

1 Lending; and Power Default Services, Inc., arising from the
2 foreclosure of their home. Defendants Town and Country Title
3 Services, Ameriquest Mortgage Company, and Ameriquest Mortgage
4 Securities, Inc., ("Ameriquest defendants") and defendants
5 Homeward Residential, Inc., Deutsche Bank National Trust Company,
6 and Power Default Services, Inc., ("remaining defendants") now
7 separately move to dismiss plaintiffs' Second Amended Complaint
8 ("SAC") for failure to state a claim upon which relief can be
9 granted pursuant to Federal Rule of Civil Procedure 12(b)(6).
10 (Docket Nos. 57 and 62, respectively.)

11 I. Factual and Procedural Background

12 The factual background of this case is described in
13 detail in the court's September 18, 2013, Order granting
14 defendants' motion to dismiss. (Docket No. 40.) In short,
15 plaintiffs obtained a loan in the amount of \$270,000.00 from
16 Ameriquest Mortgage Company ("Ameriquest") in 2003, secured by a
17 Note and Deed of Trust on property located at 11603 Northern
18 Lights Drive in Grass Valley, California (the "Property"). (SAC
19 ¶¶ 2-3, 12-13; Defs.' Req. for Judicial Notice in Supp. Of
20 Ameriquest's Mot. To Dismiss ("Ameriquest RJN") Ex. A (Docket No.
21 58-1).)¹

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23 ¹ A court may take judicial notice of facts "not subject
24 to reasonable dispute" because they are either "(1) generally
25 known within the territorial jurisdiction of the trial court or
26 (2) capable of accurate and ready determination by resort to
27 sources whose accuracy cannot reasonably be questioned."
28 Turnaclair v. Westly, 456 F.3d 1113, 1120 n.5 (9th Cir. 2008)
(quoting Fed. R. Evid. 201) (internal quotations omitted).

Defendants separately request that the court judicially
notice of various recorded documents relating to the Property, as
well as documents filed in plaintiffs' bankruptcy proceeding.

1 Ameriquest assigned its interest in the Note and Deed
2 of Trust to Deutsche Bank National Trust Company ("Deutsche
3 Bank") by way of a Corporate Assignment and Deed of Trust. (SAC
4 ¶ 18; Ex. 1.) Plaintiffs allege this assignment to a securitized
5 trust was improper because it violated the terms of the trust's
6 pooling and servicing agreement. (Id. ¶¶ 26-64.)

7
8 Sometime in 2010, plaintiffs allege an employee of
9 American Home Mortgage Servicing, Inc., ("AHMSI") named "HOUTEN"
10 represented to plaintiffs that they would receive a loan
11 modification if they became three months delinquent on their
12 mortgage payments. (Id. ¶ 71.) However, on October 12, 2010,
13 Deutsche Bank recorded a Notice of Default and Election to Sell
14 Under Deed of Trust ("NOD") against the Property, which stated
15 plaintiffs were in default on the loan, owing at least
16 \$15,379.31. (Id. ¶¶ 21-23, Ex. 2.)

17 Subsequently, Power Default Services, Inc., recorded a
18 Notice of Trustee's Sale against the Property, (id. Ex 3), and,
19 on May 6, 2011, executed a Trustee's Deed Upon Sale conveying the
20 Property to Deutsche Bank, (id. Ex. 4). Plaintiffs allege this
21 sale never actually took place. (Id. ¶ 25.)

22 In October 2011, plaintiffs filed a Chapter 7
23 bankruptcy petition in the United States Bankruptcy Court for the
24 Eastern District of California, (Bk. No. 11-45476; RJN Ex. I.).

25 (See Ameriquest RJN Exs. A-B; Defs.' Req. for Judicial Notice
26 ("RJN") Exs. A-J (Docket No. 63).). Plaintiffs do not oppose the
27 request. The court will take judicial notice of these documents,
28 since they are matters of public record whose accuracy cannot be
questioned. See Lee v. City of Los Angeles, 250 F.3d 668, 689
(9th Cir. 2001).

1 On January 5, 2012, plaintiffs filed a complaint to commence a
2 bankruptcy adversary proceeding, (Ad. Pro. No. 12-02007), and
3 filed an amended complaint ("FAC") in that proceeding on February
4 9, 2012.

5 Plaintiffs obtained a discharge in bankruptcy on
6 February 13, 2012, (RJN Ex. J), and the court granted plaintiffs'
7 motion to withdraw the reference of the adversary complaint to
8 bankruptcy court on July 16, 2013. (Docket No. 32.) On
9 September 18, 2013, the court granted Ameriquest defendants'
10 motion to dismiss plaintiffs' FAC. (Docket No. 40.) Plaintiffs
11 filed the SAC on October 8, 2013, realleging claims for wrongful
12 foreclosure, fraud, and cancellation of instruments. (Docket No.
13 41.) Defendants now move to dismiss the SAC for failure to state
14 a claim pursuant to Rule 12(b)(6).

15 II. Analysis

16 On a motion to dismiss, the court must accept the
17 allegations in the complaint as true and draw all reasonable
18 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
19 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
20 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
21 (1972). To survive a motion to dismiss, a plaintiff needs to
22 plead "only enough facts to state a claim to relief that is
23 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
24 544, 570 (2007). This "plausibility standard," however, "asks
25 for more than a sheer possibility that a defendant has acted
26 unlawfully," and where a complaint pleads facts that are "merely
27 consistent with" a defendant's liability, it "stops short of the
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1 line between possibility and plausibility.” Ashcroft v. Iqbal,
2 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556-57).

3 A. Wrongful Foreclosure

4 Under California law, “[w]rongful foreclosure is an
5 action in equity, where a plaintiff seeks to set aside a
6 foreclosure sale.” Castaneda v. Saxon Mortgage Servs., Inc., 687
7 F. Supp. 2d 1191, 1201 (E.D. Cal. 2009) (Shubb, J.). California
8 courts require an allegation of prejudice to maintain a wrongful
9 foreclosure claim. Herrejon v. Ocwen Loan Servicing, LLC, --- F.
10 Supp. 2d ----, Civ. No. F 13-1756 LJO MJS, 2013 WL 5934148, at *8
11 (E.D. Cal. Nov. 1, 2013) (citing Fontenot v. Wells Fargo Bank,
12 N.A., 198 Cal. App. 4th 256, 272 (1st Dist. 2011)).

13 Allegations that the improper party initiated
14 foreclosure proceedings do not satisfy the element of prejudice;
15 rather, a plaintiff must allege facts demonstrating “that the
16 foreclosure would have been averted but for these alleged
17 deficiencies.” Reynoso v. Paul Fin., LLC, No. 09-3225 SC, 2009
18 WL 3833298, at *4 (N.D. Cal. Nov. 16, 2009); see also Ghuman v.
19 Wells Fargo Bank, N.A., Civ. No. 1:12-00902 AWI BAM, 2012 WL
20 2263276, at *5 (E.D. Cal. Jun. 15, 2012) (noting “Plaintiffs
21 would be hard pressed to show any conceivable prejudice” from
22 alleged improper substitution of trustee because a “substitution
23 would simply have replaced one trustee with another without
24 modifying Plaintiffs’ obligations under the note or deed of
25 trust”); Permito v. Wells Fargo Bank, N.A., No. C-12-00545 YGR,
26 2012 WL 1380322, at *6 (N.D. Cal. Apr. 20, 2012) (“[F]or a
27 foreclosure to be ‘wrongful,’ Plaintiff also must allege that no
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1 entity had the right to foreclose upon her, not simply that the
2 wrong entity foreclosed upon her.”).

3 Here, plaintiffs have amended their complaint to add
4 conclusory allegations of prejudice. (See SAC ¶ 69 (“Plaintiffs
5 allege that they were prejudiced as a result of this process.”).)
6 In more detail, plaintiffs claim that, had the loan not been
7 improperly assigned, “the original lender would not have
8 foreclosed upon the Subject Property as it would have been more
9 profitable to modify the Subject Loan.” (Id.) These allegations
10 provide no factual basis, beyond sheer speculation, for an
11 inference that “the foreclosure would have been averted but for
12 these alleged deficiencies.” Reynoso, 2009 WL 3833298, at *4.
13 The allegations are also highly implausible because, as
14 plaintiffs themselves admit, the original lender Ameriquest could
15 not have offered a modification because it was no longer in the
16 mortgage business. (See Pls.’ Opp’n (Docket No. 65) at 17:24-
17 18:2 (noting Ameriquest “was defunct in 2009” and “did not exist
18 in 2009”).)

19 Even if plaintiffs were able to obtain a modification,
20 there is no factual basis to assume they would have made the
21 payments and prevented foreclosure by curing the default.
22 Plaintiffs do not dispute they were in default on the loan, and
23 owed \$15,379.31 as of October 7, 2010. (SAC Ex. 2.) Plaintiffs
24 have not alleged any facts to suggest the allegedly improper
25 assignment “adversely affected their ability to pay or to cure
26 their default.” Ghuman, 2012 WL 2263276, at *5. Without more,
27 plaintiffs have not alleged any prejudice from any party’s lack
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1 of authority in the foreclosure process. See Siliga v. Mortg.
2 Elec. Registration Sys., Inc., 219 Cal. App. 4th 75, 85 (2d Dist
3 2013) (finding no prejudice when plaintiffs "do not dispute that
4 they are in default under the note," the "assignment of the deed
5 of trust and the note did not change [plaintiffs'] obligations
6 under the note, and there is no reason to believe that . . . the
7 original lender would have refrained from foreclosure in these
8 circumstances."). Accordingly, because prejudice is an essential
9 element of a wrongful foreclosure claim, the court must grant
10 defendants' motions to dismiss this claim.²

11 B. Fraud

12 "The elements of fraud are (1) misrepresentation; (2)
13 knowledge of falsity; (3) intent to defraud; (4) justifiable
14 reliance; and (5) resulting damage." Doe v. Gangland Prods.,
15 Inc., 730 F.3d 946, 960 (9th Cir. 2013) (citing Lazar v. Superior
16 Court, 12 Cal. 4th 631, 638 (1996)). Under the heightened
17 pleading requirements for claims of fraud under Federal Rule of
18 Civil Procedure 9(b), "a party must state with particularity the
19 circumstances constituting the fraud." Fed. R. Civ. P. 9(b).
20 "Rule 9(b) demands that the circumstances constituting the
21 alleged fraud 'be specific enough to give defendants notice of
22 the particular misconduct . . . so that they can defend against
23 the charge and not just deny that they have done anything
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25 ² Plaintiffs' reliance on Glaski v. Bank of Am., Nat'l
26 Ass'n, 218 Cal. App. 4th 1079 (5th Dist. 2013), is misplaced.
27 Glaski did not address the issue of prejudice one way or another.
28 Were it even controlling here--and it is not--Glaski does not
stand for the proposition that plaintiffs need not allege
prejudice in a wrongful foreclosure claim.

1 wrong.'" Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir.
2 2009) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th
3 Cir. 2001) (internal quotation marks and citations omitted)).

4 To survive a motion to dismiss, a plaintiff must
5 include the "who, what, when, where, and how" of the fraud. Vess
6 v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)
7 (citation omitted). "When bringing a fraud claim against a
8 corporate defendant, a plaintiff must 'allege the names of the
9 persons who made the allegedly fraudulent representations, their
10 authority to speak, to whom they spoke, what they said or wrote,
11 and when it was said or written.'" Lugo v. Bank of Am., N.A.,
12 Civ. No. 2:11-01956 MCE EFB, 2012 WL 893878, at *5 (E.D. Cal.
13 Mar. 15, 2012) (quoting Tarmann v. State Farm Mut. Auto. Ins.
14 Co., 2 Cal. App. 4th 153, 157 (6th Dist. 1991)).

15 Plaintiffs have amended this claim to allege two
16 separate misrepresentations. One generally claims that all
17 defendants "and their representatives/employees/agents"
18 represented "to Plaintiffs and the general public" that "they had
19 the right, power and authority to foreclosure upon the Subject
20 Property" from 2009 to 2011. (SAC ¶¶ 76-80). These allegations
21 clearly fail for lack of specificity, and do not come close to
22 "stat[ing] with particularity the circumstances constituting the
23 fraud," Fed. R. Civ. P. 9(b), much less "give defendants notice
24 of the particular misconduct . . . so that they can defend
25 against the charge and not just deny that they have done anything
26 wrong." Kearns, 567 F.3d at 1124.

27 Plaintiffs also allege that, sometime "[i]n or about
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1 2010," a representative of AHMSI named "HOUTEN" falsely
2 "represented that Plaintiffs would receive a loan modification if
3 they became three months delinquent in their mortgage payments
4 and returned all of the requested modification applications and
5 requested documents." (SAC ¶ 71.) Plaintiffs claim they
6 justifiably relied on this representation, did not receive a loan
7 modification, and as a result "were induced to accept a loan
8 modification with unfavorable and unfair terms," ultimately
9 losing title to the Property through foreclosure. (Id. ¶¶ 71-75;
10 ¶ 81.)

11 Even assuming plaintiffs adequately pled the
12 circumstances of this alleged fraud with sufficient
13 particularity, plaintiffs have fallen short of stating a
14 plausible claim of relief. Plaintiffs must "allege facts showing
15 that [their] reliance on [the alleged] statement caused the
16 trustee's sale of [their] home." Sholiay v. Fed. Nat. Mortgage
17 Ass'n, Civ. No. 2:13-00958 WBS, 2013 WL 3773896, at *6 (E.D. Cal.
18 July 17, 2013). In Sholiay, the plaintiff claimed that, but for
19 defendant's alleged misrepresentation that plaintiff would
20 receive a loan modification, plaintiff would have sought legal
21 advice and prevented the foreclosure of his home. Id. However,
22 this court dismissed the claim because the plaintiff "fail[ed] to
23 allege facts suggesting how hiring a lawyer could have prevented
24 the sale." Id.

25 Here, although plaintiffs allege they "were induced to
26 continue seeking a modifications [sic] when they could have
27 explored other remedies such as a short sale, deed in lieu for
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1 foreclosure or could have obtained alternative financing," (SAC ¶
2 75), they do not allege any facts suggesting how pursuing these
3 hypothetical avenues could have prevented the foreclosure of
4 their home. As in Sholiay, the allegations do not allow for a
5 plausible inference that plaintiffs would have been able to make
6 the payments on the loan, or that these purported alternative
7 remedies would have been successful in stemming the eventual
8 foreclosure. 2013 WL 3773896, at *6; see also Manzano v. Metlife
9 Bank N.A., Civ. No. 2:11-651 WBS DA, 2011 WL 2080249, at *5 (E.D.
10 Cal. May 25, 2011) (dismissing fraud claim that misrepresentation
11 regarding loan modification caused plaintiff to stop making
12 payments where plaintiff did not allege she otherwise would or
13 could have resumed making the payments); Newgent v. Wells Fargo
14 Bank, N.A., Civ. No. 09-1525 WQH, 2010 WL 761236, at *5 (S.D.
15 Cal. Mar. 2, 2010) (dismissing fraud claim because plaintiff did
16 "not allege facts that support a cognizable theory upon which she
17 would have succeeded in preventing the trustee's sale."); cf.
18 DeLeon v. Wells Fargo Bank, N.A., Civ. No. 10-10390 LHK, 2011 WL
19 311376, at *7 (N.D. Cal. Jan. 28, 2011) (dismissing unfair
20 competition claim asserting fraud because "[w]ithout some factual
21 basis suggesting that Plaintiffs could have cured the default . .
22 . the Court cannot reasonably infer that [defendant's] alleged
23 misrepresentations resulted in the loss of Plaintiffs' home.
24 Rather, the facts alleged suggest that Plaintiffs lost their home
25 because they became unable to keep up with monthly payments and
26 lacked the financial resources to cure the default.").

27 Accordingly, because plaintiffs do not state a
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1 plausible claim of relief, the court must grant defendants'
2 motions to dismiss the fraud claim.

3 C. Cancellation of Instruments

4 "The Court may order cancellation of an invalid written
5 instrument that is void or voidable." Compass Bank v. Petersen,
6 886 F. Supp. 2d 1186, 1194 (C.D. Cal. 2012) (citing Cal. Civ.
7 Code §§ 3412, et seq). "To plead a cause of action for
8 cancellation of instrument, plaintiff must show that he will be
9 injured or prejudiced if the instrument is not cancelled, and
10 that such instrument is void or voidable." Zendejas v. GMAC
11 Wholesale Mortg. Corp., Civ. No. 1:10-00184 OWW GSA, 2010 WL
12 2629899, at *7 (E.D. Cal. June 29, 2010). "A party is not
13 prejudiced by an irregularity if he is unable to pay his
14 reasonable indebtedness." Wilson v. Household Fin. Corp., Civ.
15 No. S-12-1413 KJM AC, 2013 WL 1310589, at *8 (E.D. Cal. Mar. 28,
16 2013).

17 Plaintiffs have amended this claim to add a single
18 allegation of prejudice. (SAC ¶ 86 ("Plaintiffs have been
19 prejudiced in that they have wrongly deprived of title of the
20 Subject Property.")) This conclusory allegation provides no
21 factual basis for plaintiffs' assertion of prejudice. Moreover,
22 for the same reasons regarding plaintiffs' wrongful foreclosure
23 claim, plaintiffs cannot allege prejudice here because they
24 cannot plausibly allege that the improper assignment affected
25 their inability to pay their debt. See also Cornell v. That
26 Certain Instrument Entitled Deed of Trust, Civ. No. 2:12-330 WBS
27 CKD, 2012 WL 1869689, at *5 (E.D. Cal. May 22, 2012) (requiring
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1 causal relationship between alleged deficiency and circumstances
2 leading to foreclosure). Finally, plaintiffs admit they are in
3 default and lost title to the property through foreclosure, (SAC
4 ¶ 81), and do not allege an ability "to pay [their] reasonable
5 indebtedness." Wilson, 2013 WL 1310589, at *8. Accordingly,
6 because plaintiffs fail to allege prejudice, the court must grant
7 defendants' motions to dismiss plaintiffs' claim for cancellation
8 of instruments.³

9 D. Leave to Amend

10 Although leave to amend must be freely given, the court
11 is not required to allow futile amendments. See DeSoto v. Yellow
12 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992). Because
13 the court has already permitted plaintiffs to amend their
14 pleadings and it appears that plaintiffs are unable to state a
15 viable claim against defendants, all claims will be dismissed
16 with prejudice and without leave to amend.

17 IT IS THEREFORE ORDERED that defendants' motions to
18 dismiss be, and the same hereby are, GRANTED.

19 The Clerk of the Court is directed to enter a judgment
20 of dismissal in accordance with this Order and close the file.

21 Dated: January 14, 2014

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23 **WILLIAM B. SHUBB**
24 **UNITED STATES DISTRICT JUDGE**

25 _____
26 ³ Because the court grants defendants' motions to dismiss
27 the SAC in its entirety, it need not reach defendants' arguments
28 that plaintiffs are estopped from bringing claims that they did
not include in their bankruptcy petition, that plaintiffs did not
comply with the tender rule, and that plaintiffs lack standing.