
25 irreparable; it must also be shown that such irreparable injury is likely. *See id.*; *see also Knight*,

26 _____
27 ²⁵ In the case of Plaintiff Lopez, she not only used the money to finance the purchase of her
28 home, she refinanced her loan and received \$100,000 (the repayment of which was secured by
the property) to use for other unrestricted purposes. Ex. I, Lopez Dep., Vol. I, 57:5-58:24.

1 2009 U.S. Dist. LEXIS 19986, at *7-8. Here, the Borrowers make no such showing. The
2 Borrowers seek injunctive relief on behalf of a proposed class that consists of homeowners in
3 non-judicial foreclosure states with deeds of trust identifying MERS as the beneficiary as
4 nominee for the lender, which amounts to millions of deeds of trust. The Borrowers premise their
5 request for injunctive relief on the question of whether these millions of deeds of trust should be
6 ruled “invalid.” The Borrowers, however, make no showing that any of the class members are
7 suffering any actual injury as a result of the “invalid” or “sham” deeds of trust. Significantly, the
8 Borrowers also fail to make any showing that such injury is likely with regard to the proposed
9 class members. Irreparable harm requires either “an actual or concrete harm or the threat of an
10 actual or concrete harm.” *See Lands Council v. Martin*, No. CV-06-0229-LRS, 2006 U.S. Dist.
11 LEXIS 64764, at *13-14 (E.D. Wash. Sept. 11, 2006) (citing *L.A. Mem. Coliseum Comm’n v.*
12 *NFL*, 634 F.2d 1197, 1200 (9th Cir. 1980)). Harm is not considered imminent if it is based, as it
13 is here, only on “remote possibilities or speculation.” *Caribbean Marine Serv. Co. v. Baldrige*,
14 844 F.2d 668, 675 (9th Cir. 1988).

15 The Borrowers seek relief on behalf of a proposed class with no showing that there
16 is any probability the class members suffer, or will suffer, from the threat of a foreclosure. The
17 proposed class includes borrowers who are current on their loans, or who are attempting to
18 renegotiate their loans. These class members are not suffering irreparable harm, and it cannot be
19 said that the threat of irreparable harm to these class members is “likely.”²⁶ There is, therefore,
20 no showing that irreparable harm is likely as to the members of the proposed class if the
21 injunction is not issued. The Borrowers’ failure to demonstrate the immediacy or likelihood of
22

23 ²⁶ In a similar case in an Arizona federal court, in which the plaintiff sought similar injunctive
24 relief, the Court refused to issue a preliminary injunction precisely because “[t]he mere *future*
25 threat of foreclosure and eviction, however, fails to satisfy [Plaintiff’s] burden that he will
26 suffer irreparable harm if the Court fails to grant [Plaintiff] the preliminary injunction he
27 seeks.” Order at 4, *Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT, 4
28 (D. Ariz. June 10, 2009). In *Cervantes*, the injunctive relief was denied as to the named-
plaintiff; similarly, here, the future threat of millions of foreclosure actions in twenty-nine
states is not a sufficient basis for an injunction on behalf of the putative class. A copy of the
Order in *Cervantes* is attached as Ex. R.

1 the harm they allege necessarily means that they have failed to meet their burden to demonstrate
2 irreparable harm. As a result, their motion must fail. *See Caribbean Marine Serv. Co.*, 844 F.2d
3 at 668 (“At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it
4 will be exposed to irreparable harm. Speculative injury does not constitute irreparable injury
5 sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely
6 allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate
7 threatened injury as a prerequisite to preliminary injunctive relief.” (citing *L.A. Mem. Coliseum*,
8 634 F.2d at 1201-1203; *Goldie’s Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 472 (9th Cir. 1984))).

9 **F. The Borrowers Can Show No Probability of Success as to the Merits of Their**
10 **Claims.**

11 The Borrowers have demonstrated no probability of success on the merits of their
12 claims, which are for conspiracy to commit fraud and conversion and conspiracy to commit fraud
13 related to the MERS® System.

14 **1. The Borrowers Can Demonstrate No Probability of Success Under the**
15 **Laws of Twenty-Nine Separate States.**

16 The Borrowers have not met their burden to demonstrate success on the merits of
17 their claims for injunctive relief because the class on whose behalf they seek relief is too large,
18 spanning twenty-nine states and millions of deeds of trust. As a matter of law, all matters relating
19 to real property are governed by the law of the state where the land is situated. *See Blythe v.*
20 *Hinckley*, 180 U.S. 333 (1901); *Hutchinson Invest. Co. v. Caldwell*, 152 U.S. 65 (1894);
21 *Carpenter v. Strange*, 141 U.S. 87 (1891); *Arndt v. Griggs*, 134 U.S. 316 (1890); *Montgomery v.*
22 *Samory*, 99 U.S. 482 (1878); *Smith’s Lessee v. McCann*, 65 U.S. 398 (1860); *United States v.*
23 *Crosby*, 11 U.S. 115 (1812). That is, the laws of twenty-nine separate states apply to the claims
24 surrounding the deeds of trust in this action. To demonstrate a probability of success on the
25 merits sufficient to justify the issuance of an injunction in *each* of the twenty-nine states, the
26 Borrowers must show that they will succeed under *each* state’s separate laws. The Borrowers
27 have made no such showing, nor have they attempted to do so, because the Borrowers are well
28

1 aware that they cannot demonstrate a likelihood of success on claims that involve such
2 foreclosures. As such, the Borrowers' Motion fails.²⁷

3 **2. The Borrowers' Failure to State a Claim Against the MERS**
4 **Defendants Precludes Injunctive Relief.**

5 When a plaintiff fails to state a claim as to which relief can be granted, there can
6 be no probability of success on the merits and injunctive relief is inappropriate. *See McNeil v.*
7 *Verisign, Inc.*, 127 Fed. Appx. 913, 914 (9th Cir. 2005) ("Because he failed to state a claim
8 against ICANN, McNeil has no cause of action on which to request declaratory or injunctive
9 relief").²⁸ The Borrowers now allege claims against the MERS Defendants for conspiracy to

10 _____
11 ²⁷ Significantly, the proposed class representatives are all residents of Nevada, with deeds of
12 trust that were formed and executed in Nevada securing residential properties in Nevada. As
13 such, the law of Nevada applies to their claims. It is clear that the proposed class
14 representatives are not capable of maintaining claims on behalf of class members from other
15 states, all of whom are subject to different statutory requirements. This, of course, is a reason
16 why the Borrowers' motion for class certification must be denied. *Zinser v. Accufix Research*
17 *Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (affirming denial of class certification, in part
18 because "[t]he complexity of the trial would be further exacerbated to the extent that the laws
19 of the forty-eight states must be consulted to answer such questions." (citing *Castano v. Am.*
20 *Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (holding that "proliferation of disparate factual
21 and legal issues is compounded exponentially" when the law of multiple jurisdictions
22 apply)); *see also Sweet v. Pfizer*, 232 F.R.D. 360 (C.D. Cal. 2005) (Holding that a "bald
23 statement" by plaintiffs that there are common questions of law and these common questions
24 predominate is inadequate to support class certification, "A 'court cannot rely merely on the
25 assurances of counsel that any problems with predominance or superiority can be overcome.'" (quoting *Zinser*, 253 F.3d at 1189 (citing *Castano*, 84 F.3d at 742)); *In re Ford Motor Co.*
26 *Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 349 (D.N.J. 1997) ("In a motion for class
27 certification plaintiffs bear the burden of providing an extensive analysis of state law
28 variations to determine whether there are insuperable obstacles to class certification.")).

22 ²⁸ *See also, Krain v. State Bar of Cal.*, 972 F.2d 1340, (9th Cir. 1992) ("Krain's claim for
23 injunctive relief is meritless because he did not state a claim regarding either a present
24 constitutional violation or the threat of a future violation." (citing *Lyons*, 461 U.S. at 111)); *St.*
25 *Hilaire v. Ariz. Dep't of Corr.*, 936 F.2d 579 (9th Cir. 1991) ("Because St. Hilaire's complaint
26 fails to state a valid claim, St. Hilaire had no probability of success on the merits of his action,
27 and the preliminary injunction was properly denied." (citing *Chalk v. U. S. Dist. Ct.*, 840 F.2d
28 701, 704 (9th Cir. 1988) (finding that preliminary injunction requires probable success on the
merits of the underlying complaint)); *Giannini v. Real*, 911 F.2d 354, 359 (9th Cir. 1990)
("because [plaintiff] failed to state a constitutional claim, the district court did not abuse its
discretion in denying the preliminary injunction motion"); *Hunt v. Nat'l Broad. Co.*, 872 F.2d
289, 296 (9th Cir. 1989) ("Hunt thus failed to state a claim against NBC, and was thus not
entitled to injunctive relief."); *Brady v. State Bar of Cal.*, 533 F.2d 502, 503 (9th Cir. 1976)

(continued)

1 commit fraud and conversion and conspiracy to commit fraud related to the MERS® System.
2 (D.E. 239 at 2-3.) These two claims fail to meet the pleading requirements for stating a
3 conspiracy claim. The Amended Complaint fails to allege any specific facts relating to the
4 MERS Defendants' role or participation in the conspiracy; it fails to allege any wrongful or illegal
5 conduct in the carrying out of the conspiracy; it fails to allege any independent torts from which a
6 conspiracy must be derived; and it fails to allege the necessary agreement between and among the
7 conspirators. As to the "independent" tort of fraud alleged against the MERS Defendants, the
8 Amended Complaint fails to allege any acts of fraud by the MERS Defendants, or to make any
9 specific allegations as to how the MERS Defendants committed the fraud. The Supreme Court
10 has now made clear in *Twombly* and *Iqbal* that pleadings must allege facts that state plausible
11 theories of recovery, and the "unadorned" allegations in the Amended Complaint that the MERS
12 Defendants participated in, or conspired to perform, wrongful acts, or that the MERS Defendants
13 committed fraud, are plainly insufficient. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)
14 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory
15 statements, do not suffice." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).
16 Absent a claim stated in the Amended Complaint against the MERS Defendants, no injunctive
17 relief can be obtained by the Borrowers against the MERS Defendants.²⁹

18 3. The Borrowers' Claims Are Without Merit.

19 Because the Amended Complaint fails to identify any facts showing wrongdoing
20 or illegal conduct by the MERS Defendants, a discussion of why the Borrowers will not succeed
21 on the merits necessarily involves speculation regarding factual allegations of wrongdoing. The
22 Borrowers seem to advance four theories to show they will succeed on the merits of their claims:
23

24 ("The court's denial of a preliminary injunction was proper. Having failed to state any claim
25 for relief, appellant had no basis for any injunctive relief.")

26 ²⁹ For a more in-depth discussion of the reasons the Borrowers' claims against MERS
27 necessarily fail, MERS refers to its Motion to Dismiss and its Reply to Plaintiffs' Opposition
28 to MERS's Motion to Dismiss, which amply demonstrate that the Borrowers have no
probability of success on their claims because they have failed to state a claim as to any cause
of action. (D.E. 163, 275.)

1 (1) designating MERS as the “Beneficiary as Nominee for Lender” on the deeds of trust renders
2 the deeds of trust void, and correspondingly renders the loans unsecured; (2) the Defendants
3 wrongfully foreclosed or wrongfully attempted to foreclose on the Borrowers; (3) the deeds of
4 trust were fraudulently obtained and are thus void; and (4) the Defendants prevented the
5 Borrowers from modifying their loans. Analyzing each contention in turn demonstrates that none
6 can factually or legally justify the issuance of an injunction.

7 **a. Designating MERS as the “Beneficiary as Nominee for Lender”**
8 **on the Deeds of Trust is Proper and Does Not Void the Deeds.**

9 The Borrowers assert that the designation of MERS as the beneficiary on the
10 Deeds of Trust by the Borrowers and their lenders was somehow “fraudulent” because MERS is
11 named as the “beneficiary” on the deeds of trust, although “there is no actual ‘beneficiary’ under
12 the deed of trust.” (D.E. 75 at 8.) This contention is simply false. MERS is the beneficiary, and
13 MERS was designated as the beneficiary in the contract—that is the deed of trust—by all of the
14 lenders involved, and by all of the named Plaintiffs. The Borrowers do not proffer a scintilla of
15 evidence that shows otherwise. The Borrowers also contend that because MERS was improperly
16 named the beneficiary there is, therefore, no beneficiary on the deeds of trust, and the deeds of
17 trust are then void. This is also false—both as a matter of fact and of law.

18 **(i) MERS is the Beneficiary on the Deeds of Trust.**

19 A deed of trust is “essentially a mortgage, and ordinarily does not differ therefrom,
20 in legal operation and effect.” CJS Mortgages § 6; *see* Nevada Revised Statute § 319.100
21 (defining the term “mortgage” to include a deed of trust). Deeds of trust, like mortgages, are
22 “contracts” used to “secure the performance of an obligation or the payment of any debt.” *Chartz*
23 *v. Cardelli*, 279 P. 761, 763 (Nev. 1929); *Lloyds Bank PLC v. State*, 109 Nev. 1111, 1116 (Nev.
24 1993). The parties to a mortgage contract are a mortgagor-debtor and a mortgagee, to whom the
25 mortgagor grants a security interest in property. *See* 1 THE LAW OF DEBTORS AND CREDITORS §
26 8:3. The parties to a deed of trust are “a trustor or grantor, trustee, and beneficiary.” CJS
27 MORTGAGES § 77. The “rights of the trustor and beneficiary are equated with those of a
28 mortgagor and mortgagee,” 12-101 THOMPSON ON REAL PROPERTY, § 101.01, and the trustee acts

1 as an agent for both, pursuant to the terms of the contract. *See, e.g., Kenly v. Miracle Props*, 412
 2 F. Supp. 1072, 1075 (D. Ariz. 1976) (a deed of trust is a “private contractual relationship”
 3 between “the trustor and the beneficiary, with the trustee acting as agent for both and acting
 4 pursuant to the terms of the instrument and their instructions”). The trustee holds the property “in
 5 trust for the beneficiary.” 4A-3 REAL ESTATE FINANCING § 3.11.

6 Parties are, of course, free to contract as they please in all of the twenty-nine states
 7 for which an injunction is sought. *See, e.g., Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 487
 8 (2006). A mortgagee has been defined as “he who takes or receives a mortgage,” CJS
 9 MORTGAGES § 75, and similarly, a beneficiary has been generally defined as the person named or
 10 otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given.³⁰
 11 The parties to the deed of trust contracts are the lender, the beneficiary, the trustor (or the
 12 borrowers and named plaintiffs), and the trustee. All of those parties—including the named
 13 Plaintiffs—agreed that MERS, for purposes of the deed of trust contracts, would be designated as
 14 the beneficiary. There is simply no evidence to the contrary.³¹

16 ³⁰ Generally, the person designated in the deed of trust as the beneficiary is the person or entity
 17 for whose benefit the deed of trust—not the loan or promissory note—is given. *See, e.g., Ark.*
 18 *Code Ann. § 18-50-101* (“Beneficiary’ means the person named or otherwise designated in a
 19 deed of trust as the person for whose benefit a deed of trust is given or his successor in
 20 interest.”); *Ariz. Stat. § 33-801(1)* (same); *see also, Idaho Code Ann. § 45-1502(1)*
 21 (“Beneficiary’ means the person named or otherwise designated in a trust deed as the person
 22 for whose benefit a trust deed is given, or his successor in interest, and who shall not be the
 23 trustee.”); *Wyo. Stat. § 34-1-145(a)(i)* (“Beneficiary’ means the record owner of the
 24 beneficiary’s interest under a trust deed, including successors in interest”). Notwithstanding
 25 the law in the states for which the Borrowers seek an injunction, the Borrowers wrongly
 26 suggest—without citation—that a “beneficiary” on the deed of trust is the person or entity that
 27 has a “beneficial” interest in the proceeds of the loan itself. When confronted with the
 28 definition for a “beneficiary” on a deed of trust under Arizona law and statute, the Borrowers’
 proffered “expert” claimed that the definition of “beneficiary” in the Arizona statutes was not
 the definition of a beneficiary under Arizona law. Ex. G, Garfield Dep. Vol. II, 93:5-8, (“Q:
 You don’t think the definition that’s contained in the Arizona statutes of a beneficiary is the
 full definition of a beneficiary under Arizona law? A: Correct.”).

³¹ All the named Plaintiffs testified to signing the subject deeds of trust, and none claimed they
 were under duress such that the contracts should be rescinded. Indeed, the Borrowers do not
 seek the remedy of rescission for the deed of trust contracts, nor have they alleged any facts
 that would support a rescission of the deed of trust contracts, based on duress.

1 An examination of the deeds of trust signed by the Borrowers demonstrates that
 2 MERS is, in fact, the beneficiary under the deeds. Each deed of trust states the following: (1)
 3 **“MERS is the beneficiary under this Security Instrument;”** (2) “[t]he beneficiary of this
 4 Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and
 5 assigns);” (3) MERS holds “legal title to the [property] interests granted by Borrower in this
 6 Security Instrument;” and (4) the Borrower “understands and agrees” that MERS “has the right:
 7 to exercise any and all of those [property] interests, including, but not limited to, the right to
 8 foreclose and sell the Property.” Exs. K - Q at 2, 3. *See* Order at 6-7, *Ramos v. Mortgage Elec.*
 9 *Reg. Sys.*, 2:08-CV-1089-ECR-RJJ (D. Nev. March 5, 2009) (finding that, under Nevada law,
 10 MERS is the beneficiary under the deed of trust and, as such, has standing to foreclose), attached
 11 as Ex. S.

12 As an example, the clear and unambiguous language in Plaintiff Lopez’s deed of
 13 trust has MERS “named or otherwise designated” as the person for whose benefit a deed of trust
 14 is given; Plaintiff Lopez conveyed the property to Stewart Title of Northern Nevada as a trustee
 15 to hold the property for the beneficiary designated in the Deed of Trust. *See* Ex. P, Lopez Deed
 16 of Trust 2, 3 (“Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale,
 17 the following described property . . .”). The Lopez Deed of Trust also states clearly that “MERS
 18 is the beneficiary under this Security Instrument.” *Id* at 2. Thus, the Lopez Deed of Trust
 19 shows—without contradiction—that MERS is the beneficiary on the deed. *See* Ex. S, *Ramos*
 20 Order at 6-7. The Borrowers make their conclusions about MERS being a “sham” beneficiary
 21 with no factual or legal basis, and they fail to explain the plain language of the deeds of trust,
 22 which each Borrower willingly signed to obtain their residential loans.³²

23 _____
 24 ³² The statements contained in the Borrowers’ deeds of trust are the *only* representations made to
 25 the Borrowers relating to MERS’s interests as the beneficiary under the deeds. The
 26 Borrowers’ “expert,” Mr. Garfield, maintains that his opinions rely on representations
 27 contained in MERS’s Terms and Conditions that MERS would never acquire a beneficial
 28 interest in the loans for which MERS serves as the deed of trust beneficiary or mortgagee.
 Ex. G, Garfield Dep. Vol. III, 82:18 - 89:9. The statements made by MERS in its Terms and
 Conditions, however, are to the members of MERS, and not to borrowers such as the named
 Plaintiffs. Such representations, therefore, cannot form the basis of a fraud allegedly
 perpetrated against the Borrowers. A representation that MERS has no beneficial interest in a

(continued)

1 MERS serves as the beneficiary as the nominee or designee of a lender or its
2 successors or assigns, and in so doing, MERS and its members have agreed to contractual rules
3 and practices that are to govern their relationships—that is, the relationships between MERS and
4 the lenders or their successors or assigns. When MERS serves as the beneficiary or the beneficial
5 title holder under a deed of trust, the lender and MERS have agreed that MERS will not obtain a
6 beneficial interest in the loan that the lender makes to a borrower. Instead, as agreed by MERS
7 and its members, and as agreed by MERS and the Borrowers, MERS will serve solely as the
8 beneficial title holder or beneficiary on the deed. Serving as a beneficiary or beneficial title
9 holder does not require one to acquire a beneficial interest in the note. *See, e.g., Ex. T, Jackson,*
10 *slip op. at 22-24* (finding that in Minnesota, one of the twenty-nine non-judicial foreclosure states,
11 “a party can hold legal title to the security instrument without holding an interest in the
12 promissory note.”). Here, the lender, or its successors or assigns, holds the beneficial interest in
13 the note, and MERS (as the Lender’s nominee) is the designated beneficiary under the security
14 instrument, or the deed of trust.

15 It is perfectly appropriate for the lender, or its successors or assigns, to hold the
16 beneficial interest in the note, and for its nominee MERS to be the entity for whose benefit the
17 deed of trust is conveyed to secure the repayment of the loan. *See id.* The Borrowers maintain
18 that the lender is the beneficiary, and the beneficiary is the lender, and that only the lender may be
19 designated as the beneficiary on a deed of trust. This circular reasoning that only one who is to
20 receive the proceeds from the note may be designated by the lender and the borrower to serve as
21 the beneficiary on the deed of trust is without any support. The Borrowers can point to no statute
22 or law to support their fallacious conclusion.³³ There are no laws or legal principles that prohibit
23 one entity from lending the money, and for that lender to designate a nominee or designee to
24 serve as the beneficiary. Moreover, contract law (which is applied to deeds of trust) contains no
25 principles or policies that would preclude contracting parties from agreeing that MERS, in the

26 loan, or a right to receive the proceeds from the repayment of a loan is not relevant to whether
27 MERS has been designated as a beneficiary on a deed of trust.

28 ³³ Ex. G, Garfield Dep. Vol. III, 74:1-15-79:1-18.

1 stead of the lender, may act as the beneficiary on a deed of trust. This is precisely what
2 occurred—all the parties to the deeds of trust agreed that the lenders could designate MERS to
3 serve as the beneficiary as the nominee of the lenders. And, the Borrowers have shown no legal
4 or factual reason why that contractual provision in the deeds of trust, or the contractual principles
5 upon which the designation of MERS as a beneficiary is founded, should be disturbed in millions
6 of contracts in some twenty-nine states.

7 As discussed, the Borrowers cite to no legal principles or policies that stand for the
8 proposition they advance, and they allege no causes of action seeking to alter the contracts that
9 the Borrowers agree they entered. Courts, when faced with this basic issue, have always held that
10 the beneficiary on a deed of trust, or a mortgagee, may be a person other than the lender or the
11 entity that is the “source of the funds.” *See, e.g., Ex. T, Jackson*, slip op. at 24; *First Nat’l Bank*
12 *v. Nat’l Grain Corp.*, 131 A. 404, 406-7 (Conn. 1925) (“A mortgage may be held for the security
13 of the real creditor, whether he is the party named as mortgagee or some other party, for the
14 provisions of a mortgage are not necessarily personal to the mortgagee named. The real party in
15 interest may be an assignee of the mortgagee or some one subrogated to his rights under the
16 mortgage, or even a third person not answering either of these descriptions.”); *Adams v. Niemann*,
17 8 N.W. 719, 720 (Mich. 1881) (“A mortgage to a third person would be as valid as a mortgage to
18 a creditor. The choice of a mortgagee is a matter of convenience.”); *Ogden State Bank v. Barker*,
19 40 P. 769, 769 (Utah 1895) (“The mere fact that the mortgagee was not the real owner of the
20 notes, but was simply a trustee or agent for the owner, does not affect the validity of the
21 mortgage.”).³⁴

22 Nor is there anything fraudulent in MERS being designated by the borrower and
23 lender as the beneficiary. It was fully disclosed to the Borrowers that MERS would serve only in

25 ³⁴ The Borrowers’ purported expert could not point to a case, statute, or legal principle that
26 would prohibit a lender from designating a separate entity as a mortgagee on a mortgage. *Ex.*
27 *G, Garfield Dep. Vol. III, 75:18-22*, (“Q: So just by way of making sure I’ve got this right,
28 you’re not aware of any such case that would prohibit a lender from designating a separate
 entity as a mortgagee on a mortgage if it involves a single transaction? A: I have not inquired
 into that area.”).

1 that capacity; the Borrowers, in turn, granted MERS the legal title to the secured interests; and
 2 they all signed the deeds of trust acknowledging their agreement.³⁵ And the Borrowers do not
 3 allege that MERS or anyone else made any representations to the Borrowers that MERS would
 4 hold a beneficial interest in the Borrowers' promissory notes. Nowhere does the law in any of the
 5 twenty-nine states in which the Borrowers seek injunctive relief suggest that only the individual
 6 holding the beneficial interest in a note can be the beneficiary under a deed of trust.³⁶

7
 8 ³⁵ See Exs. L - R.

9 ³⁶ The Borrowers' purported expert testified that it is only the beneficial owner of the note, or
 10 the entity who actually funded the loan, who can subsequently bring an action to enforce the
 11 obligations of the note. Ex. G, Garfield Dep., Vol. I, 134:4-10 ("My opinion is that the only
 12 party for whom any action can be maintained to enforce or collect on a note, whether through
 13 foreclosure or otherwise, is a party who funded the original transaction or the ultimate
 14 transaction and who at the time that the action is commenced would suffer financial injury if
 15 the effort to collection failed."). Case law in non-judicial foreclosure states holds the reverse;
 16 that the beneficial owner of the note is not relevant to the question of who is the proper party
 17 to enforce a note or other negotiable instrument. See, e.g., *Caballero v. Wilkinson*, 367 So. 2d
 18 349 (La. 1979) (although holder of bearer note was not the owner, he could sue makers for
 19 payment notwithstanding that record did not show that he was specifically authorized by the
 20 owners to sue for payment); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 450 P.2d 166
 21 (Wash. 1969) (holder of negotiable instrument may sue thereon in his own name and payment
 22 to him in due course discharges instrument; it is not necessary for holder to first establish that
 23 he has some beneficial interest in proceeds); *Goyer Supply Co. v. Bell*, 149 So. 2d 351 (Miss.
 24 1963) (corporation could not maintain action on note in absence of any endorsement, transfer,
 25 or assignment of note to corporation); *Hubby v. Willis Agency, Inc.*, 283 P.2d 1080, 1082
 26 (Colo. 1955) ("The payee and holder of a promissory note may maintain an action thereon
 27 even if he is not the beneficial owner of the negotiable instrument sued on, even though he is
 28 only a nominal payee and the beneficial interest of equitable ownership is another person.");
W Title Ins. & Guar. Co. v. Bartolacelli, 269 P.2d 165 (Cal. App. 1954) (holder-payee of
 check may sue thereon in his own name even though he is not the beneficial owner); *C.I.T
 Corp. v. Elliott*, 159 P.2d 891 (Idaho 1945) (anyone in possession of a negotiable instrument
 may maintain an action thereon); *Wick v. Cleveland Sees. Corp.*, 50 N.E.2d 351,352 (Ohio
 App. 1943) ("A person who is a holder within the meaning of pertinent provisions of the
 Negotiable Instruments Act is entitled to sue notwithstanding he is without beneficial interest
 and a general code provision required every action to be prosecuted in the name of the real
 party in interest."); *Howell v. Flora*, 127 P.2d 721,721 (Kan. 1942) ("Under Negotiable
 Instruments Law, it is the legal title to negotiable paper and not the beneficial interest therein
 which controls as to proper parties plaintiff in suit for collection thereof."); *Nw. Nat 'I Bank &
 Trust Co. v. Hawkins*, 286 N.W. 717 (Minn. 1939) ("Even a nominal payee or title holder,
 although having no beneficial interest, may maintain an action on a promissory note."); *Rose-
 Derry Corp. v. Proctor & Schwartz*, 193 N.E. 50 (Mass. 1934) (plaintiff need not have legal
 title to or beneficial interest in notes on which it sues); *Spears v. Sutherland*, 23 P.2d 622
 (N.M. 1933) (payee in possession of notes was "real party in interest" to sue thereon

(continued)

1 The Borrowers rely on several distinguishable cases as supporting their contention
2 that the subject deeds of trust are void. But they make no attempt to explain how the fact-specific
3 findings and legal conclusions in *In re Hawkins*, 2009 WL 901766 (Bankr. D. Nev. 2009), *In re*
4 *Jacobson*, 402 B.R. 359 (W.D. Wash. 2009), and *Mortgage Electronic Registration System, Inc.*
5 *v. Southwest Homes of Arkansas*, 2009 WL 723182 (2009) support their allegations that the deeds
6 of trust are void due to fraud. *In re Hawkins* and *In re Jacobson* involved a party's standing to
7 seek relief from a bankruptcy stay, and what evidence is necessary to establish standing to obtain
8 such relief. In both cases, the Court held that one must proffer evidence demonstrating an interest
9 in the underlying obligation (i.e., the promissory note), or evidence showing authorization to act
10 on behalf of the holder of the promissory note, to have standing. *Southwest Homes* involved the
11 denial of a motion by MERS to set aside a mortgage foreclosure judgment, where the plaintiff had
12 failed to serve MERS, but did in fact serve the lender, against whom a default judgment was
13 entered. The court found that under Arkansas law and its rules of procedure, the named
14 beneficiary on the deed of trust was not—under the given circumstances—a necessary party to
15 the foreclosure action, and service on the lender was sufficient.

16 These three cases do not stand for the proposition that only an entity that holds a
17 beneficial interest in the note can be the beneficiary on a deed of trust. And, while MERS was a
18 party to *In re Hawkins*, *In re Jacobson* and *Southwest Homes*, the decisions there were not
19 unique to MERS, and they did not hold that MERS could never have standing to seek relief from
20 a bankruptcy stay or to foreclose. Instead, they held that once MERS proffers evidence showing
21 that it has authority to act on behalf of the holder of the note or the legal right to enforce the note,
22

23 irrespective of ownership interest in the notes); *Turner v. Crowder*, 273 P. 349 (Okla. 1928)
24 (holder of negotiable instrument could sue on the instrument even though another is the
25 beneficial owner); *Hoff v. Dougherty*, 243 Ill. App. 159, 1927 WL 4002 (Ill. App. 1927) (“In a
26 suit on a promissory note, proof that the plaintiff has no beneficial interest in the note is not a
27 bar to the suit.”); *Hay v. Hudson*, 224 P. 840 (Wyo. 1924) (possessor of a note indorsed in
28 blank may sue on the note, even though he has no interest in the proceeds); *McGowan v.*
People's Bank, 213 S.W. 579 (Ky. 1919) (denial of beneficial ownership is no defense to
enforcement of a promissory note); *Dawsey v. Kirven*, 83 So. 338 (Ala. 1919) (noteholder's
lack of interest in the proceeds of the judgment is no defense to enforcement action by
noteholder).

1 MERS (or any other similarly-situated entity) would have standing. *See, e.g., In re Hawkins*,
2 2009 WL 901766, at *2 (“Motions brought by MERS as nominee could meet the threshold test of
3 standing, and MERS might be the ‘real party in interest’ under Fed.R.Civ.P. 17, if MERS is the
4 actual nominee of the present Member who is entitled to enforce the note.”); *In re Jacobsen*, 402
5 B.R. at 367 (“To have standing, [a party] must establish its authority to act for the holder of the
6 Debtor’s note.”).

7 Additionally, no fraud is contemplated or mentioned in any of the three decisions
8 cited by the Borrowers. Nor is any fraud alleged in the Amended Complaint. The only fact
9 alleged in the Amended Complaint is that the Borrowers agreed in their deed of trust contracts
10 that MERS would serve as the beneficiary under the deeds. MERS did so.

11 **(ii) The Deeds of Trust are not Void.**

12 Even assuming that MERS was somehow “improperly,” and for some reason
13 wrongly, designated as the beneficiary as nominee for the lender on the deeds of trust, the result is
14 not that the deeds of trust are void, or that they cannot now be assigned. In Nevada, as in other
15 states, the validity of a contract is determined by the intent of the parties. *See Nee v. L. C. Smith,*
16 *Inc.*, 97 Nev. 42, 47-8 (Nev. 1981) (“A mortgage is usually considered to be a nominal
17 conveyance, held in abeyance, of certain property as a security for the payment of a certain debt.
18 If the parties intend to create a mortgage, no particular form of instrument or words is necessary
19 to create an equitable mortgage.” (footnote omitted, citations omitted)). If two parties intend to
20 create a secured interest by way of a deed of trust or mortgage for the property in the event the
21 loan is not repaid, but fail as to the form of the instrument, at the very least, the loan remains
22 secured. *See id.* Here, there is not a single allegation or fact proffered by the Borrowers,
23 indicating that the Borrowers did not intend to borrow money for the purposes of purchasing or
24 refinancing their properties; nor is there a single allegation that the Borrowers did not intend to
25 secure those loans using the properties they were purchasing as collateral. Regardless of what the
26 terms of the loans were or what the Borrowers intended the terms of the loans to be, the
27 Borrowers clearly intended to borrow monies and to secure the repayment of the monies with the
28 properties for which the proceeds of the loans were being used. Nevada law is clear that loan

1 agreements are contracts and that loan contracts, like all contracts, are interpreted in accordance
2 with the clear intent of the parties. *See Sterling v. Goodman*, 102 Nev. 218 (Nev. 1986) (“The
3 note and deed of trust were executed contemporaneously and are part of one contract.”); *Id.* at
4 219 (“Generally, a contract will be interpreted in accordance with the intentions of the parties.”
5 (citing *Shel-Al Corp. v. Am. Nat’l Ins. Co.*, 492 F.2d 87 (5th Cir. 1974)).

6 Nevada courts have addressed the question of assignments of deeds of trust that
7 failed by reason of improper acknowledgement. In accordance with the decisions of other states
8 with similar property laws, the Nevada Supreme Court held that “as between the parties a
9 defective acknowledgment does not invalidate the instrument.” *See, e.g., Allen v. Herson*, 74
10 Nev. 238, 242-243 (Nev. 1958) (“Appellants also assert that the assignment of the deed of trust
11 from the mortgage company to the [Defendants] was void because it purported to be
12 acknowledged before one... who likewise was not at the time a notary public... As between the
13 parties a defective acknowledgment, however, does not invalidate the instrument.” (citing *Perris*
14 *v. Perris*, 115 Utah 128; *Cornett v. Maddin*, 277 Ky. 480)). Similarly, in the context of an invalid
15 lease provision, the Nevada Supreme Court held that although the lease provision was invalid, it
16 was “valid and enforceable as between the parties.” *Elliot v. Resnick*, 114 Nev. 25 (Nev. 1998)
17 (finding that a lease provision that might be invalid was “valid and enforceable as between the
18 parties” (quoting *Kurpjuweit v. Nw. Dev. Co.*, 708 P.2d 39, 45 (Wyo. 1985))). These cases reflect
19 a consistent policy that permits parties to a contract to decide the terms of their contract and be
20 bound by those terms. *See, e.g., NAD, Inc. v. Eighth Jud. Dist. Ct.*, 115 Nev. 71, 77 (“We
21 validate these contracts based on the well-established principle that parties are free to contract in
22 any lawful matter”); *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 324 (Nev. 1947) (“If the
23 parties to a contract adopt a provision which contravenes no principle of public policy and
24 contains no element of ambiguity, the courts have no right, by a process of interpretation, to
25 relieve one of them from disadvantageous terms which he has actually made.”). There is no
26 support in the law for the proposition suggested by the Borrowers that a contract should be
27 rendered void where the parties intend to be bound by their contract but the form of the contract
28 does not comport to the parties’ well-stated and mutually agreed upon intent.

1 The Borrowers here allege that they intended to take out promissory notes secured
2 by deeds of trust, but that MERS could not serve as the beneficiary on such deeds of trust, which
3 is essentially an allegation that MERS was improperly designated as the beneficiary on the deeds
4 of trust. If MERS were indeed improperly designated as the beneficiary on the deeds of trust, this
5 would amount to a mutual mistake by the parties, since both parties clearly intended to create a
6 deed of trust to secure the promissory notes. An improper designation is not sufficient to void the
7 deeds of trust, based on the parties' demonstrated intent to execute promissory notes and secure
8 those notes with deeds of trust. Nor would an improper designation render the promissory notes
9 "unsecured" in light of the clear intent of the parties to secure them.

10 And in the specific context of this Motion, the remedy for such an improper
11 designation would not be to halt the foreclosures, but rather to reform the deeds of trust, based on
12 the parties' mutual mistake.³⁷ See *First Fed. Sav. & Loan*, 106 Nev. at 761 ("Courts in this state
13 will reform contracts and deeds in accordance with the true intention of the parties when their
14 intentions have been frustrated by a mutual mistake." (citing *Lattin v. Gray*, 75 Nev. 128 (Nev.
15 1959); *Roberts v. Hummel*, 69 Nev. 154 (1952); *Holman v. Vieira*, 53 Nev. 337 (1931))). This is
16 particularly true where, as here, the failure to reform the deeds would create a windfall profit for
17 the Borrowers, permitting them to borrow money to purchase property, not repay the money but
18 keep the very property for which they borrowed the money. See *First Fed. Sav. & Loan*, 106
19 Nev. at 762 ("Here, not allowing First Federal to reform its deeds would result in a windfall profit
20 to RCC, a nonprofit organization For RCC to now receive the unencumbered interests in
21 both condominiums would result in an award to RCC of over \$200,000.00 (the estimated worth of
22 the units) and a loss to First Federal of over \$160,000.00 (the amount of the unpaid loans). RCC
23 would reap an extraordinary benefit from a technical mistake"). The Borrowers cannot
24

25 ³⁷ This is true of the laws of at least twenty-seven of the states at issue in this case, which all
26 permit modification of invalid or ambiguous contract provisions, although the approaches to
27 such modification are not uniform among the states. See, e.g., *First Amer. Title Ins. & Trust*
28 *Co. v. Cook*, 12 Cal. App. 3d 592, 598 (1970); *City of Brownsville v. Golden Spread Elec. Co-*
op, Inc., 192 S.W.3d 876, 881 (Tex. App. 2006); *Beneficial Haw., Inc. v. Kida*, 30 P.3d 895,
917 (Haw. 2001); *Sprouse v. Wentz*, 781 P.2d 1136, 1140 (Nev. 1989).

1 succeed on a claim that the deeds of trust should be declared void, or that the promissory notes
2 are rendered unsecured if the deeds of trust are voided.

3 **b. No Action for Wrongful Foreclosure Lies.**

4 At the core of the Borrowers' Motion is the allegation that the foreclosures being
5 conducted against them are wrongful. The Borrowers have not brought an action for "wrongful
6 foreclosure," but have made the allegations that would be made in such a claim: namely, that
7 foreclosures are being conducted for improper reasons, coupled with a request that the Court set
8 the foreclosures aside. See *Ernestburg*, 2009 U.S. Dist. LEXIS 4560, at *16-17 (finding cause of
9 action for wrongful foreclosure based on posture of case). In Nevada, allegations such as those
10 the Borrowers make are viewed as wrongful foreclosure claims, regardless of how they are
11 identified by a plaintiff. *Id.* But before a plaintiff can bring such an action in Nevada, he is
12 required to establish that "no breach of condition or failure of performance existed on the
13 mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the
14 power of sale." *Id.* ("An action for the tort of wrongful foreclosure will lie if the trustor or
15 mortgagor can establish that at the time the power of sale was exercised or the foreclosure
16 occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's
17 part which would have authorized the foreclosure or exercise of the power of sale" (citing *Collins*
18 *v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284 (Nev. 1983) (citations omitted))). Here, the fact of
19 the Borrowers' defaults are not only uncontested, they are affirmatively alleged in the Amended
20 Complaint as to each proposed class representative. (D.E. 35 ¶¶ 72, 78, 84, 93, 103, 108, 114.)
21 The "material issue of fact in a wrongful foreclosure claim is whether the trustor was in default."
22 *Ernestburg*, 2009 U.S. Dist. LEXIS 4560, at *16-17. If, as here, the trustor is in uncontested
23 default on his or her promissory note, then a claim for wrongful foreclosure cannot be made, nor
24 can a foreclosure be halted. *Id.*

25 **c. The Borrowers Have Made No Showing of Fraudulent**
26 **Inducement.**

27 The Borrowers' also allege that "the deeds of trust are invalid, based on a theory to
28 conspire to commit fraud and conversion, and that any foreclosures and/or transfers of those

1 deeds of trust should not proceed.” (D.E. 78 at 26-7.) Presumably, this is because fraud is one of
2 the few things that will permit a contract to be declared void. *See, e.g., Mahaffey v. Investor’s*
3 *Nat’l Sec. Co.*, 103 Nev. 615 (Nev. 1987). As discussed in the Motion to Dismiss, the Borrowers
4 made insufficient allegations as to fraud, and continue to fail to explain how such fraud would
5 lead to invalid deeds of trust. (D.E. 163); *see also J.A. Jones Constr. Co. v. Lehrer McGovern*
6 *Bovis, Inc.*, 120 Nev. 277, 291 (Nev. 2004) (quoting *Havas v. Alger*, 85 Nev. 627, 631 (Nev.
7 1969)) (holding that each element of fraud must be proved by clear and convincing evidence); *Ex.*
8 *S, Ramos* Order at 9-10.

9 But to the extent that the Borrowers are alleging that they were induced by the fact
10 that MERS was named in the deed of trust, and that but for MERS being named as the beneficiary
11 on a deed of trust the Borrowers would not have signed the contracts, this is directly contradicted
12 by their clear intention to take out loans for the purchase of their residences and to secure the
13 payment of the loans with the properties. (D.E. 35 at ¶¶ 60, 75, 79, 90, 97, 106, 110.) The
14 Borrowers knowingly entered these contracts with MERS listed as the beneficiary as nominee on
15 the deeds of trust. And the Borrowers did so with the express intention of securing loans. Upon
16 obtaining the loans, the Borrowers accepted the monies from the lenders and enjoyed the benefits.

17 To show that they were fraudulently induced into the contracts, the Borrowers
18 must assert that they detrimentally relied on the fraudulent statement. *See J.A. Jones Constr. Co.*,
19 120 Nev. at 292. In a case with similar facts, a court in this Circuit recently found that reliance
20 regarding a statement made in connection with a home loan is almost impossible to show at the
21 preliminary injunction stage because it is always equally probable that the Borrowers executed
22 the loans because they believed they would benefit by doing so, and that the Borrowers would
23 have done so regardless. *See Jordan*, 2009 U.S. Dist. LEXIS 7592, at *17 (“The Court cannot, as
24 plaintiff urges, infer reliance in this case. Plaintiff argues that the Court can infer plaintiff relied
25 on false statements about the true nature of the loan because it is highly improbable that plaintiff
26 would have otherwise entered into a loan that would cause him to lose equity in his home and
27 would require prohibitively high payments in the future Here, it is plausible that plaintiff
28 signed the mortgage note because he believed it would benefit him.”). Likewise, here, the fact

1 that MERS is listed as the beneficiary as nominee for the Lender on the deed of trust is not
 2 sufficient to create an inference of reliance, because it is equally probable that the Borrowers
 3 would have executed the deeds of trust and other loan documents regardless of who was named as
 4 the beneficiary on the deeds of trust.³⁸ These allegations are, therefore, insufficient to
 5 demonstrate a probability of success on the merits of the Borrowers' fraud claim.

6 **d. The Borrowers Have No Right to Modify Their Loans.**

7 As a final matter, the Borrowers accuse MERS of "transferring the beneficial
 8 rights after appointing some unknown third party as the Trustee," alleging that this is "an
 9 intentional act to insulate the true beneficiary from contact by the borrower." (D.E. 78 at 8.)
 10 First, the Borrowers' allegations that they do not know the identity of the "true" beneficiary under
 11 the note are belied by named plaintiffs' testimonies.³⁹ (D.E. 35 at 13-22.)

12 There is no legal requirement or contractual obligation owed to the Borrowers that
 13 a deed be recorded; it is done for the purpose of securing a lien priority on the Borrowers'
 14 properties so in case of a default, the creditor's priority position has been established as a result of
 15 recording the security instrument. In Nevada, "recording a document is a purely ministerial task."
 16 *See In re Jeremiah Grant, Jr.*, 303 B.R. 205, 210 (Bkrcty. D. Nev. 2003) (citing *Schneider v.*
 17 *County of Elko*, 75 P.3d 368 (2003)). *See also May v. G.M.B., Inc.*, 105 Nev. 446 (Nev. 1989)
 18 (Finding in the context of UCC security instruments that "[n]othing, except perhaps good
 19 business practice and good sense, requires a secured creditor to perfect his security interest.").
 20 And "[t]he statutory provisions relating to the acknowledgment and recordation of [the deeds of
 21 trust] are for the protection and security of creditors and purchasers," not borrowers or sellers.

22 _____
 23 ³⁸ Additionally, the named Plaintiffs testified that the designation of MERS as the beneficiary on
 24 their deeds of trust was not related to their defaults on their mortgage loans. Ex. H, Graves
 25 Dep. 95, 109, 140-141 (default caused by loss of business); Ex. J, Peternell Dep. 116 (default
 26 caused by lost income); Ex. E, Casas Dep. 15, 26-27 (default caused by loss of income).

27 ³⁹ Ex. H, Graves Dep., 232:1-235:22 (testifying as to his knowledge of what entity he was
 28 required to pay each month on his loan and knowledge of where to deliver such payment); Ex.
 I, Lopez Dep. 254:5-255:23 (testifying as to her knowledge of what entity she was required to
 pay each month on her loan and knowledge of where to send such payment); Ex. J, Peternell
 Dep. 96:12-98:10 (testifying as to his knowledge of what entity he was required to pay each
 month on his loan and knowledge of where to send such payment).

1 *Allen v. Hernan*, 74 Nev. 238, 24 (Nev. 1958) (citing *Kimbro v. Kimbro*, 199 Cal. 344 (1926)).
2 Thus, the fact that MERS recorded the deeds of trust at the direction of the lender does not affect
3 the Borrowers' rights to notice in any way, because the recordation of a deed of trust is not for a
4 borrower's benefit, as the Borrowers allege, but rather it is for the lender's benefit.

5 This contention is simply a restatement of the allegation contained in the Amended
6 Complaint that due to the alleged inability of the Borrowers to "identify the actual beneficial
7 owner of any particular loan or the property which was the collateral securing that loan until such
8 time, if any that foreclosure was initiated . . . Plaintiffs . . . [were] deprived of the right to attempt
9 to modify the toxic loan, as the true identity of the actual beneficial owner was intentionally
10 hidden from Plaintiffs." (D.E. 35 at 35.) Nevada is a lien state, so the owner of the property that
11 is the collateral securing the loans at issue here, is in each instance the borrower; the deed of trust
12 is a security instrument, granting only a priority lien on the property in case of default. *See*
13 *Edwards v. Hancock Mut. Life Ins. Co.*, 973 F.2d 1027 (1st Cir. 1992) ("In Nevada, real estate
14 mortgage deeds take the form of deeds of trust. Essentially, the encumbered property is conveyed
15 by the mortgagor (variously referred to in the deeds of trust as the trustor, grantor or borrower) to
16 the trustee, a title company, as security for repayment of the loan from the mortgagee (the
17 beneficiary or lender)."). The Borrowers, as the owners of the collateral, were at all times aware
18 of the identity of the owners of the "property which was the collateral" securing the loans at
19 issue—they were the owners.

20 More importantly, there exists no "right to attempt to modify" a loan, either in
21 common law or in the Nevada statutes. Instead, principles of contract law clearly state that a
22 party to a contract only has a "right" to its modification pursuant to the terms of the contract. *See*,
23 *e.g., McCall v. Carlson*, 63 Nev. 390, 424 (Nev. 1946) (finding that the Court's "equitable powers
24 do not extend so far as to permit us to disregard fundamental principles of the law of contracts, or
25 arbitrarily to force upon parties contractual obligations, terms or conditions which they have not
26 voluntarily assumed."). For this reason, the Borrowers can point to no support for their entirely
27 novel theory of contract law, which would literally upend the centuries-old principle of certainty
28 on which contract law is founded. *See, e.g., id.* 63 Nev. at 424 (holding that Court did not have

1 the authority to modify the contract because it “must maintain the necessary certainty, stability
2 and integrity of contractual rights and obligations”). The right that the Borrowers allege is being
3 violated—the “right to attempt to modify the toxic loan”—simply does not exist. The Borrowers
4 can show no injury from their inability to exercise a non-existent right; and, in the absence of any
5 such injury, the Borrowers cannot allege a cause of action against Defendants.

6 Thus, there is no way in which the Borrowers can succeed on the merits of their
7 claims; and they have certainly failed to carry their heavy burden, which requires that they show a
8 probability of success on the merits of their claims. For this reason alone, the motion for
9 injunctive relief must be denied.

10 **G. Weighing the Balance of Harms to the Parties Shows That if the Injunction**
11 **Were to Issue, Defendants Would Suffer Close to Irreparable Harm.**

12 Before a preliminary injunction may issue, the Court must weigh the potential
13 harm to the Borrowers if the injunction does not issue, against the potential harm to the
14 Defendants if it does issue. *See Stormans, Inc. v. Selecky*, 571 F.3d 960, *72-74 (9th Cir. 2009);
15 *L.A. Mem’l Coliseum*, 634 F.2d at 1209. The Borrowers seek injunctive relief on behalf of a
16 proposed class composed of all residential homeowners in non-judicial foreclosure states who
17 have deeds of trust that name MERS as the beneficiary, and which were entered into between the
18 years of 2004 and 2008. Between the years of 2004 and 2008, for the twenty-nine states that
19 permit non-judicial foreclosure, more than six million deeds of trust naming MERS as the
20 beneficiary have been registered on the MERS® System and designated as such.

21 The proposed injunction will, therefore, disproportionately burden the MERS
22 Defendants because it will potentially impact each of the six million loans in its system in twenty-
23 nine states, regardless of the specific facts associated with those loans. The business of the
24 MERS Defendants relies on the validity of the contracts entered into with lenders, which are
25 predicated on the validity of the deeds of trust that name MERS as the beneficiary as nominee for
26 the lender, and its successors and assigns. In fact, MERS’s sole business is to serve as the
27 beneficiary on deeds of trust, or as mortgagee on mortgages, as the nominee for the lender and its
28 successors and assigns. The business model for the MERS Defendants is premised on the ability

1 of its members to buy and sell negotiable instruments, such as promissory notes, with the
2 knowledge that MERS has recorded their deeds of trust and perfected the secured interests in the
3 notes on their behalf or on behalf of the successor or assigns of such negotiable instruments.
4 Because of this, the injunction sought here by the Borrowers, would cause irreparable harm to the
5 goodwill, and the business, of the MERS Defendants.

6 The issuance of such an injunction would call into question the very legitimacy of
7 the MERS Defendants. Such a loss of goodwill is an intangible harm that cannot be remedied
8 after the injunction is issued. And the unequivocal loss of goodwill that MERS will suffer if this
9 injunction were to issue would be for the purpose of remedying the Borrowers' speculative
10 allegations, which are premised on no legal or factual support. The Borrowers are seeking to
11 remedy an illusory harm that is neither imminent nor irreparable with the extraordinary remedy of
12 a preliminary injunction that will irreparably tarnish the MERS Defendants. On balance, it is
13 clear that the harm to the MERS Defendants that would attend the issuance of this injunction
14 greatly outweighs any possible harm to the Borrowers that would occur in the absence of an
15 injunction.

16 And with regard to the Defendants as a whole, as the recent crises in the banking
17 industry have demonstrated, large banking institutions are far from immune to large losses. In
18 fact, it is now general knowledge that the large number of homeowners defaulting on their loans
19 was one of the principal drivers of the current economic crisis. The Borrowers, though, seek to
20 add to the losses already being suffered by Defendants as a result of the foreclosure crisis, by
21 preventing the Defendants from realizing on the collateral securing the promissory notes that they
22 issued. The Borrowers seek to prevent the Defendants from foreclosing non-judicially, on any
23 home on which MERS is listed as the beneficiary as nominee, in any one of twenty-nine states.
24 This would force the Defendants to invoke the judicial foreclosure process available in the
25 twenty-nine states, despite the clear statutory option and policy in each of these states to foreclose
26 non-judicially. The judicial foreclosure process is significantly more costly, as it would require
27 Defendants to file foreclosure actions in already clogged state courts. Not only does this have the
28 potential to significantly add to the losses already suffered by Defendants, it would also

1 overwhelm already overwhelmed state court dockets. The issuance of this injunction, which
2 would be predicated solely on the Borrowers' far-fetched beliefs that they are entitled to its
3 issuance, would cause significant harm to the Defendants and to the court systems of the twenty-
4 nine states involved. This harm is in no way outweighed by the remote possibility of injury that
5 Borrowers allege they would suffer if the injunction were not issued.

6 **H. The Entry of an Injunction Preventing the Free Alienation of Property is**
7 **Contrary to the Public Interest.**

8 The final factor required for the issuance of a preliminary injunction is whether the
9 injunction is in the public interest. This factor is particularly important where, as here, the reach
10 of the proposed injunction goes beyond the parties, carrying potential consequences to the public
11 at large. *Stormans*, 571 F.3d at *75-76; *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 965
12 (9th Cir. 2002) (“In cases where the public interest is involved, the district court must also
13 examine whether the public interest favors the plaintiff.” (alteration omitted) (quoting *Fund for*
14 *Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992)). Here, the requested injunction would
15 halt non-judicial foreclosures and sales of real property in twenty-nine states. Such an injunction
16 is in direct contravention of the universal public policy of U.S. law, which is in favor of the free
17 alienation of property. *See Transworld Airlines v. Am. Coupon Exch.*, 813 F.2d 626, 682 (9th Cir.
18 1990) (finding “a time honored rule against restraints on the alienation of property”); *Maxwell v.*
19 *Moore*, 63 U.S. 185, 188 (1859) (“[T]he almost universal policy of our laws [is] to allow, if not to
20 favor, the right to free alienation of property.”). Equally significantly, the injunction that the
21 Borrowers seek would enjoin property rights in twenty-nine different states; something that the
22 Ninth Circuit has stated should only be done with extreme caution. *See Nat’l Wildlife Fed’n*, 45
23 F.3d at 1343 (“A federal court will not likely employ the power of equity to disrupt good faith
24 reliance on state property law.”); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 724
25 (1996) (“[F]ederal courts of equity should exercise their discretionary power with proper regard
26 for the rightful independence of state governments in carrying out their domestic policy.”). There
27 is an overriding public interest in permitting the free alienation of property, and a strong public
28 interest against having federal courts disrupting, and interfering with, state property law. *See id.*

1 Additionally, to the extent that members of the proposed class are already involved
2 in foreclosure proceedings, it is not clear that a federal court has the power to issue such an
3 injunction. A mortgage foreclosure proceeding is generally considered to be an *in rem*
4 proceeding, which makes jurisdiction dependent upon the presence of the land within the state.
5 59A C.J.S. MORTGAGES § 698 (2009); 7 Fletcher Cyc. Corp. *In Rem Jurisdiction* § 3234 (2008).
6 A court does not have the power to foreclose land, or presumably to halt the foreclosure of
7 property, not within its territorial jurisdiction. *Id.* Where there are multiple *in rem* or *quasi in*
8 *rem* suits over the same property, the jurisdiction of one court must necessarily yield to that of the
9 other. *See Penn. Gen. Cas. Co. v. Penn. ex rel Schnader*, 294 U.S. 189, 195 (1935). It is well-
10 established that the court first assuming jurisdiction over the property may exercise that
11 jurisdiction to the exclusion of other courts. This rule avoids unseemly and disastrous conflicts in
12 a system of dual sovereignty and protects the judicial processes of the court first assuming
13 jurisdiction. *Id.* (citing *Wabash R. Co. v. Adelbert Coll.*, 208 U.S. 609 (1908); *Palmer v. Texas*,
14 212 U.S. 118, 129 (1909)).

15 Aside from the clearly stated public interest in permitting the free alienation of
16 property that the injunction sought here would violate, the proposed injunction also flies in the
17 face of the public interest in light of the current economic conditions. These conditions have
18 resulted in multiple government bailouts amounting to several trillion dollars; and they led to the
19 creation of government-funded loan modification programs. In fact, the government is still
20 contemplating various types of federal legislation regarding both the bankruptcy laws and loan
21 modifications. In light of these conditions, the injunction sought here—which would halt
22 foreclosures in twenty-nine states—is clearly not in the public interest, as it would interfere with
23 federal and state laws enacted, and being enacted, in response to the economic downturn..

24 The crisis has led to a huge drop-off in the ability of lenders to make home loans,
25 and borrowers have found it increasingly difficult to find lenders willing to take the risk of
26 making loans. As the home loan market begins to come to a new equilibrium, the injunction
27 sought here would destabilize the home loan industry, making it even riskier for lenders to issue
28 home loans, with the additional threat that courts could step in at any time and change the terms

1 of those loans, and modify the terms of valid contracts, including mortgages and deeds of trust.
2 Such destabilization would have far-reaching consequences for the economy, including making it
3 more difficult for borrowers to obtain home loans. These potential consequences for the home
4 loan industry make the injunction sought clearly against the public interest.

5 **V. CONCLUSION**

6 For the foregoing reasons, the MERS Defendants, respectfully request that this
7 Court deny the Borrowers' Motion for Preliminary Injunction on behalf of their proposed class.
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1 DATED this 21st day of August, 2009.

2 Attorneys for MERSCORP, Inc. and Mortgage Electronic
3 Registration Systems, Inc.

4 By _____
5 **Patrick G. Byrne**
6 Snell & Wilmer
7 3883 Howard Hughes Pkwy
8 Suite 1100
9 Las Vegas NV 89169-
10 Telephone: 702-784-5201
11 Facsimile: 702-784-5252
12 Email: pbyrne@swlaw.com

13 By _____ s/Robert M. Brochin
14 Robert M. Brochin (*admitted pro hac vice*)
15 (Fla. Bar No. 0319661)
16 rbrochin@morganlewis.com
17 Morgan, Lewis & Bockius LLP
18 5300 Wachovia Financial Center
19 200 South Biscayne Boulevard
20 Miami, FL 33131-2339
21 Telephone: 305-415-3456
22 Facsimile: 305-415-3001

23 **CERTIFICATE OF SERVICE**

24 I hereby certify that on August 21, 2009, I electronically filed the foregoing
25 *Defendants MERS' and MERSCORP, Inc.'s Motion to Dismiss Plaintiffs' First Amended*
26 *Complaint and Memorandum of Points and Authorities in Support* using the CM/ECF
27 system which will send a notice of electronic filing to all parties as listed on the Notice of
28 Electronic Filing.

I further certify that I mailed a courtesy copy of foregoing document and the
notice of electronic filing by Federal Express to the following:

The Honorable Edward C. Reed, Jr.
U.S. District Court - Reno
400 S. Virginia St.
Reno, NV 89501
(775-686-5800)

s/Robert M. Brochin