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14 *MORTGAGE ELECTRONIC REGISTRATION*
15 *SYSTEMS, INC.*

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE DISTRICT OF ARIZONA**

18 **IN RE MORTGAGE ELECTRONIC**
19 **REGISTRATION SYSTEMS (MERS)**
20 **LITIGATION,**

MDL Docket No. 09-2119-JAT

21 THIS DOCUMENT RELATES TO:

22 Lacy J. Dalton, et al.,
23 C.A. No. 3:09-cv-00374

24 Lacy J. Dalton, et al.,
25 Plaintiffs,

26 v.

27 CitiMortgage, Inc., et al.,

28 Defendants.

REPLY MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO DISMISS BY
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
AND MERSCORP, INC.

ORAL ARGUMENT REQUESTED

29 Defendants Mortgage Electronic Registration Systems, Inc. and MERSCORP,
30 Inc. (together, "MERS") submit this Reply Memorandum of Law in support of their Motion to
31 Dismiss Plaintiffs' Class Action Complaint for failure to state a claim against MERS upon

1 which relief can be granted (the “Motion”) (DE 174), and in reply to Plaintiffs’ Response to
2 MERS’ Motion (the “Response”) (DE 226).

3 **I. INTRODUCTION**

4 MERS moved to dismiss the Plaintiffs’ Class Action Complaint (the
5 “Complaint”) because the pleading did not put MERS on notice of what wrongful conduct it
6 committed, and MERS’ Motion implored Plaintiffs to identify those allegations that show
7 wrongdoing by MERS. But Plaintiffs’ Response points to no such allegations of wrongful
8 conduct. Plaintiffs instead repeatedly suggest only that MERS represented and held itself out
9 as a beneficiary, knowing it was not. This sole allegation, however, fails to allege a conspiracy
10 to commit fraud. Indeed, the federal district court of Arizona in *Cervantes, et al. v.*
11 *Countrywide Home Loans, Inc., et al.*, the first of seven (including this case) almost identical
12 national class action lawsuits filed against MERS by the same Plaintiffs’ counsel, considered
13 the **very same** conspiracy and fraud allegations made here largely verbatim, and found the
14 plaintiffs’ conspiracy and fraud claims against MERS to be entirely baseless and lacking the
15 necessary facts to state any plausible and actionable legal theories.

16 Plaintiffs argue that the applicability of the *Cervantes* decision to this case is
17 “questionable” because of “the difference in claims made,” the “degree of detail,” and because
18 “the *Cervantes* court’s reasoning was based on Arizona (not Nevada) law.” *See* Response, n. 1.
19 But Plaintiffs’ “conspiracy to commit wrongful foreclosure” claim (the only “different” claim
20 lodged against MERS), like Plaintiffs’ fraud conspiracy claim, is based upon the same factual
21 allegations of conspiracy as the plaintiffs’ claims for conspiracy to commit fraud and
22 conversion in *Cervantes*. Furthermore, the Response makes no attempt to address the
23 deficiencies in Plaintiffs’ wrongful foreclosure claim such as the failure to allege Plaintiffs
24 were not in default on their loan payments at the time of the wrongful foreclosure. Plaintiffs
25 fail as well to show how the applicable substantive law in this case is distinguishable from
26 *Cervantes*, such that unlike the plaintiffs’ claims in *Cervantes*, a dismissal of Plaintiffs’ claims
27 is not warranted. They cannot. Plaintiffs allege no plausible and actionable claims against
28 MERS under any legal theory. In fact, the Plaintiffs’ Response is by and large copied verbatim

1 from the plaintiffs' response to MERS' motion to dismiss in *Cervantes*, and the legal authority
2 cited by the Plaintiffs is identical. A copy of the plaintiffs' response to MERS' motion to
3 dismiss in *Cervantes* is attached as Exhibit A.

4 Here, much like their Complaint, and like the plaintiffs in *Cervantes*, Plaintiffs
5 respond to MERS' Motion to Dismiss with broad-based, fanciful statements about MERS and
6 its role in the Plaintiffs' loans. The Response speaks in terms of a "system of greed" and
7 "disregard for the law," without identifying specific conduct that violates any laws or is
8 actionable as a common law claim. General, conclusory and inflammatory allegations based on
9 "information and belief" simply do not suffice in the wake of *Twombly* and *Iqbal*, and as such,
10 they cannot survive a motion to dismiss. Plaintiffs' Response offers no further insight on a
11 cure for the Complaint's fundamental pleading defects, except to suggest that facts could be
12 developed through discovery such that they could then be alleged in the Complaint. The
13 Supreme Court has made clear that proceeding with discovery as a means to then allege the
14 necessary factual wrongdoing is not a cure for the Plaintiffs' woeful pleading deficiencies.

15 And much like their Complaint, and like the plaintiffs in *Cervantes*, Plaintiffs do
16 not point to any factual details of specific wrongdoing by MERS, or how MERS possibly
17 caused the Plaintiffs any injury. Plaintiffs' Response, not the Complaint, seems to suggest that
18 MERS deceptively represented to the Plaintiffs in their Deeds of Trust that MERS was the
19 "beneficiary" when, in fact, MERS knew it was not. The sole allegation relating to MERS'
20 deceptive conduct in regard to its role as a beneficiary in the Deeds of Trust is, according to the
21 Response, found in paragraph 192 of the Complaint, which states in typical conclusory fashion:
22 "Upon information and belief, the Defendant conspirators have conspired...to ...create . . . the
23 Defendants MERSCORP, Inc. and MERS, Inc. for the specific purpose of MERS, Inc. being
24 designated as a sham 'beneficiary' in the original deeds of trust securing those loans." There
25 are no allegations in the Complaint as to how or why MERS is a "sham" beneficiary—
26 Plaintiffs merely label it a "sham." On its face, the allegation falls far short of the necessary
27 conduct that must be alleged to state a claim for conspiracy and fraud. And in dismissing the
28

1 *Cervantes* First Amended Complaint, Judge Teilborg emphatically rejected the plaintiffs' claim
2 that MERS is a "sham" beneficiary, and that the MERS® System is fraudulent.

3 In addition to alleging no wrongful conduct, the Complaint alleges no injury that
4 could possibly have occurred to the Plaintiffs as a result of who actually held the beneficial title
5 to the property securing the debt. Plaintiffs clearly intended, and they agree that they so
6 intended, to secure the repayment of the loan proceeds by conveying certain property interests
7 in the Deed of Trust. Essentially, Plaintiffs complain in their Response that it was represented
8 to them that MERS would serve as the beneficiary on the Deed of Trust, and now that they
9 believe MERS was a "sham" beneficiary, and as a result Plaintiffs have been injured. As the
10 *Cervantes* Court held, that is not a plausible theory, as there is no injury alleged and no
11 damages were incurred based on **the identity** of the beneficiary. It is not plausible to suggest
12 that Plaintiffs would not have entered into the loans had they known MERS (as compared to
13 some other entity) was not serving as the beneficiary on the Deed of Trust.

14 Like the plaintiffs in *Cervantes*, Plaintiffs allege no wrongdoing by MERS that
15 states a claim against MERS; they only label MERS as a "sham" beneficiary. Plaintiffs allege
16 no injury or damages as a result of their conclusion that MERS was a "sham" beneficiary, for
17 indeed no injury or damages did occur simply because MERS was designated by both lender
18 and borrower as the beneficiary. Plaintiffs' Complaint, like the *Cervantes* plaintiffs' complaint,
19 fails to state any plausible theory of recovery against MERS and it should be dismissed.

20 **II. ARGUMENT**

21 **A. Legal standard**

22 Plaintiffs critically misstate the correct standard for determining whether their
23 pleading states a claim in order to survive a Rule 12(b)(6) Motion to Dismiss. In their
24 Response, Plaintiffs represent that a motion to dismiss cannot be granted "unless it appears
25 beyond doubt that the plaintiff can prove **no set of facts** in support of his claim which would
26 entitle him to relief." Response, 6 (citing to *Lone Star Industries v. Horman Family Trust*, 960
27 F.2d 917 (10th Cir. 1992) (emphasis added). But the Supreme Court discarded the "no set of
28 facts" standard relied upon by the Plaintiffs. See *Bell Atlantic v. Twombly*, 127 S. Ct. 1955

1 (2007) (“*Conley’s* ‘no set of facts’ language is best forgotten as an incomplete, negative gloss
 2 on an accepted pleading standard.”). And the Ninth Circuit recognized that the *Conley* “no set
 3 of facts standard is no longer the standard to be applied by District Courts. *See Rick-Mik*
 4 *Enterprises, Inc. v. Equilon Enterprises LLC*, 532 F.3d 963, 971 (9th Cir. 2008) (“In *Twombly*,
 5 . . . the Supreme Court ‘retired’ the familiar language derived from *Conley*”).

6 In *Aschcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), the Supreme Court iterated
 7 its holding in *Twombly* that a complaint must plead sufficient facts to state a claim of relief that
 8 is “plausible on its face,” and that Rule 8 “demands more than an unadorned, the-defendant-
 9 unlawfully-harmed-me accusation.” *Iqbal*, 129 S.Ct. at 1949. The Supreme Court had the
 10 Plaintiffs’ Complaint in mind when it made clear that specific facts must be alleged to show a
 11 plausible theory of recovery in order to plead valid claims. The Complaint here is replete with
 12 conclusory allegations that MERS harmed the Plaintiffs, and yet it contains no facts that show
 13 conduct by MERS that is unlawful. As noted in *Iqbal*, “[w]here a complaint pleads facts that
 14 are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility
 15 and plausibility of entitlement to relief.’” *Id.*, 1950 (quotations and citation omitted). Once this
 16 Complaint is examined in the light of the correct pleading standard as articulated in *Twombly*
 17 and *Iqbal*, it is revealed that no unlawful wrongdoing is alleged to have been committed by
 18 MERS and there was no injury as a result of conduct by MERS. The Complaint is nothing
 19 “more than conclusions [that] are not entitled to the assumption of the truth.” *Id.*; *see Twombly*,
 20 127 S. Ct. at 1966. (Bare allegation of conspiracy does not satisfy the federal rules for purposes
 21 of surviving a motion to dismiss).

22 **B. The Complaint does not allege fraud by MERS in the Deeds of Trust.**

23 The Plaintiffs now introduce in their Response that the basis for the fraud claims
 24 against MERS is that the Plaintiffs’ Deeds of Trust themselves “deceptively” stated that MERS
 25 was the “beneficiary.”¹ With this allegation as the basis for the conspiracy and fraud, the

26 ¹ *See* Response, 3-4 (“MERS was not, in fact, the beneficiary”; “deeds of trust . . .
 27 deceptively stated that MERS was the ‘beneficiary’ under the Deeds of Trust, acting in the
 28 capacity as the nominee for the Lender”), 7 (“MERS knew that it was not the beneficiary, but
 nevertheless allowed itself to be represented as such to borrowers”), 9 (“MERS committed

1 Complaint fails to state any claim for relief against MERS, and must be dismissed similar to the
2 complaint in *Cervantes*.

3 **1. Plaintiffs rely on but one factual allegation in the Complaint to plead**
4 **fraud on the grounds that MERS deceptively stated it was the**
5 **beneficiary.**

6 The allegation in the Complaint that MERS falsely alleges that it was the
7 beneficiary is essentially contained in one paragraph in the Complaint, which states MERS was
8 created “for the specific purpose of MERS being designated as a sham ‘beneficiary’ in the
9 original deeds of trust securing those loans.” Compl. ¶ 192. Notably, as alleged in the
10 Complaint, MERS’ so-called misrepresentations about its role as a beneficiary are solely
11 confined to the written statements contained in the Deeds of Trust. Indeed, MERS became the
12 beneficiary, as nominee for the Lender, by operation of the Deeds of Trust agreed to and signed
13 by the Plaintiffs, which are contracts whereby the Plaintiffs granted secured interests in the
14 legal title of property to MERS, as the beneficiary, as nominee for the Lender. *See* Motion,
15 Section II(B); *infra*, Section II(B)(3). There are no allegations in the Complaint (or in the
16 Response) and none are identified that MERS made verbal misrepresentations, or that MERS
17 provided the Plaintiffs with any other written misrepresentations, or that MERS even
18 participated in the loan origination process. Undoubtedly, Plaintiffs’ single conclusory
19 allegation of fraud does not state a claim as a matter of law. *See nSight, Inc. v. PeopleSoft, Inc.*,
20 296 Fed.Appx. 555, 557 (9th Cir. 2008) (“Conclusory allegations and unwarranted inferences
... are insufficient to defeat a motion to dismiss”).

21 Moreover, Plaintiffs’ sole conclusory allegation about MERS falsely stating its
22 beneficiary status is made “upon information and belief.” And the law is clear that “allegations
23 of fraud based on ‘information and belief’ typically do not satisfy Rule 9(b).” *Neubronner v.*
24 *Milken*, 6 F.3d 666, 672 (9th Cir. 1993); *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531,

25 fraud in that it purported to be the beneficiary on the loans, when in fact it was a ‘nominee.’
26 MERS was never the true beneficiary.”), (“MERS is referred to in the Deeds of Trust as the
27 ‘beneficiary’ when it was not”), 12 (“MERS . . . knew that its role as “beneficiary” was a
28 sham”), 14 (“The MERS system required that MERS be listed as the “beneficiary” even though
it was not actually a *bona fide* beneficiary”).

1 540 (9th Cir. 1989) (same); *see Twombly*, 127 S. Ct. at 1974 (“a ‘belief’ . . . does not raise a
2 right to relief above the speculative level”). Plaintiffs argue that their allegation of fraud made
3 “upon information and belief” is sufficient, and cite two cases in support. *See* Response, n. 26
4 (citing to *Hockey v. Medhekar*, 30 F. Supp.2d 1209, 1213 (N.D. Cal. 1998) and *Rich-Taubman*
5 *Associates v. Stamford Restaurant Operating Co., Inc.* 587 F. Supp. 875,880 (D.C.N.Y. 1984)).
6 Plaintiffs’ reliance on *Hockey* and *Rich-Taubman* is unwarranted. *Hockey* addressed the
7 pleading standards for a claim made under the Securities Reform Act, not a fraud claim.
8 Nevertheless, the court found where an allegation is “made on information and belief,” the
9 complaint shall state with particularity all facts on which that belief is formed.” *Hockey*, 30 F.
10 Supp.2d at 1215. Here, by contrast, Plaintiffs do not state with particularity **any** facts on which
11 their beliefs are formed. *Rich-Taubman* is also distinguishable. There, the court found that
12 where the complaint set forth numerous specific factual allegations of fraud, although the
13 complaint relied “to some extent upon pleadings based on information and belief,” more could
14 not be demanded. *Rich-Taubman*, 587 F. Supp. at 779-80. In Plaintiffs’ Complaint, by
15 contrast, virtually all material allegations in the Fourth Claim for Relief are pled “upon
16 information and belief.” *See* Compl. ¶¶ 173, 192, 193, 196, 197, 199, 213, 214.

17 There is not a one fact alleged in the Complaint that supports the bare bones
18 legal conclusion that MERS was not the beneficiary. To the contrary, the conclusion is
19 factually refuted in the Deeds of Trust that have the Plaintiffs contractually agreeing that
20 MERS is to be the beneficiary, as the nominee for the Lender, to hold legal title in the secured
21 interests of the property. There are simply no facts alleged to state MERS was not a
22 beneficiary, as nominee for the Lender, or that its designation by the Plaintiffs as the
23 beneficiary, as nominee for the Lender, is somehow the result of some fraudulent acts
24 committed by MERS.

25 The *Cervantes* Court found meritless the plaintiffs’ claim that MERS is a
26 “sham” beneficiary, and that the MERS® System is fraudulent. *See* Motion, 14-15, 18. The
27 same claim made by the Plaintiffs in this case is also meritless.

28

1 **2. The Deeds of Trust themselves can be examined in light of the**
 2 **alleged misrepresentations by MERS about its status as a**
 3 **beneficiary.**

4 Because the Plaintiffs claim to have alleged the misrepresentations made by
 5 MERS are contained in the Deeds of Trust, it is proper to consider the so-called deceptive
 6 statements in the context of a Motion to Dismiss.² A copy of the Deed of Trust signed by
 7 Plaintiff Aguilar, naming MERS as the beneficiary, as the nominee for the Lender and the
 8 Lender's successors and assigns, is attached as Exhibit B.³ An examination of the
 9 representations in the Deed of Trust clearly demonstrate that the statements contained therein
 10 are not deceptive, and they cannot stand as the basis for a conspiracy and fraud.

11 **3. MERS is the beneficiary on Plaintiffs' Deeds of Trust, as the**
 12 **nominee for the Lender.**

13 A deed of trust is "essentially a mortgage, and ordinarily does not differ
 14 therefrom, in legal operation and effect." CJS Mortgages § 6; *see* Nevada Revised Statute §
 15 319.100 (defining the term "mortgage" to include a deed of trust). Deeds of trust, like
 16 mortgages, are "contracts" used to "secure the performance of an obligation or the payment of
 17 any debt." *Chartz v. Cardelli*, 279 P. 761, 763 (Nev. 1929); *Lloyds Bank PLC v. State*, 109
 18 Nev. 1111, 1116 (Nev. 1993). The parties to a mortgage contract are a mortgagor-debtor and a
 19 mortgagee, to whom the mortgagor grants a security interest in property. *See* 1 The Law of
 20 Debtors and Creditors § 8:3. The parties to a deed of trust are "a trustor or grantor, trustee, and
 21 beneficiary." *See* CJS Mortgages § 77. The "rights of the trustor and beneficiary are equated
 22 with those of a mortgagor and mortgagee," 12-101 Thompson on Real Property, § 101.01, and
 23 the trustee acts as an agent for both, pursuant to the terms of the contract. *See, e.g., Kenly v.*
 24 *Miracle Properties*, 412 F. Supp. 1072, 1075 (D. Ariz. 1976) (a deed of trust is a "private
 25 contractual relationship" between "the trustor and the beneficiary, with the trustee acting as

26 ² In deciding upon a motion to dismiss, a court may consider documents on which the
 27 complaint necessarily relies, so long as the authenticity of the document is not contested. *See*
 28 *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

³ Except for the identities of the parties, each of Plaintiffs' Deeds of Trust are identical.

1 agent for both and acting pursuant to the terms of the instrument and their instructions.”). The
 2 trustee holds the property “in trust for the beneficiary.” 4A-3 Real Estate Financing § 3.11.

3 A mortgagee has been simply defined as “he who takes or receives a
 4 mortgage,”⁴ and similarly, a beneficiary has been generally defined as the person named or
 5 otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given.⁵
 6 Parties are, of course, free to contract as they please. *See Griffin v. Old Republic Ins. Co.*, 122
 7 Nev. 479, 487 (2006).

8 The Aguilar Deed of Trust states the following: (1) “**MERS is the beneficiary**
 9 **under this Security Instrument**” (emphasis in original); (2) the beneficiary of this Security
 10 Instrument is MERS (solely as nominee for Lender, as hereinafter defined, and Lender’s
 11 successors and assigns);” (3) MERS holds “legal title to the [property] interests granted by
 12 Borrower in this Security Instrument”; and (4) the Borrower “understands and agrees” that
 13 MERS “has the right: to exercise any and all of those [property] interests, including, but not
 14 limited to, the right to foreclose and sell the Property.” Ex. B, Deed of Trust, 1, 3.

15 So the Aguilar Deed of Trust has MERS “named or otherwise designated” as the
 16 person, as nominee for the Lender, for whose benefit a deed of trust is given. And Plaintiff
 17 Aguilar conveyed the property to Stewart Title, as a trustee to hold the property for the
 18 beneficiary designated in the Deed of Trust. *See* Ex. B, Deed of Trust, 3 (“Borrower
 19 irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described

20 ⁴ CJS Mortgages § 75.

21 ⁵ Plaintiffs’ is a nation-wide class action Complaint seeking relief in unlimited
 22 jurisdictions where MERS is named as the beneficiary, as nominee for the Lender, for the
 23 purpose of a Deed of Trust. Generally, the person designated in the Deed of Trust as the
 24 beneficiary is the person or entity for whose benefit the Deed of Trust—not the loan or
 25 promissory note—is given. *See, e.g.*, Arkansas Code Ann. § 18-50-101 (“‘Beneficiary’ means
 26 the person named or otherwise designated in a deed of trust as the person for whose benefit a
 27 deed of trust is given or his successor in interest.”); Arizona Stat. § 33-801(1) (same); *see also*,
 28 Idaho Code Ann. § 45-1502(1) (“‘Beneficiary’ means the person named or otherwise
 designated in a trust deed as the person for whose benefit a trust deed is given, or his successor
 in interest, and who shall not be the trustee”); Wyoming Stat. § 34-1-145(a)(i) (“‘Beneficiary’
 means the record owner of the beneficiary’s interest under a trust deed, including successors in
 interest”).

1 property . . .”). Thus, the allegation contained in the Deed of Trust itself shows without
2 contradiction that MERS is the beneficiary, as nominee for the Lender.

3 Plaintiffs maintain their fraud claim is supported by the allegation that MERS
4 “informed **all lenders** who originated loans” that “MERS would never own or acquire any
5 actual beneficial interest in **any loan** in which it was named as beneficiary under the deed of
6 trust.” Response, 4 (emphasis added). Note that the allegation here is a statement made by
7 **MERS to the Lenders, not to the Plaintiffs.**

8 MERS serves as the beneficiary as the nominee or designee of a Lender, and in
9 so doing, MERS and its members have agreed to contractual rules and practices that are to
10 govern their relationship—that is, the relationship between MERS and the Lender. Indeed, the
11 Plaintiffs acknowledge that the representation that MERS would not acquire any beneficial
12 interest **in the loan** comes from MERS’ Rules of Membership. *See* Response, n. 4. And when
13 MERS is designated the beneficiary under the Deed of Trust, the Lender and MERS have
14 agreed that, in so doing, MERS will not obtain a beneficial interest **in the loan** that the Lender
15 makes to Borrower. Rather, as agreed to between MERS and its members and as agreed to by
16 MERS and the Plaintiff-borrowers, MERS will act solely as the beneficiary on the Deed of
17 Trust, as nominee for the Lender. Simply put, serving as a beneficiary does not require one to
18 obtain a beneficial interest in the Note, and there is nothing wrong with serving as the
19 beneficiary on the Deed of Trust, as nominee for the Lender, without having a beneficial
20 interest in the Note. Here, the Lender holds the beneficial interest in the Note, and it is MERS
21 (as the Lender’s nominee) who is the designated beneficiary under the Deed of Trust. It is
22 perfectly appropriate for the Lender to hold the beneficial interest in the Note, and for its
23 nominee MERS to be the person for whose benefit the deed of trust is conveyed to secure the
24 repayment of the loan. The Plaintiffs cannot point to any legal authority to show otherwise.⁶

25
26 ⁶ Though rarely considered, Courts have consistently held that a deed of trust beneficiary
27 or mortgagee may be a person other than the obligee of the debt secured thereby. *See, e.g.,*
28 *First Nat. Bank v. National Grain Corp.*, 131 A. 404, 406-7 (Conn. 1925) (“a mortgage may be
held for the security of the real creditor, whether he is the party named as mortgagee or some
other party, for the provisions of a mortgage are not necessarily personal to the mortgagee

1 As noted by Judge Teilborg in *Cervantes*, “Plaintiffs’ allegations would foreclose the very
 2 splitting of a promissory note from a deed of trust. Such an approach, of course, would intrude
 3 into the realm of third-party beneficiary contracts, as well as assignments and delegations.”

4 *Cervantes* Order, attached to MERS’ Motion as Exhibit A, 15:21-23.

5 There is nothing deceptive or fraudulent in MERS being the beneficiary, as the
 6 nominee for the Lender. It was fully disclosed to the Borrower that MERS would serve only in
 7 that capacity, and the Borrower, in turn, granted MERS the legal title to the secured interests,
 8 and then signed the Deed of Trust acknowledging agreement. Notably, the Plaintiffs do not
 9 allege that MERS or anyone else made any representations to the Plaintiffs that MERS would
 10 hold some beneficial interest in the Notes. And nowhere does the law suggest that **only** the one
 11 who holds a beneficial interest in the Note may also serve as the designated beneficiary under a
 12 Deed of Trust.⁷

13
 14 named. The real party in interest may be an assignee of the mortgagee or some one subrogated
 15 to his rights under the mortgage, or even a third person not answering either of these
 16 descriptions”); *Adams v. Niemann*, 8 N.W. 719, 720 (Mich. 1881) (“A mortgage to a third
 17 person would be as valid as a mortgage to a creditor. The choice of a mortgagee is a matter of
 18 convenience”); *Ogden State Bank v. Barker*, 40 P. 769, 769 (Utah 1895) (“The mere fact that
 19 the mortgagee was not the real owner of the notes, but was simply a trustee or agent for the
 20 owner, does not affect the validity of the mortgage”).

21 ⁷ In the Response, and not the Complaint, Plaintiffs state that “MERS and its co-
 22 conspirator ‘members’ then split the note and the deed, contrary to law.” See Response, 4. But
 23 Plaintiffs fail to identify any law that is to the contrary, for indeed they cannot cite to any such
 24 law, rule, statute or case. Plaintiffs’ reliance on *In re Vargas*, *In re Jacobson*, *Mortgage*
 25 *Electronic Registration System, Inc. v. Southwest Homes of Arkansas*, and *Landmark Nat. Bank*
 26 *v. Kesler* is completely misplaced. *In re Vargas* and *In re Jacobson* involved a party’s standing
 27 to seek relief from a bankruptcy stay, and the evidence necessary to establish standing to obtain
 28 such relief. In both cases, the Court held that one must proffer evidence demonstrating an
 interest in the underlying obligation (i.e., the promissory note), or evidence showing
 authorization to act on behalf of the holder of the note in order to have standing. *Southwest*
Homes and *Kesler* involved motions by MERS to set aside a mortgage foreclosure judgment,
 where the plaintiff had failed to serve MERS, but did in fact serve the lender, or the lender was
 otherwise on notice. The courts found that under Arkansas and Kansas law and their rules of
 procedure, the named beneficiary on the deed of trust was not—under the given
 circumstances—a necessary party to the foreclosure action, and the lender’s notice was
 sufficient. Though these cases involved MERS mortgages or deeds of trust, the decisions were
 not unique to MERS, and did not hold MERS can never have standing to seek relief from a
 bankruptcy stay or to foreclose. Rather, once MERS proffers the necessary evidence showing

1 **4. MERS is designated by the Lender to act as the beneficiary, and is**
 2 **thus the “nominee” of the Lender.**

3 Plaintiffs claim in their Response that “MERS was never the true beneficiary”
 4 because “it was a ‘nominee,’”—as if to suggest that one who acts as a beneficiary, by
 5 definition, is excluded then from also being a “nominee.” Response, 9. A “beneficiary” is the
 6 person “named or otherwise designated” in a deed of trust as the person for whose benefit a
 7 deed of trust is given, *see supra*, Section II(B)(3), and a “nominee” is a **“person designated to**
 8 **act in the place of another.”** *In re Huggins*, 357 B.R. 180, 183 (Bankr. D.Mass. 2006) (citing
 9 Black's Law Dictionary (8th ed. 2004)) (emphasis added). In this instance, and as clearly stated
 10 in the Deed of Trust, MERS is designated to act as the beneficiary “in the place of,” or as the
 11 “nominee” of, the Lender. *See* Ex. B, Deed of Trust, 1.

12 Plaintiffs posit that a “nominee” is “an undefined and unrecognized title with no
 13 legal or beneficial rights in the property.” Response, 3 (citing *In re Hawkins*, 2009 WL 901766
 14 (Bankr. D. Nev. 2009)).⁸ But the term “nominee” is not “undefined,” and it is not a title. It is a
 15 reference to the status or capacity in which one acts. *See* Black's Law Dictionary (7th ed. 1999)

16 that it has authority to act on behalf of the holder of the note or the legal right to enforce the
 17 note, MERS (and any other such party similarly situated) would have standing. *See, e.g., In re*
 18 *Jacobsen*, at 367 (“To have standing, [a party] must establish its authority to act for the holder
 of the Debtor’s note.”).

19 ⁸ *In re Hawkins* does not concern the meaning of the term “nominee,” and the case is not
 20 about whether a beneficiary is excluded then from also being a “nominee.” *Hawkins*, like *In re*
 21 *Vargas* and *In re Jacobson*, involved a question of standing to obtain stay relief in bankruptcy
 22 court, and is therefore inapplicable to this case. *See supra*, n. 9. But notably, the *Hawkins*
 23 Court recognized that if MERS proffered the necessary evidence, MERS, as a “nominee,”
 24 could also be the real party in interest, with standing to seek relief from stay. *See Hawkins*,
 25 2009 WL 901766, at *2 (“Motions brought by MERS as nominee could meet the threshold test
 26 of standing, and MERS might be the ‘real party in interest’ under Fed.R.Civ.P. 17, if MERS is
 27 the actual nominee of the present Member who is entitled to enforce the note”). In fact,
 28 recently the Nevada district court in affirming the *Hawkins* bankruptcy decision held that
 MERS may present evidence to the bankruptcy court to show that MERS is the real party in
 interest, and the district court made clear that its holding “is limited to the specific facts and
 procedural posture of the instant case.” *Mortg. Elec. Reg. Sys. v. Chong*, Case No. 2:09-CV-
 00661-KJD-LRL (D.Nev. Dec. 4, 2009) (“The Court makes no finding that MERS would not
 be able to establish itself had it identified itself as the holder of the note or provided sufficient
 evidence of the source of its authority.”).

1 (defining “nominee” as “(1) a person who is proposed for an office, position or duty. (2) a
2 person designated to act in the place of another, usu. in a very limited way”). In this case,
3 MERS was designated or nominated by the Lender to “act in its place” as the beneficiary
4 under the Deed of Trust.

5 As a matter of law, it cannot be said that the Plaintiffs’ conclusory allegation
6 that MERS is a “sham” beneficiary is actionable fraud. The very representations in the Deed of
7 Trust that make up the alleged fraud show that MERS is the beneficiary, as the nominee for the
8 Lender. But even if Plaintiffs could and did allege that the naming of MERS as the beneficiary
9 on Plaintiffs’ Deeds of Trust, as the nominee for the Lender, was fraudulent, Plaintiffs still fail
10 to allege other elements of a fraud claim under Nevada law.

11 **5. No injury is pled as a “consequent and proximate result” of the**
12 **allegedly fraudulent representations.**

13 Nowhere in the Complaint is it alleged that Plaintiffs were injured as a
14 “consequent and proximate result” of MERS fraudulently being named as the beneficiary on
15 Plaintiffs’ Deeds of Trust. In essence, the Plaintiffs’ contention is that they were lied to about
16 MERS being the beneficiary when, in fact, they were not. Of course, MERS was the
17 beneficiary, as the nominee for the Lender—it stated so in the Deeds of Trust agreed to and
18 signed by the Plaintiffs. But even assuming that MERS’ “representation” about it being the
19 beneficiary on the Deed of Trust, as the nominee for the Lender, was false, it is simply not
20 “plausible” to suggest that Plaintiffs were somehow injured as a result of MERS not serving as
21 the beneficiary, or that had MERS served as the beneficiary, some benefit would have inured to
22 the Plaintiffs. The Plaintiffs cannot be heard to claim that they would not have entered into the
23 loan if they knew that MERS was not to be the beneficiary, or that they would only have
24 entered into the loan if MERS was the beneficiary.⁹ See *Cervantes* Order, 15:24-28 (“Plaintiffs
25 have failed to allege what effect, if any, listing the MERS system as a ‘sham’ beneficiary on the

26 ⁹ Taken to its logical conclusion, to state a claim for fraud, according to Plaintiffs’
27 Response, the Plaintiffs would have to prove that, as borrowers, they would have only accepted
28 the loan proceeds and granted an interest in the home to secure the repayment of that loan, **if**
and only if MERS was to serve as the beneficiary.

1 deed of trust had upon their obligations as borrowers. Plaintiffs do not allege that they were
2 somehow induced to enter into their loans on the basis that MERS was a genuine and not a
3 ‘sham’ beneficiary.”).

4 The issue here is not whether Plaintiffs did, in fact, rely on a representation that
5 MERS was to be the beneficiary, but rather whether such reliance caused injury to the
6 Plaintiffs. The Complaint makes no such allegation, and the suggestion in the Response that
7 such injury was caused by Plaintiffs’ reliance on a representation that MERS is the beneficiary
8 is just not “plausible.”¹⁰

9 In dismissing the *Cervantes* complaint, the district court in Arizona summarized
10 the plaintiffs’ fraud claims as follows:

11 For the reasons articulated above, **the Court finds that Defendants**
12 **representations to Plaintiffs that MERS would serve as the**
13 **beneficiary under the deed of trust was not a false representation**
14 **and, even if such a representation was false, the Court finds that it**
15 **was not material.** Furthermore, Plaintiffs have failed to adequately
16 allege that Defendants’ representations concerning the MERS system—
17 including serving as the beneficiary under the deeds of trust—induced
18 them to rely upon such representations and, in so doing, Plaintiffs have
19 suffered injuries that resulted from the false representations. **At most,**
20 **Plaintiffs find the MERS system to be disagreeable and**
21 **inconvenient to them as consumers. Such complaints, however, do**
22 **not arise to the level of fraud, much less a conspiracy to commit**
23 **fraud.**

24 *Cervantes* Order, 16:19-17:8 (emphasis added).

25 ¹⁰ The Response makes inconsistent assertions about the Plaintiffs’ reliance on the Deeds
26 of Trust by stating first, “MERS implies that Plaintiffs could not have relied upon the
27 representations buried in the... [D]eed [of Trust] because the loan documents constituted a
28 contract.” Response, 14. And then Plaintiffs claim, “a party to a contract does, and is entitled
to rely upon verbal and other representations separate from the boilerplate language buried in
the contract.” *Id.* (citing *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d
388, 398 (Ariz. 1984)). It is not necessary to discuss whether the Plaintiffs did, in fact, rely
justifiably on “verbal and other representations” other than the representations contained in the
Deed of Trust because no such verbal representations are alleged. Regardless, however, of
whether the Plaintiffs relied on the representations in the Deeds of Trust concerning the role of
MERS, such representations could not plausibly have caused injury to the Plaintiffs.

1 There are no additional allegations in the Plaintiffs' fraud claims in this case to
2 cure the deficiencies found in the *Cervantes* plaintiffs' claims. Plaintiffs fail to allege fraud.

3 **C. A civil conspiracy action requires the commission of an underlying wrong,
4 as well as a conspiracy to commit the wrong, and Plaintiffs have alleged
5 neither.**

6 In the Complaint, Plaintiffs purport to allege a civil conspiracy to commit
7 wrongful foreclosure and fraud. *See* Compl., Third Claim for Relief ("Conspiracy to Commit
8 Wrongful Foreclosure") and Fourth Claim for Relief ("Conspiracy to Commit Fraud by
9 Creation, Operation and Use of the MERS® System"). Plaintiffs fail to adequately plead fraud
10 by MERS or in the MERS® System. And Plaintiffs do not dispute that no action for wrongful
11 foreclosure lies where, as here, the Plaintiff-borrowers do not allege that they are not in default
12 on the repayment of their loans—a prerequisite to the pursuit of a wrongful foreclosure claim.
13 *See* III(B)(2)(a). Plaintiffs' derivative conspiracy claims must therefore be dismissed. *See*
14 Motion, 12-13; *Rashidi v. Albright*, 818 F.Supp. 1354, 1360 (D.Nev. 1993) (holding that
15 because the underlying claim was "not maintainable," the "claim[] of conspiracy . . . must also
16 be dismissed).

17 Notwithstanding, even if Plaintiffs have alleged fraud or wrongful foreclosure
18 —they have not—their conspiracy claims fail because no conspiracy to commit fraud or
19 wrongful foreclosure is alleged. A plaintiff must allege "specific facts which support the
20 inference of an agreement." *In re Sunset Bay Associates*, 944 F.2d 1503, 1517-18; *see Kendall*
21 *v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (a complaint must allege facts such as
22 a "specific time, place, or person involved in the alleged conspiracies"). And Rule 9(b)
23 particularity "calls for the complaint to specify the manner in which a defendant joined the
24 conspiracy and how he participated in it." *Arroyo v. Wheat*, 591 F.Supp. 141, 144 (D.Nev.
25 1984).

26 For reasons unknown, Plaintiffs cite *Beltz Travel Service, Inc. v. Int'l Air*
27 *Transp. Ass'n*, 620 F.2d 1360, to argue their conspiracy claims are adequately pled. *See*
28 Response, 13. But that case is wholly inapplicable to this case. *Beltz Travel* is about a
conspiracy to monopolize the tour packaging industry in violation of the Sherman Act antitrust

1 laws, a claim not made by Plaintiffs against MERS, and a statute nowhere mentioned in the
2 Complaint. *See Beltz Travel*, 620 F.2d at 1367 (“conspiracy in violation of the antitrust laws”).
3 More important, nothing in *Beltz Travel* suggests a plaintiff need not allege the commission of
4 the underlying tort, as well as facts showing an agreement by the defendant to commit the tort
5 and specifically how the defendant participated in conspiracy to commit the tort. And there are
6 no such allegations in Plaintiffs’ Complaint.

7 Plaintiffs, in their Response, do not point to a single factual allegation in the
8 Complaint to support the existence of a conspiracy to commit fraud or wrongful foreclosure.
9 Indeed, they cannot. Plaintiffs’ Complaint contains nothing but conclusory allegations of
10 conspiracy, and this deficiency is fatal to Plaintiffs’ conspiracy claims as well. *See Twombly*,
11 127 S. Ct. at 1966 (“a conclusory allegation of agreement at some unidentified point does not
12 supply facts adequate to show illegality ... without some further factual enhancement it stops
13 short of the line between possibility and plausibility of “entitle[ment] to relief”).

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1 **III. CONCLUSION**

2 Plaintiffs fail to show any cause of action alleged in the Complaint against
3 MERS. The Complaint as to MERS should be dismissed with prejudice.

4 DATED this 23rd day of December, 2009.

5
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CERTIFICATE OF SERVICE

I certify that on December 23, 2009, I electronically filed the foregoing *Reply Memorandum of Law in Support of Motion to Dismiss by Mortgage Electronic Registration Systems, Inc. and MERSCORP, Inc.* using the CM/ECF system which will send a notice of electronic filing* to all parties as listed on the Notice of Electronic Filing.

s/Robert M. Brochin
Robert M. Brochin

* If electronic notice is not indicated through the court's e-filing system, a true and correct paper copy of the foregoing document was delivered via U.S. Mail.