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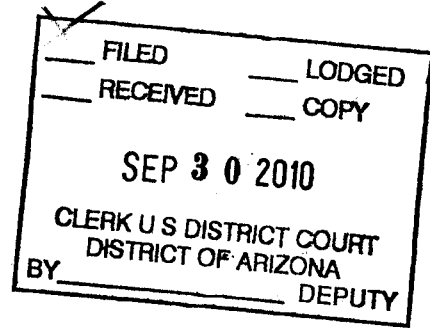
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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

IN RE Mortgage Electronic Registration
 Systems (MERS) Litigation

MDL DOCKET NO. 09-2119-JAT

ORDER

This Order Applies to:

- CV 09-2616-PHX-JAT
- CV 10-78-PHX-JAT
- CV 10-79-PHX-JAT
- CV 10-80-PHX-JAT
- CV 10-81-PHX-JAT
- CV 10-630-PHX-JAT

In the initial Practice and Procedure Order (Doc. 25), this Court set for the briefing schedule for six above-captioned actions transferred by the Panel's initial CTO.

On August 24, 2010, this Court heard oral argument on sixty-five motions to dismiss pertaining to these six member cases. The motions are as follows:

Motions regarding *Vargas, et al. v. Countrywide Home Loans, et al.*,

CV 09-2616-PHX-JAT:

(1) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 262);

(2) GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 285);

1 (3) Motion of Defendants National City Bank, National City Mortgage, National City
2 Corporation and PNC Financial Services Group, Inc. to Dismiss Count Seven of the First
3 Amended Complaint (Doc. 292);

4 (4) Defendant MortgageIT, Inc.'s Motion to Dismiss First Amended Complaint and
5 Joinder in Certain Other Defendants' Motion to Dismiss (Doc. 299);

6 (5) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended
7 Complaint [#5 in *Vargas*] and Joinder in Certain Other Defendants' Motions to Dismiss
8 (Doc. 309);

9 (6) Certain Defendants' Motion to Dismiss First Amended Class Action Complaint
10 (Doc. 314);

11 (7) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
12 Inc.'s Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 324).

13 **Motions regarding *Lopez, et al. v. Executive Trustee Services, LLC, et al.,***

14 **CV 10-78-PHX-JAT:**

15 (8) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint
16 [#59-1] and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 260);

17 (9) GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class Action
18 Complaint (Doc. 281);

19 (10) Motion of Defendants National City Bank, National City Mortgage, National
20 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Five and Six
21 of the Second Amended Complaint (Doc. 291);

22 (11) Motion to Dismiss Second Amended Complaint Against T.D. Service Company
23 (Doc. 297);

24 (12) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' Second Amended
25 Complaint [#419 in *Lopez*] and Joinder in Certain Other Defendants' Motions to Dismiss
26 (Doc. 308);

27 (13) Certain Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint
28 (Doc. #316);

1 (14) National Default Servicing Corp.'s Motion to Dismiss for Failure to State a
2 Claim for Relief or, in the Alternative for More Definite Statement and/or to Strike Portions
3 of Second Amended Complaint (Doc. 318);

4 (15) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
5 Inc.'s Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint (Doc. 331).

6 **Motions regarding *Goodwin, et al. v. Executive Trustee Services, LLC, et al.*,**

7 **CV 10-79-PHX-JAT:**

8 (16) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint
9 [#45-1] and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 259);

10 (17) Defendant Deutsche Bank National Trust Company's Motion to Dismiss
11 Plaintiffs' Second Amended Class Action Complaint (Doc. 266);

12 (18) Defendant Ocwen Loan Servicing, LLC's Motion to Dismiss Second Amended
13 Complaint (Doc. 268);

14 (19) Defendant Western Progressive Trustee LLC's Motion to Dismiss Second
15 Amended Complaint (Doc. 269);

16 (20) American Home Mortgage Servicing, Inc.'s Motion to Dismiss Plaintiffs' Second
17 Amended Class Action Complaint (Doc. 278);

18 (21) GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class Action
19 Complaint (Doc. 282);

20 (22) Defendant Litton Loan Servicing LP's Motion to Dismiss Second Amended Class
21 Action Complaint (Doc. 286);

22 (23) Motion of Defendants National City Bank, National City Mortgage, National
23 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Six and Seven
24 of the Second Amended Complaint (Doc. 290);

25 (24) WMC Mortgage Corp.'s Motion to Dismiss Plaintiffs' Second Amended Class
26 Action Complaint (Doc. 296);

27 (25) Motion to Dismiss Second Amended Complaint Against T.D. Service Company
28 (Doc. 298);

1 (26) Motion to Dismiss Second Amended Complaint Against I.B. Property Holdings,
2 L.L.C. (Doc. 300);

3 (27) Aztec Foreclosure Corporation and National Default Servicing Corp.'s Motion
4 to Dismiss for Failure to State a Claim for Relief (Doc. 304);

5 (28) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' Second Amended
6 Complaint [#443 in *Goodwin*] and Joinder in Certain Other Defendants' Motions to Dismiss
7 (Doc. #305);

8 (29) Bank of New York's Motion to Dismiss (Doc. 310);

9 (30) Certain Defendants' Motion to Dismiss (Doc. 320);

10 (31) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
11 Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. 327);

12 (32) Defendant MTC Financial, Inc. dba Trustee Corp's Motion to Dismiss Plaintiffs'
13 Second Amended Class Action Complaint for Failure to State a Claim for Relief, or,
14 Alternatively, Motion for Summary Judgment (Doc. 479).

15 **Motions regarding *Green, et al. v. Countrywide Home Loans, Inc., et al.*,**

16 **CV 10-80-PHX-JAT:**

17 (33) Citimortgage, Inc. and CR Title Services, Inc.'s Motion to Dismiss Plaintiffs'
18 First Amended Complaint [#35] and Joinder in Certain Other Defendants' Motions to
19 Dismiss (Doc. 257);

20 (34) American Home Mortgage Servicing, Inc.'s Motion to Dismiss Plaintiffs' First
21 Amended Class Action Complaint (Doc. 279);

22 (35) GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action
23 Complaint (Doc. 283);

24 (36) Defendant Litton Loan Servicing LP's Motion to Dismiss First Amended Class
25 Action Complaint (Doc. 287);

26 (37) Motion of Defendants National City Bank, National City Mortgage, National
27 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Two, Three and
28 Four of the First Amended Complaint (Doc. 294);

1 (38) The Bank of New York Mellon's Motion to Dismiss Plaintiffs' First Amended
2 Complaint [#35] and Joinder In Certain Other Defendants' Motions to Dismiss (Doc. 302);

3 (39) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended
4 Complaint [#35] and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 307);

5 (40) NdeX West, LLC's Motion to Dismiss Plaintiffs' First Amended Class Action
6 Complaint (Doc. 317);

7 (41) National Default Servicing Corp.'s Motion to Dismiss for Failure to State a
8 Claim for Relief, or, in the Alternative for More Definite Statement and/or to Strike Portions
9 of the First Amended Complaint (Doc. 312);

10 (42) Certain Defendants' Motion to Dismiss (Doc. 321);

11 (43) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
12 Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 333).

13 **Motions regarding *Dalton, et al. v. Citimortgage, Inc., et al.*,**

14 **CV 10-81-PHX-JAT:**

15 (44) Citimortgage, Inc. and CR Title Services, Inc.'s Motion to Dismiss Plaintiffs'
16 Complaint and Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 258);

17 (45) Defendant Deutsche Bank National Trust Company's Motion to Dismiss
18 Plaintiffs' Class Action Complaint and Joinder in the Motion to Dismiss Filed by Defendant
19 American Home Mortgage Servicing, Inc. (Doc. 267);

20 (46) American Home Mortgage Servicing, Inc.'s Motion to Dismiss Plaintiffs' Class
21 Action Complaint (Doc. 277);

22 (47) GE Money Bank's Motion to Dismiss Plaintiffs' Class Action Complaint (Doc.
23 284);

24 (48) T.D. Service Company's Renewed Motion to Quash Service of Summons and
25 Complaint and Renewed Motion to Dismiss Class Action Complaint (Doc. 293);

26 (49) Motion of Defendants National City Bank, National City Mortgage, National
27 City Corporation and PNC Financial Services Group, Inc. to Dismiss Counts Two, Three and
28 Four of the Complaint (Doc. 295);

1 (50) JPMorgan Chase Bank, N.A., EMC Mortgage Corporation, and California
2 Reconveyance Company's Motion to Dismiss Plaintiffs' Complaint and Joinder in Certain
3 Other Defendants' Motions to Dismiss (Doc. 306);

4 (51) Defendant MetLife Bank, N.A.'s Motion to Dismiss and Joinder in GMAC
5 Mortgage, LLC's Motion to Dismiss and Certain Defendants' Motion to Dismiss Filed By
6 Bank of America, N.A., et al. (Doc. 319);

7 (52) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
8 Inc.'s Motion to Dismiss Plaintiffs' Class Action Complaint (Doc. 325);

9 (53) Certain Defendants' Motion to Dismiss (Doc. 328);

10 (54) Cal-Western Reconveyance Corporation's Motion to Dismiss Class Action
11 Complaint, or in the Alternative for a More Definite Statement; Motion to Strike Portions of
12 Class Action Complaint (Doc. 423).

13 **Motions regarding *Robinson, et al. v. Citimortgage, Inc., et al.*,**

14 **CV 10-630-PHX-JAT:**

15 (55) Citimortgage, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint and
16 Joinder in Certain Other Defendants' Motions to Dismiss (Doc. 261);

17 (56) GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action
18 Complaint (Doc. 280);

19 (57) Motion of Defendants National City Bank, National City Mortgage, National
20 City Corporation and PNC Financial Services Group, Inc. to Dismiss Count Eight of the First
21 Amended Complaint (Doc. 288);

22 (58) JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended
23 Complaint [#91 in *Robinson*] and Joinder in Certain Other Defendants' Motions to Dismiss
24 (Doc. 303);

25 (59) Certain Defendants' Motion to Dismiss Plaintiff's First Amended Complaint
26 (Doc. 311);

27 (60) Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
28 Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 326).

1 **Motions addressing multiple cases:**

2 (61) Motion of the Federal Housing Finance Agency as Conservator of Fannie Mae
3 and Freddie Mac to Dismiss (Doc. 264) (Concerning all six);

4 (62) Motion of Defendants GMAC Mortgage, LLC, Executive Trustee Services, Inc.,
5 and Homecomings Financial, LLC to Dismiss All Plaintiffs' Claims Retained by the Court
6 in these Six Cass Actions (Doc. 276) (Concerning all six);

7 (63) Motion to Dismiss Plaintiffs' Complaints Filed by Defendants Aurora, Old
8 Republic, and Saxon (Doc. 289) (Concerning *Goodwin, Green, and Dalton*);

9 (64) Motion to Dismiss By Shareholder Defendants (Doc. 315) (Concerning all six);

10 (65) Motion to Dismiss Plaintiffs' Complaints Filed by Quality Loan Service
11 Corporation (Doc. 343) (Concerning *Goodwin, Green, and Dalton*).

12 **I. BACKGROUND**

13 On April 1, 2009, Plaintiff Alfonso Vargas filed a putative class action. *Vargas, et*
14 *al. v. Countrywide Home Loans, et al.*, CV 09-2616-PHX-JAT, Doc. 1. On July 27, 2009,
15 a First Amended Class Action Complaint was filed. *Id.*, Doc. 5. In its March 23, 2010
16 Order, this Court retained jurisdiction over Plaintiffs' Seventh Claim and Eleventh Claim for
17 Relief, which pertain to the formation and operation of MERS. All other claims for relief
18 were remanded to the United States District Court for the Central District of California.

19 On April 8, 2009, Plaintiff Josefa Lopez filed a putative class action. *See Lopez, et*
20 *al. v. Executive Trustee Services, LLC, et al.*, CV 10-78-PHX-JAT, Doc. 1. On May 4, 2009,
21 a First Amended Class Action Complaint was filed adding nine plaintiffs. *See id.*, Doc. 35.
22 Plaintiffs filed a Second Amended Complaint on February 3, 2010. Doc. 59.¹ In its March
23 23, 2010 Order, this Court retained jurisdiction over Plaintiffs' Second, Third, Fourth, Fifth,
24 Sixth, Seventh, and Eighth Claims for relief, which pertain to the formation and operation
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¹ Unless otherwise noted, all docket numbers refer to the docket of *In re Mortgage Electronic Registration Systems*, MDL Docket No. 09-2119-JAT.

1 of MERS. All other claims for relief were remanded to the United States District Court for
2 the District of Nevada.

3 On June 9, 2009, Plaintiff Aleta Goodwin, along with several other plaintiffs, filed a
4 putative class action in the District of Nevada. *Goodwin, et al. v. Executive Trustee Services,*
5 *LLC, et al.*, CV 10-79-PHX-JAT, Doc. 1. On June 24, 2009, a First Amended Class Action
6 Complaint was filed, adding six additional plaintiffs. *See id.*, Doc. 47. On January 8, 2010,
7 Judge Reed of the District of Nevada granted Defendants' Motions to Dismiss (along with
8 other defendants. motions to dismiss) and granted Plaintiffs leave to amend their complaint.
9 *Goodwin v. Executive Trustee Services, LLC*, No. 3:09-CV-306-ECR-PAL, 2010 WL 234786
10 (D. Nev. Jan. 8, 2010), at *9-*10. In particular, Judge Reed dismissed the unjust enrichment
11 claim because Plaintiffs had entered into express, written contracts and thus could not state
12 a claim. *Id.* at *7-*8. Judge Reed noted that he lacked jurisdiction over the claims that were
13 transferred to this Court. *Id.* at *10. On January 29, 2010, Plaintiffs filed the Second
14 Amended Class Action complaint. Doc. 45-1. In an order dated March 23, 2010, this Court
15 retained the Third, Fourth, Sixth, and Seventh Claims for Relief and parts of the Second,
16 Eighth, and Ninth Claims for Relief that relate to the formation or operation of MERS. All
17 other claims for relief were remanded to the United States District Court for the District of
18 Nevada.

19 On July 10, 2009, Plaintiff Joseph Green, along with 30 others, filed a putative class
20 action. *Green, et al. v. Countrywide Home Loans, Inc., et al.*, CV 10-80-PHX-JAT, Doc. 1.
21 On January 8, 2010, Judge Reed of the District of Nevada granted all defendants' motions
22 to dismiss and denied Plaintiffs leave to amend their complaint. See Doc. 283-1. In this
23 Court's March 23, 2010 Order, this Court retained jurisdiction over the First, Third and
24 Fourth Claims for Relief and parts of the Second, Fifth, and Sixth Claims for Relief as they
25 relate to the formation and operation of MERS. All other claims for relief were remanded
26 to the United States District Court for the District of Nevada.

27 On September 14, 2009, Plaintiff Lacy J. Dalton, along with over eighty other
28 plaintiffs, filed a putative class action in the District of Nevada. *Dalton, et al. v.*

1 *Citimortgage, Inc., et al.*, CV 10-81-PHX-JAT, Doc 1. In an order dated March 23, 2010,
2 this Court retained claims for relief 1, 3 and 4, retained-in-part claims for relief 2, 5 and 6 to
3 the extent they involved allegations involving the function or operation of MERS. All other
4 claims for relief were remanded to the United States District Court for the District of Nevada.

5 On April 21, 2009, Plaintiffs Jonathan Robinson and Sally Robinson-Burke filed this
6 lawsuit, asserting multiple statutory and common law claims. *Robinson-Burke, et al. v. GE*
7 *Money Bank, et al.*, CV 09-227-TUC-JMR, Doc. 1. On June 19, 2009, Plaintiffs filed the
8 First Amended Class Action Complaint, which added two new plaintiffs. *See id.*, Doc. 91.
9 In an order dated March 23, 2010, this Court retained the Eighth Claim for Relief, and parts
10 of the Tenth and Eleventh Claims for Relief which related to formation and operation of
11 MERS in a separately captioned action, *Robinson, et al. v. GE Money Bank, et al.*, CV 10-
12 630-PHX-JAT. All other claims for relief were remanded to the Honorable Judge John M.
13 Roll of the United States District Court for the District of Arizona.

14 Defendants have now filed the above listed sixty-five motions to dismiss. Nearly all
15 seek to dismiss Plaintiffs' complaints for failure to state a claim under Rule 12(b)(6) and
16 some also advance other theories. As all six class action complaints share nearly identical
17 causes of action, the Court will group similar claims together and address the 12(b)(6)
18 motions pertaining to each set of claims.

19 **II. LEGAL STANDARD**

20 "A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim." *Navarro*
21 *v. Block*, 250 F.3d 7129, 732 (9th Cir.2001). "To survive a motion to dismiss, a complaint
22 must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
23 plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl.*
24 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a
25 'probability requirement,' but it asks for more than a sheer possibility that a defendant has
26 acted unlawfully." *Iqbal*, 129 S.Ct. at 1949. "Where a complaint pleads facts that are
27 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility
28 and plausibility of entitlement to relief.' " *Id.* (quoting *Twombly*, 550 U.S. at 557).

1 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
2 detailed factual allegations, a plaintiff’s obligation to provide the grounds of entitlement to
3 relief requires more than labels and conclusions, and a formulaic recitation of the elements
4 of the cause of action will not do.” *Twombly*, 550 U.S. at 545 (internal quotations, citations
5 and alterations omitted). “Determining whether a complaint states a plausible claim for relief
6 . . . [is] a context-specific task that requires the reviewing court to draw on its judicial
7 experience and common sense. But where the well-pleaded facts do not permit the court to
8 infer more than the mere possibility of misconduct, the complaint has alleged-but it has not
9 ‘show[n]’-‘that the pleader is entitled to relief.’” *Iqbal*, 129 S.Ct. at 1950 (quoting Fed. Rule.
10 Civ. P. 8(a)(2)) (citation omitted).

11 Under Rule 9(b), plaintiffs have an even higher pleading standard in all allegations
12 of fraud, especially in multi-defendant cases such as these. The Ninth Circuit has repeatedly
13 emphasized that “Rule 9(b) does not allow a complaint to merely lump multiple defendants
14 together but require[s] plaintiffs to differentiate their allegations when suing more than one
15 defendant . . . and inform each defendant separately of the allegations surrounding his alleged
16 participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007) (citation
17 omitted); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (“membership
18 in an association does not render an association’s members automatically liable” for a
19 conspiracy); *N. Cal. Pharm. Ass’n v. United States*, 306 F.2d 379, 388-89 (9th Cir. 1962)
20 (trade association membership “does not mean, however, that every member of the
21 Association, by reason of his membership alone, becomes a coconspirator”).

22 **III. WRONGFUL FORECLOSURE**

23 Plaintiffs assert claims for wrongful foreclosure in *Goodwin*, *Lopez*, *Green*, and
24 *Dalton*. Each claim fails to state a claim as a matter of law for at least two reasons.

25 *A. Failure to Allege Lack of Default*

26 First, Nevada law is clear that “[a]n action for the tort of wrongful foreclosure will lie
27 if the trustor or mortgagor can establish at the time the power of sale was exercised or the
28 foreclosure occurred, no breach of condition or failure of performance existed on the

1 mortgagor or trustor’s part which would have authorized the foreclosure or exercise of the
2 power of sale.” *Ernestburg v. Mortgage Investors Group*, No. 2:08-cv-01304-RCJ-RJJ, 2009
3 WL 160241, at *6 (D. Nev. Jan. 22, 2009) (internal citations and quotations omitted). The
4 plaintiff must establish that they were not “in default when the power of sale was exercised.”
5 *Id.* (citing *Collins v. Union Fed. Sav. & Loan Ass’n*, 662 P.2d 610, 623 (Nev. 1983)).
6 Furthermore, a claim for wrongful foreclosure does not arise until the power of sale is
7 exercised. *Collins*, 662 P.2d at 623.

8 *Green* Plaintiffs admit that they have breached their loan obligations:
9 “Borrower/Plaintiffs did not pay the payments agreed in the ‘Note’ . . .” Doc. 35, ¶ 92. In
10 *Lopez*, Plaintiff Lopez “was unable to continue making payments” and a Notice of Default
11 was recorded. Doc. 59-1, ¶¶ 58, 63. In fact, the *Lopez* Amended Complaint admits that
12 every named plaintiff had been defaulted or was otherwise behind in their payments. Doc.
13 59-1, ¶¶ 71, 79, 88, 99, 109, 118. Similarly, the *Dalton* complaint alleges that at least one
14 plaintiff could “no longer pay the payments” (*see* 10-81-PHX-JAT, Doc. 2, ¶ 138 (a)) and
15 does not make any allegation that any plaintiff made the payments agreed upon under the
16 terms of their loans. The *Goodwin* Second Amended Complaint alleges that at least one
17 plaintiff “ceased making payments” (*see* Doc. 54-4, ¶ 134 (b)) and does not make any
18 allegation that any plaintiff made the payments agreed upon under the terms of their loans.
19 By failing to plead that their loans are not in default, all of Plaintiffs’ claims for wrongful
20 foreclosure are barred as a matter of law and will be dismissed for failure to state a claim.
21 Further, for many of the claims in these actions, Plaintiffs do not allege that the power of sale
22 has been exercised. For these plaintiffs, these claims for wrongful foreclosure are premature
23 and not actionable.

24 *B. MERS and MERS-appointed trustees have power to foreclose*

25 Even if Plaintiffs’ claims for wrongful foreclosure were not barred by their failure to
26 plead absence of default, Plaintiffs’ claims suffer other deficiencies. Plaintiffs have failed
27 to allege facts upon which the Court could draw the reasonable inference that the foreclosure
28 trustees were not properly appointed and thus lacked the power to exercise the power of sale.

1 Plaintiffs’ “split the note” theory has been recognized by several courts in are particular
2 context and to a limited extent. MERS has been found to be less than a traditional
3 beneficiary in that it holds the deed of trust, but not the accompanying mortgage note and the
4 payments made on account of such loans. *See In re Hawkins*, No. BK-S-07-13593-LBR,
5 2009 WL 901766 (Bankr. D. Nev. Mar. 31, 2009). This splitting of the note from the deed
6 of trust does affect the parties’ legal rights and thus, when MERS or a participant in the
7 MERS system has needed a Court to grant affirmative relief—for example, when it needs
8 relief from an automatic stay in a bankruptcy court—Courts have not granted that relief. *See*
9 *In re Hawkins* (denying relief from automatic state in bankruptcy proceedings); *In re Vargas*,
10 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) (same); *Bellistri v. Ocwen Loan Servicing, L.L.C.*,
11 284 S.W.3d 619 (Mo. Ct. App. 2009) (denying relief to a foreclosure trustee appointed by
12 MERS for lack of “interest” in the property).

13 However, the situation in the cases before the Court differ in one important respect:
14 they concern non-judicial foreclosures under Nevada law. “Defendants do not need to
15 produce the note to the property in order to proceed with a non-judicial foreclosure.” *Urbina*
16 *v. Homeview Lending Inc.*, 681 F. Supp. 2d 1254 (D. Nev. 2009) (dismissing Plaintiffs’
17 allegations that Defendants did not possess the original note); *see also Mansour v.*
18 *Cal-Western Reconveyance Corp.*, 618 F.Supp.2d 1178, 1181 (D. Ariz. 2009) (rejecting
19 similar “show me the note” argument under Arizona’s non-judicial foreclosure law and
20 collecting cases with similar holdings).

21 Plaintiffs further argue that when “the note is split from the deed of trust, then the note
22 becomes unsecured and a person holding only the note lacks the power to foreclose and a
23 person holding only a deed of trust suffers no default because only the holder of the note is
24 entitled to payment on it.” *See, e.g., Dalton* Complaint, CV 10-81-PHX-JAT, Doc. 3 at 18.
25 Plaintiffs, however, fail to allege any facts in their amended complaint that would support
26 such a theory. Indeed, the deeds of trust state that MERS will serve as the nominee for the
27 original lender as well as the original lender’s successors and assigns. *See, e.g., the Casas-*
28 *Martinez Deed of Trust*, Doc. 352 at 25. Thus, from the very language of the deeds of trust,

1 to which Plaintiffs agreed in entering into their home loan transaction, MERS is still acting
2 as the nominee for the current holder of the promissory note. Plaintiffs have failed to allege
3 any facts suggesting that MERS is not the nominee of the current owner of the promissory
4 note; nor do Plaintiffs allege any facts supporting their assertion that the promissory note and
5 the deed of trust have been bifurcated. Plaintiffs have not cited any legal authority where the
6 naming of MERS—and the consequent “splitting of the note”—was cause to enjoin a
7 non-judicial foreclosure as wrongful. Indeed Nevada case law universally holds that these
8 deeds are enforceable. *See Orzoff v. MERS*, No. 2:08-cv-01512, 2009 WL 4643229, at *6
9 (D. Nev. Mar. 26, 2009) (“Plaintiff has cited no authority that is controlling upon this Court
10 that holds MERS cannot have standing as a nominee beneficiary in connection with a
11 nonjudicial foreclosure proceeding under Nevada law. This Court has previously determined
12 that MERS does have such standing.”); *Vazquez v. Aurora Loan Servs.*, No 2:08-cv-01800,
13 slip op. at 2 (D. Nev. Mar. 30, 2009) (loan documents sufficiently demonstrated standing by
14 Defendants, including MERS, “with respect to the loan and the foreclosure”); *Gonzalez v.*
15 *Home American Mortgage Corp.*, Case No. 2:09-cv-00244, slip op. at 7-9 (D. Nev. Mar. 12,
16 2009) (MERS and successor trustee have the power to initiate non-judicial foreclosure
17 without presenting the note); *Ramos v. MERS, Inc.*, Case No. 2:08-cv-1089-ECR-RJJ, 2009
18 WL 5651132, at *3 (D. Nev. Mar. 5, 2009) (“under the deed of trust, MERS was empowered
19 to foreclose on the property and to appoint [a] substitute trustee for purpose of conducting
20 the foreclosure”). Therefore, for this additional reason, Plaintiffs’ claims for wrongful
21 foreclosure fail to state a claim.

22 In sum, Plaintiffs’ actions for wrongful foreclosure are all dismissed for failure to state
23 a claim.

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1 **III. CONSPIRACY TO COMMIT WRONGFUL FORECLOSURE**

2 A. *Lack of Underlying Claim*

3 Plaintiffs also assert claims for conspiracy to commit wrongful foreclosure in
4 *Goodwin, Lopez, Green, and Dalton*.² Since Plaintiffs fail to state a claim for wrongful
5 foreclosure, their claims for conspiracy to commit wrongful foreclosure also must fail. It is
6 well settled that a plaintiff cannot prevail on a claim for conspiracy if the underlying claim
7 is defective. *Grisham v. Philip Morris USA*, 403 F.3d 631, 635 (9th Cir. 2000) (claim for
8 civil conspiracy fails if underlying cause of action fails). “Civil conspiracy is not an
9 independent cause of action—it must arise from some underlying wrong.” *Paul Steelman*
10 *Ltd. v. HKS, Inc.*, No. 2:05-cv-01330-BES-RJJ, 2007 WL 295610, at *3 (D. Nev. Jan. 26,
11 2007) (“having concluded that Plaintiffs’ claim of tortious interference is not actionable as
12 pleaded, Steelman’s civil conspiracy claim must also fail”) (citing *Sahara Gaming Corp. v.*
13 *Culinary Workers Union Local 226*, 984 P.2d 164, 165 (Nev. 1999)). Accordingly, because
14 plaintiffs have not and cannot present a valid claim for wrongful foreclosure, these claims
15 are dismissed as a matter of law.

16 B. *Failure to Allege Specific Facts to Support Inference of a Conspiracy*

17 Regardless of the merits of Plaintiffs’ underlying claims for fraud, Plaintiffs’ claim
18 that Defendants conspired to commit wrongful foreclosure is insufficient both for a failure
19 to plead conspiracy with the requisite particularity and for a failure to plead an agreement to
20 participate in the wrongful foreclosure.

21 For a conspiracy-to-defraud action to lie under Nevada law, a plaintiff must plead and
22 prove that there is: “(1) a conspiracy agreement . . . ; (2) an overt act of fraud in furtherance
23 of the conspiracy; and (3) resulting damages to the plaintiff.” *Jordan v. State ex rel. Dept.*
24 *of Motor Vehicles and Pub. Safety*, 110 P.3d 30, 51 (Nev. 2005). “To prevail in a civil
25

26 ² The claims in *Green* and *Dalton* are titled: “Conspiracy to Commit Wrongful
27 Foreclosure by Creation, Operation and Use of the MERS System.” The claims in *Goodwin*
28 and *Lopez* are titled: “Conspiracy to Commit Wrongful Foreclosure Related to the MERS
System.”

1 conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether
2 explicit or tacit.” *GES, Inc. v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Thus, to maintain a
3 viable conspiracy claim a plaintiff must allege with sufficient factual particularity the
4 “specific time, place, or person involved in the alleged conspiracies to give a defendant
5 seeking to respond to allegations of a conspiracy an idea of where to begin.” *Kendall v. Visa*
6 *U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quotations and citation omitted). Put
7 another way, plaintiffs must plead the “who, what, when, where and how of the misconduct
8 charged” necessary to satisfy the requirements of Federal Rule of Civil Procedure 9(b). *See*
9 *Gowen v. Tiltware LLC*, No. 2:08-CV-1581, 2009 WL 1441653, at *9 (D. Nev. May 19,
10 2009) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)).
11 Specifically, “a plaintiff must allege with sufficient factual particularity that defendants
12 reached some explicit or tacit understanding or agreement. It is not enough to show that
13 defendants might have had a common goal unless there is a factually specific allegation that
14 they directed themselves towards this wrongful goal by virtue of a mutual understanding or
15 agreement.” *S. Union Co. v. Sw. Gas Corp.*, 165 F.Supp.2d 1010, 1020-21 (D. Ariz. 2001)
16 (quoting *Alfus v. Pyramid Technology Corp.*, 745 F.Supp. 1511, 1521 (N.D. Cal. 1990)).

17 Plaintiffs allege that Defendants: (1) formed an association to conspire in order to
18 deprive Plaintiffs of their property; (2) knew Plaintiffs would be unable to pay the loans and,
19 thus, Defendants would be in a position to seize Plaintiffs’ real property through foreclosure;
20 and (3) targeted Plaintiffs for the purpose of misrepresenting the terms of the loans in order
21 to seize Plaintiffs’ properties. However, Plaintiffs do not plead any of these allegations with
22 sufficient factual allegations. Plaintiffs have failed to plead how or even when Defendants
23 formed this purported association to conspire. Neither have Plaintiffs included any factual
24 allegations pertaining to how Defendants targeted Plaintiffs. Plaintiffs’ allegations amount
25 to a claim that Defendants *somehow* formed a conspiracy with the intent to provide Plaintiffs
26 with a loan, the terms of which they could not afford, thus permitting Defendants to gain
27 control of the properties through foreclosure. “But terms like ‘conspiracy,’ or even
28 ‘agreement,’ are border-line: they might well be sufficient in conjunction with a more

1 specific allegation—for example, identifying a written agreement or even a basis for inferring
2 a tacit agreement—but a court is not required to accept such terms as a sufficient basis for a
3 complaint. The case law on this point is ample.” *DM Research, Inc. v. Coll. of Am.*
4 *Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (cited with approval in *Twombly*, 550 U.S. at
5 557). Plaintiffs have failed to provide any specific, factual allegations inferring even a tacit
6 agreement. As such, Plaintiffs’ claims for conspiracy fall short of the requirements of Rule
7 9(b), *Twombly*, and *Iqbal*.

8 Plaintiffs’ claim for conspiracy to commit wrongful foreclosure fails both because
9 Plaintiffs have not stated a claim for the underlying tort—wrongful foreclosure—and because
10 Plaintiffs fail to state the basic elements of conspiracy. Thus, the Court will grant the
11 motions to dismiss these claims.

12 **IV. CONSPIRACY TO COMMIT FRAUD RELATED TO THE MERS SYSTEM**

13 In all six actions, Plaintiffs attempt to state a claim for Conspiracy to Commit Fraud
14 Related to the MERS® System.³ In these claims, Plaintiffs assert that various named
15 Defendants conspired to commit fraud through the MERS system. From the complaints,
16 Plaintiffs’ claims for conspiracy to commit fraud appears to be an attack on the legitimacy
17 of the MERS system itself. A nearly identical claim for Conspiracy to Commit Fraud
18 Related to the MERS® System was dismissed with prejudice by this Court in *Cervantes v.*
19 *Countrywide Home Loans*, CV 09-517-PHX-JAT, 2009 WL 3157160 (D. Ariz. Sep. 24,
20 2009), because no facts were alleged showing any fraud was committed by MERS or in the
21 MERS system. In an effort to distinguish the present cases from *Cervantes*, Plaintiffs, in
22 their responses, argue that they “have not alleged that the MERS system is fraudulent, and
23 Plaintiffs have not alleged that MERS committed any fraud” (Doc. 448 at 4). Instead,
24 Plaintiffs now maintain that these claims:

25 “are about how the defendants named as co-conspirators created and used the
26 MERS system to facilitate the securitization and sale of loans procured by

27 ³ The Claims in *Green* and *Dalton* are titled: “Conspiracy to Commit Fraud by
28 Creation, Operation and Use of the MERS System.”

1 fraud (also known as predatory loans, subprime loans, and toxic loans), and
2 how the defendants created and used the MERS system to facilitate wrongful
3 foreclosures on the parties who were the victims of predatory lending, and how
the MERS system was used to facilitate wrongful foreclosures on others in
Nevada”

4 *Id.* Under both Plaintiffs’ complaints and the gloss provided by Plaintiffs’ Responses,
5 Plaintiffs fail to state a claim. For the sake of thoroughness, the Court will consider each of
6 these constructions—that the MERS system is itself fraudulent or that the MERS system
7 “facilitated” fraudulent activity in turn.

8 *A. The MERS system is not fraudulent, and MERS has not committed any fraud*

9 While Plaintiffs have conceded this point, it is helpful to provide an overview of the
10 facts. MERS is a wholly owned subsidiary of MERSCORP, a Virginia corporation. Various
11 of the named Defendant banks and lending institutions are shareholders in MERSCORP and
12 participants in the MERS system. Under the MERS system, at the origination of a residential
13 loan, the lender takes possession of a promissory note and the borrower and lender agree to
14 designate MERS as the beneficiary under a deed of trust. Under the MERS system, the rights
15 to the mortgage are tracked internally and not recorded in the public records each time the
16 rights to the mortgage are bought and sold, so long as the buyer is a member of the MERS
17 system.

18 This Court in *Cervantes* considered two possible ways in which this MERS system
19 could be considered fraudulent: (1) MERS is never really a beneficiary under the deed of
20 trust because it never acquires a true beneficial interest; and (2) the MERS system is a means
21 of circumventing the public recording requirements. The Court found that Plaintiffs’ claims
22 for conspiracy to commit fraud fail as a matter of law under Rule 12(b)(6) in that it failed to
23 assert several elements of a claim for fraud. The Court relies on the analysis put forward in
24 *Cervantes*. The elements of a fraud claim under California and Nevada law are largely
25 similar to the elements of fraud under Arizona law.⁴ Here, under both theories considered
26

27 ⁴ In Arizona, a fraud claim requires proof of nine elements: (1) a representation; (2)
28 its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its

1 in *Cervantes*, several elements of a fraud claim under Arizona, California, or Nevada
2 law—falsity, reliance, and injury—are lacking from Plaintiffs’ complaints. Thus, Plaintiffs
3 have now reframed the issue as a question of whether MERS facilitates origination fraud, a
4 question to which the Court now turns.

5 *B. MERS “facilitated” fraudulent practices*

6 1. Failure to Plead the Underlying Claim

7 Plaintiffs have, in their responses, advanced a new gloss on their conspiracy to commit
8 fraud claims. They maintain that fraudulent inducement is the “underlying act[] on which
9 the conspiracy claim[] is based.” (Doc. 448 at 8 n. 17.) The complaints in *Goodwin, Lopez*,
10 and *Vargas* contain such allegations of fraudulent inducement, but nothing in the *Dalton*,
11 *Green* and *Robinson* complaints makes this type of allegation. Plaintiffs admit this
12 deficiency in their responses. *See id.* at 20 n. 51 (Admitting that while “Plaintiffs in *Dalton*
13 and *Green* and *Robinson* are also able to make similar allegations,” the current complaints
14 do not contain these allegations.). Thus, absent allegations of the underlying fraud, the
15 *Dalton, Green, and Robinson* Complaints do not—and cannot as a matter of law—state a claim
16 for Conspiracy to Commit Fraud Related to the MERS® System. *Rashidi v. Albright*, 818
17 F. Supp. 1354, 1360 (D.Nev. 1993) (holding that because the underlying claim failed the
18 conspiracy claim must also be dismissed); *see also Willis v. City of L.A.*, 57 F. App’x 283,

19 _____
20 truth; (5) the speaker’s intent that it be acted upon by the recipient in a manner reasonably
21 contemplated; (6) the hearer’s ignorance of the falsity of the representation; (7) the hearer’s
22 reliance on the truth of the representation; (8) the right to rely on it; and (9) consequent and
proximate injury. *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (1982).

23 In Nevada, to state a claim for fraud in the inducement, a plaintiff must allege (1) a
24 false representation of material fact made by the defendant; (2) defendant’s knowledge or
25 belief that the representation is false; (3) defendant’s intention to induce the plaintiff to act
26 or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff’s justifiable
27 reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such
28 reliance. *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260-61 (1998).

29 In California, to state a claim for fraud, a party must allege (1) a misrepresentation,
30 (2) scienter or knowledge of falsity, (3) an intention to defraud, (4) justifiable reliance, and
31 (5) damages to state a claim for fraud. *Dias v. Nationwide Life Ins.*, No. 09-cv-524, 2010
32 WL 1032777, at *8 (E.D. Cal. Mar. 19, 2010).

1 287 (9th Cir. 2002) (where no tort alleged, defendants not liable for civil conspiracy as a
2 matter of law).

3 As for the *Goodwin*, *Lopez*, and *Vargas* complaints' allegations of fraudulent
4 inducement, those claims have been remanded to the transferor courts. Yet, because the
5 claim for Conspiracy to Commit Fraud must necessarily fail without an underlying tort, the
6 undersigned must consider the validity of the Fraud in the Inducement Claims. Helpfully, two
7 transferor courts have already addressed these claims and dismissed them under Rule
8 12(b)(6) for failure to state a claim. See *Goodwin v. Executive Trustee Services, LLC*, 680
9 F.Supp.2d 1244, 1256 (D. Nev. 2010) (dismissing fraud in the inducement claim, finding
10 "Plaintiffs' claim for fraud in the inducement fails to allege who made what
11 misrepresentations or when any of the alleged misrepresentations took place. The claim is
12 replete with vague and conclusory allegations such as 'Defendants misrepresented the ability
13 of Plaintiffs, and other similarly situated, to qualify for the loans.'"); *Lopez, et al., v.*
14 *Executive Trustee Services, LLC, et al.*, No. 3:09-CV-0180-ECR (D. Nev. Jan. 13, 2010)
15 Order at 17 (same). The Court finds that just as in *Goodwin* and *Lopez*, the *Vargas* Plaintiffs
16 fail to plead any of the requisite elements of a claim for fraud in the inducement with the
17 specificity required by Fed. R. Civ. P. 9(b).⁵

18 2. Insufficient allegation of conspiracy

19 Regardless of the merits of Plaintiffs' underlying claims for fraud, Plaintiffs' claim
20 that Defendants conspired to commit fraud related to MERS is insufficient both for a failure

21
22 ⁵ Defendant GE Money Bank also raised the possibility that Plaintiffs' state law
23 claims for conspiracy to commit fraud against GE Money Bank are preempted by the Federal
24 Home Owners' Loan Act of 1933 (HOLA) and Office of Thrift Supervision regulations
25 promulgated thereunder. See 12 U.S.C. §§ 1461, *et seq.*; 12 C.F.R. § 560.2. However, GE
26 Money Bank provides no evidence (i.e., through a request for judicial notice) beyond mere
27 assertion that it is a thrift or savings association that would be governed by HOLA and
28 protected by the OTS regulations on preemption. Furthermore, the Court is not convinced
that HOLA preempts this type of fraud claim. See *Reyes v. Downey Savings & Loan Ass'n,*
F.A., 541 F. Supp. 2d 1108, 1114 (C.D. Cal. 2008) (finding state law claims that defendants
had misrepresented the contract terms were based on the "principles of breach of contract and
fraud in the inducement [that] are not specific to lending activities" and thus not preempted).

1 to plead conspiracy with the requisite particularity and for a failure to plead an agreement to
2 participate in the fraud. “In alleging fraud or mistake, a party must state with particularity
3 the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Plaintiffs’ allegations
4 with respect to fraud were not made with particularity. Rather, Plaintiffs’ allegations amount
5 to mere conclusory statements and general averments of fraud. As set forth above section
6 III.B above, Plaintiffs’ complaints fall short of the requirements of Rule 9(b), *Twombly*, and
7 *Iqbal*.

8 Thus, due both a lack of an underlying fraud and insufficient allegations of
9 conspiracy, the facilitation gloss advanced by Plaintiffs in their responses fails to save their
10 claims for conspiracy to commit fraud. The Court will dismiss these claims for failure to
11 state a claim.

12 **SLANDER OF TITLE**

13 Plaintiffs assert claims for slander of title in *Goodwin* and *Lopez*. A claim for slander
14 of title requires “false and malicious communications, disparaging to one’s title in land, and
15 causing special damages.” *Executive Mgmt., Ltd. v. Ticor Title Co.*, 963 P.2d 465, 478 (Nev.
16 1998).

17 Plaintiffs bring claims for slander of title in *Goodwin* on the allegation that certain
18 defendants “caused to be recorded a Trustee’s Deed Upon Sale related to the . . . residence
19 showing that the property” had been conveyed at a trustee’s sale (Doc. 45-1, ¶¶ 170-190) and
20 claims for slander of title in *Lopez* on the allegation that certain defendants wrongfully
21 recorded notices of default and intent to foreclose against Plaintiffs’ property (Doc. 59-1, ¶¶
22 154-170). Here, Plaintiffs have not sufficiently alleged the falsity of these communications.
23 Just as in *Ramos v. Mortgage Electronic Registrations [sic] Systems, Inc.*, No.
24 2:08-cv-1089-ECR-RJJ, 2009 WL 5651132, at *4 (D. Nev. Mar. 5, 2009), “Plaintiffs do not
25 dispute that they were in default on their loan. Nor is it false that the property was to be sold
26 at a trustee’s sale. . . . It is not clear, therefore, what Plaintiffs might assert to be false or
27 malicious about the recorded notice.” In *Goodwin*, there is no allegation that the trustee’s
28 sale had not taken place and the property had been conveyed, and in *Lopez*, there is no

1 allegation that Plaintiffs were not in default or that a trustee's sale was actually not
2 scheduled. The only alleged falsity emerges from Plaintiffs' argument that the MERS
3 recordation process splits the note from the deed of trust, renders the note unenforceable, and
4 thus all subsequent action—including these recordations—are invalid and false. As dealt with
5 elsewhere in this Order, this argument is not supported by the law. Therefore, the Court will
6 dismiss Plaintiffs' claims for slander of title for failure to state a claim.

7 **UNJUST ENRICHMENT**

8 Plaintiffs set forth claims for unjust enrichment in *Goodwin, Lopez, Dalton, Green* and
9 *Vargas*. To set forth a claim for unjust enrichment under Nevada law, a plaintiff must allege
10 that a defendant unjustly retained money or property of another against fundamental
11 principles of equity. *See Asphalt Prods. Corp. v. All Star Ready Mix*, 898 P.2d 699, 700
12 (Nev. 1995). California law is similar. *See, e.g., Shum v. Intel Corp.*, 630 F. Supp.2d 1063,
13 1073 (N.D. Cal. 2009) (stating elements for unjust enrichment are receipt of a benefit and
14 unjust retention of same at the expense of another). Unjust enrichment must be premised on
15 some independent basis which establishes a duty on the part of the defendant and the failure
16 of the defendant to abide by that duty. In and of itself, the phrase "unjust enrichment" does
17 not describe a theory of recovery. Rather, it is a way of describing the failure to make
18 restitution where equity requires. *See Melchior v. New Line Prods., Inc.*, 106 Cal.App. 4th
19 779, 792, (Cal. Ct. App. 2003);

20 Here, the Court finds that Plaintiffs have failed to state any other claims for relief.
21 Thus, as a matter of law, Defendants cannot have been unjustly enriched and equity does not
22 demand any restitution. Therefore, the Court will also dismiss the claims for unjust
23 enrichment for failure to state a claim.

24 **DECLARATORY AND INJUNCTIVE RELIEF**

25 Plaintiffs also seek injunctive and declaratory relief. However, for the various reasons
26 discussed above, the Court has already found that all of Plaintiffs' other claims before this
27 Court must be dismissed. Therefore, any request for injunctive and declaratory relief
28 premised upon those counts must likewise fail.

1 **ARTICLE III STANDING**

2 Several defendants argue that Plaintiffs lack standing under Article III of the United
3 States Constitution and, thus, Plaintiffs’ claims should be dismissed under Rule 12(b)(1) for
4 lack of subject matter jurisdiction. The Court has addressed the deficiencies of Plaintiffs’
5 complaints under Rule 12(b)(6), completely dismisses Plaintiffs’ complaints for their failure
6 to state a claim, and will not retrace its steps in a Rule 12(b)(1) analysis.

7 **LEAVE TO AMEND**

8 Plaintiffs do not explicitly seek leave of this Court to file amended complaints.
9 However, Plaintiffs have undertaken to remind the Court that it “should grant leave to amend
10 even if no request to amend the pleading was made, unless it determines that the pleading
11 could not possibly be cured by the allegation of other facts.” (Doc. 488 at 37 (quoting *Doe*
12 *v. United States*, 58 F.3d 494, 496-97 (9th Cir. 1995) (internal quotations omitted).)) Leave
13 to amend a complaint is within the Court’s sound discretion, and in exercising this discretion,
14 the Court must be guided by the command of Rule 15(a), which provides that “leave shall
15 be freely given when justice so requires.” *Allen v. City of Beverly Hills*, 911 F.2d 367, 373
16 (9th Cir. 1990) (citing Fed.R.Civ.P. 15(a)). “In exercising its discretion[,] . . . ‘a court must
17 be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather
18 than on the pleadings or technicalities.’ . . . Thus, ‘Rule 15’s policy of favoring amendments
19 to pleadings should be applied with extreme liberality.’” *Eldridge v. Block*, 832 F.2d 1132,
20 1135 (9th Cir. 1987) (citations omitted). The Court should consider five factors when
21 assessing whether to allow leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to
22 the opposing party, (4) futility of amendment, and (5) whether the plaintiff has previously
23 amended the complaint. *Foman*, 371 U.S. at 182.

24 The Court finds that Plaintiffs’ indirect requests to amend their complaints do not
25 constitute bad faith, have not resulted from undue delay, and would not result in undue
26 prejudice to the opposing parties. Because Plaintiffs have not formally moved for leave to
27 amend, they have deprived the Court of the benefit of the redlined proposed amended
28 complaint that would be helpful in making a determination about the futility of amendment.

1 The Court also notes that in some of these cases, Plaintiffs have already amended their
2 complaints and are seeking leave to do so for a second or third time.

3 Yet the Court finds no reason to depart from Rule 15's liberal amendment policy and
4 will grant all of Defendants' motions to dismiss without prejudice.

5 To facilitate the streamlining of this MDL, the Court directs plaintiffs, if they choose
6 to seek leave to amend, to jointly file a proposed consolidated amended complaint together
7 with the various plaintiffs whose actions are currently joined to this MDL. The Court will
8 conduct an initial round of pretrial motions for the other member cases as provided for in the
9 various practices and procedures orders until such time as it is appropriate to set forth a
10 timetable for filing this consolidated amended complaint.⁶

11 CONCLUSION

12 Accordingly,

13 **IT IS ORDERED** regarding *Vargas* that: Defendant Citimortgage, Inc.'s Motion to
14 Dismiss Plaintiffs' First Amended Complaint (Doc. 262) is granted⁷; Defendant GE Money
15 Bank's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 285) is
16 granted; Defendants National City Bank, National City Mortgage, National City Corporation
17 and PNC Financial Services Group, Inc.'s Motion to Dismiss Count Seven of the First
18 Amended Complaint (Doc. 292) is granted; Defendant MortgageIT, Inc.'s Motion to Dismiss
19 First Amended Complaint (Doc. 299) is granted; Defendant JPMorgan Chase Bank, N.A.'s
20 Motion to Dismiss Plaintiffs' First Amended Complaint [#5 in *Vargas*] (Doc. 309) is granted;

21
22 ⁶ Should there arise a need for any plaintiff to seek preliminary injunctive relief, that
23 party should file a proposed amended complaint concurrently with the motion for preliminary
24 injunction. Such a proposed amended complaint need not conform with this Court's
instruction that a consolidated amended complaint be filed.

25 In a departure from prior practice, any motions relating to less than all member cases,
26 should be filed in the individual case numbers assigned to each case.

27 ⁷ Unless otherwise noted, the Court dismisses Plaintiffs' complaints, without
28 prejudice, for failure to state a claim. As to all other theories, Defendants' motions to dismiss
are denied without prejudice.

1 Certain Defendants' Motion to Dismiss First Amended Class Action Complaint (Doc. 314)
2 is granted; Defendants MERSCORP, Inc. and Mortgage Electronic Registration Systems,
3 Inc.'s Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 324) is
4 granted;

5 **IT IS FURTHER ORDERED** regarding *Lopez* that: Defendant Citimortgage, Inc.'s
6 Motion to Dismiss Plaintiffs' Second Amended Complaint [#59-1] (Doc. 260) is granted;
7 Defendant GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class Action
8 Complaint (Doc. 281) is granted; Defendants National City Bank, National City Mortgage,
9 National City Corporation and PNC Financial Services Group, Inc.'s Motion to Dismiss
10 Counts Five and Six of the Second Amended Complaint (Doc. 291) is granted; Defendant
11 T.D. Service Company's Motion to Dismiss Second Amended Complaint Against T.D.
12 Service Company (Doc. 297) is granted; Defendant JPMorgan Chase Bank, N.A.'s Motion
13 to Dismiss Plaintiffs' Second Amended Complaint [#419 in *Lopez*] (Doc. 308) is granted;
14 Certain Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 316)
15 is granted; Defendant National Default Servicing Corp.'s Motion to Dismiss for Failure to
16 State a Claim for Relief (Doc. 318) is granted; Defendants MERSCORP, Inc. and Mortgage
17 Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Class
18 Action Complaint (Doc. 331) is granted;

19 **IT IS FURTHER ORDERED** regarding *Goodwin* that: Defendant Citimortgage,
20 Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint [#45-1] (Doc. 259) is
21 granted; Defendant Deutsche Bank National Trust Company's Motion to Dismiss Plaintiffs'
22 Second Amended Class Action Complaint (Doc. 266) is granted; Defendant Ocwen Loan
23 Servicing, LLC's Motion to Dismiss Second Amended Complaint (Doc. 268) is granted;
24 Defendant Western Progressive Trustee LLC's Motion to Dismiss Second Amended
25 Complaint (Doc. 269) is granted; Defendant American Home Mortgage Servicing, Inc.'s
26 Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint (Doc. 278) is
27 granted; Defendant GE Money Bank's Motion to Dismiss Plaintiffs' Second Amended Class
28 Action Complaint (Doc. 282) is granted; Defendant Litton Loan Servicing LP's Motion to

1 Dismiss Second Amended Class Action Complaint (Doc. 286) is granted; Defendants
2 National City Bank, National City Mortgage, National City Corporation and PNC Financial
3 Services Group, Inc.'s Motion to Dismiss Counts Six and Seven of the Second Amended
4 Complaint (Doc. 290) is granted; Defendant WMC Mortgage Corp.'s Motion to Dismiss
5 Plaintiffs' Second Amended Class Action Complaint (Doc. 296) is granted; Defendant T.D.
6 Service Company's Motion to Dismiss Second Amended Complaint (Doc. 298) is granted;
7 Defendant I.B. Property Holdings, L.L.C.'s Motion to Dismiss Second Amended Complaint
8 (Doc. 300) is granted; Defendants Aztec Foreclosure Corporation and National Default
9 Servicing Corp.'s Motion to Dismiss for Failure to State a Claim for Relief (Doc. 304) is
10 granted; Defendant JPMorgan Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' Second
11 Amended Complaint [#443 in *Goodwin*] (Doc. 305) is granted; Defendant Bank of New
12 York's Motion to Dismiss (Doc. 310) is granted; Certain Defendants' Motion to Dismiss
13 (Doc. 320) is granted; Defendants MERSCORP, Inc. and Mortgage Electronic Registration
14 Systems, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. 327) is
15 granted; Defendant MTC Financial, Inc. dba Trustee Corp's Motion to Dismiss Plaintiffs'
16 Second Amended Class Action Complaint for Failure to State a Claim for Relief (Doc. 479)
17 is granted.

18 **IT IS FURTHER ORDERED** regarding *Green* that: Defendants Citimortgage, Inc.
19 and CR Title Services, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint [#35]
20 (Doc. 257) is granted; Defendant American Home Mortgage Servicing, Inc.'s Motion to
21 Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. 279) is granted; Defendant
22 GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint
23 (Doc. 283) is granted; Defendant Litton Loan Servicing LP's Motion to Dismiss First
24 Amended Class Action Complaint (Doc. 287) is granted and Defendant Litton Loan
25 Servicing LP is dismissed with prejudice⁸; Defendants National City Bank, National City
26

27 ⁸ Plaintiffs, in their response, aver that listing Litton in the caption of the *Green* matter
28 was inadvertent. Doc. 451 at 3 n.3.

1 Mortgage, National City Corporation and PNC Financial Services Group, Inc.’s Motion to
2 Dismiss Counts Two, Three and Four of the First Amended Complaint (Doc. 294) is granted;
3 Defendant Bank of New York Mellon’s Motion to Dismiss Plaintiffs’ First Amended
4 Complaint [#35] (Doc. 302) is granted; Defendant JPMorgan Chase Bank, N.A.’s Motion to
5 Dismiss Plaintiffs’ First Amended Complaint [#35] (Doc. 307) is granted; Defendant
6 National Default Servicing Corp.’s Motion to Dismiss for Failure to State a Claim for Relief
7 (Doc. 312) is granted; Defendant NdeX West, LLC’s Motion to Dismiss Plaintiffs’ First
8 Amended Class Action Complaint (Doc. 317) is granted; Certain Defendants’ Motion to
9 Dismiss (Doc. 321) is granted; Defendants MERSCORP, Inc. and Mortgage Electronic
10 Registration Systems, Inc.’s Motion to Dismiss Plaintiffs’ First Amended Complaint (Doc.
11 333) is granted.

12 **IT IS FURTHER ORDERED** regarding *Dalton* that: Defendant Citimortgage, Inc.
13 and CR Title Services, Inc.’s Motion to Dismiss Plaintiffs’ Complaint (Doc. 258) is granted;
14 Defendant Deutsche Bank National Trust Company’s Motion to Dismiss Plaintiffs’ Class
15 Action Complaint (Doc. 267) is granted; Defendant American Home Mortgage Servicing,
16 Inc.’s Motion to Dismiss Plaintiffs’ Class Action Complaint (Doc. 277) is granted; Defendant
17 GE Money Bank’s Motion to Dismiss Plaintiffs’ Class Action Complaint (Doc. #284) is
18 granted; Defendant T.D. Service Company’s Renewed Motion to Dismiss Class Action
19 Complaint (Doc. 293) is granted and T.D. Service Company’s Renewed Motion to Quash
20 Service of Summons and Complaint is denied as moot; Defendants National City Bank,
21 National City Mortgage, National City Corporation and PNC Financial Services Group,
22 Inc.’s Motion to Dismiss Counts Two, Three and Four of the Complaint (Doc. 295) is
23 granted; Defendants Aztec Foreclosure Corporation and National Default Servicing Corp.’s
24 Motion to Dismiss for Failure to State a Claim for Relief (Doc. 301) is granted; JPMorgan
25 Chase Bank, N.A., EMC Mortgage Corporation, and California Reconveyance Company’s
26 Motion to Dismiss Plaintiffs’ Complaint (Doc. 306) is granted; Defendant MetLife Bank,
27 N.A.’s Motion to Dismiss (Doc. 319) is granted; Defendants MERSCORP, Inc. and
28 Mortgage Electronic Registration Systems, Inc.’s Motion to Dismiss Plaintiffs’ Class Action

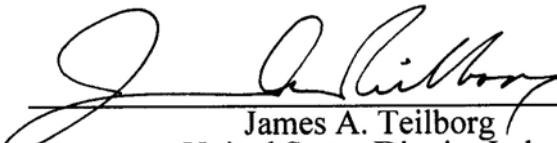
1 Complaint (Doc. 325) is granted; Certain Defendants' Motion to Dismiss (Doc. 328) is
2 granted; Defendant Cal-Western Reconveyance Corporation's Motion to Dismiss Class
3 Action Complaint (Doc. 423) is granted.

4 **IT IS FURTHER ORDERED** regarding *Robinson* that: Defendant Citimortgage,
5 Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 261) is granted;
6 Defendant GE Money Bank's Motion to Dismiss Plaintiffs' First Amended Class Action
7 Complaint (Doc. 280) is granted; Defendants National City Bank, National City Mortgage,
8 National City Corporation and PNC Financial Services Group, Inc.'s Motion to Dismiss
9 Count Eight of the First Amended Complaint (Doc. 288) is granted; Defendant JPMorgan
10 Chase Bank, N.A.'s Motion to Dismiss Plaintiffs' First Amended Complaint [#91 in
11 *Robinson*] (Doc. 303) is granted; Certain Defendants' Motion to Dismiss Plaintiffs' First
12 Amended Complaint (Doc. 311) is granted; Defendants MERSCORP, Inc. and Mortgage
13 Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' First Amended
14 Complaint (Doc. 326) is granted.

15 **IT IS FURTHER ORDERED** that Defendants GMAC Mortgage, LLC, Executive
16 Trustee Services, Inc., and Homecomings Financial, LLC's Motion to Dismiss All Plaintiffs'
17 Claims Retained by the Court in these Six Class Actions (Doc. 276) is granted; Defendants
18 Aurora, Old Republic, and Saxon's Motion to Dismiss Plaintiffs' Complaints (Doc. 289)
19 (concerning *Goodwin, Green, and Dalton*) is granted; Motion to Dismiss By Shareholder
20 Defendants (Doc. 315) (concerning all six cases) is granted; Motion to Dismiss Plaintiffs'
21 Complaints Filed by Quality Loan Service Corporation (Doc. 343) (concerning *Goodwin,*
22 *Green, and Dalton*) is granted.

23 **IT IS FURTHER ORDERED** that Motion of the Federal Housing Finance Agency
24 as Conservator of Fannie Mae and Freddie Mac to Dismiss (Doc. 264) is denied as moot.

25 DATED this 30th day of September, 2010.

26
27
28 
James A. Teilborg
United States District Judge