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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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JOHN TAYLOR, an individual;  
ANITA TAYLOR, an individual,

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Plaintiffs,

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v.

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WELLS FARGO BANK, N.A.; CAL-  
WESTERN RECONVEYANCE CORP.,

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Defendants.

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No. 2:14-cv-02007-JAM-CMK

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

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Defendants Wells Fargo Bank, N.A. ("Wells Fargo") and Cal-Western Reconveyance Corporation ("Cal-Western") (collectively "Defendants") move to dismiss (Doc. #4) Plaintiffs John and Anita Taylor's (collectively "Plaintiffs") entire complaint (Doc. #1, Exh. A).<sup>1</sup> The action arises out of a dispute over the foreclosure and sale of a property previously belonging to

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for October 15, 2014.

1 Plaintiffs and the loan modification negotiations and notice  
2 preceding that sale.

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4 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

5 In January 2007, Plaintiffs obtained a loan in the amount of  
6 \$384,000 ("the loan") secured by a deed of trust recorded against  
7 property located at 6918 N. Old Stage Road, Weed, California  
8 96094 ("the property"). Request for Judicial Notice (Doc. #5),  
9 Exh. A.

10 In July 2013, Plaintiffs applied for a loan modification  
11 through Defendant Wells Fargo. Comp. ¶ 10. When Wells Fargo  
12 received Plaintiffs' application, it sent Plaintiffs a letter  
13 stating:

14 "[y]ou have requested assistance under the federal  
15 government's Home Affordable Modification Program  
16 ("HAMP") . . . [i]f the loan has been previously  
17 referred to foreclosure, the foreclosure process will  
18 continue. However, a foreclosure sale will not be held  
19 and you will not lose your home during this time  
20 period."

21 Id. During this time period, Plaintiffs were also seeking an in-  
22 house loan modification through Wells Fargo. Id. ¶ 11.

23 In September 2013, Plaintiffs received a letter from Wells  
24 Fargo denying their application for an in-house modification  
25 based on its calculation of Plaintiffs' net present value. Comp.  
26 ¶ 12. The letter informed Plaintiffs of their right to appeal  
27 the denial and stated "[y]our home will not be sold in a  
28 foreclosure sale during the appeal period." Id. Plaintiffs  
submitted an appeal of the denial. Id. ¶ 13.

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1 On October 25, 2013, Wells Fargo sent Plaintiffs a letter  
2 acknowledging their appeal and indicating it would "provide a  
3 written response to the [appeal] by November 23, 2013." Comp.

4 ¶ 14. On November 26, 2013, Wells Fargo filed a Notice of  
5 Trustee's Sale against the property.<sup>2</sup> Id.

6 Plaintiffs allege they never received the Notice of  
7 Trustee's Sale and Wells Fargo never gave them a determination on  
8 either of their loan modification applications. Comp. ¶¶ 15-16.

9 On June 2, 2014, Wells Fargo instructed Cal-Western to sell  
10 Plaintiffs' property at a trustee's sale at which Wells Fargo  
11 took back title to the property. Id. Plaintiffs allege they had  
12 sufficient funds "to reinstate their loan prior to the sale by  
13 paying all amounts in default and would have reinstated the loan  
14 had they known that the foreclosure sale would take place." Id.  
15 ¶ 17.

16 Plaintiffs plead five causes of action in their complaint:  
17 (1) Wrongful Foreclosure; (2) Negligent Misrepresentation;  
18 (3) Fraud; (4) Breach of the Implied Covenant of Good Faith and  
19 Fair Dealing; and (5) Quiet Title. Defendants removed the matter  
20 to this Court and filed the present motion.

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22 II. OPINION

23 A. Request for Judicial Notice

24 Defendants initially request the Court take judicial notice  
25 (Doc. #5) of ten exhibits in support of their motion to dismiss.

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27 <sup>2</sup> Defendants point out, and Plaintiffs appear to concede, that  
28 the complaint erroneously dates the filing of the notice one  
month early. MTD at p. 2; Opp. at p. 2.

1 In addition, Defendants filed a "Supplemental Request for  
2 Judicial Notice" (Doc. #9) in support of their reply, seeking  
3 notice of two additional documents.

4 Generally, the Court may not consider material beyond the  
5 pleadings in ruling on a motion to dismiss for failure to state a  
6 claim. The exceptions are material attached to, or relied on by,  
7 the complaint so long as authenticity is not disputed, or matters  
8 of public record, provided that they are not subject to  
9 reasonable dispute. E.g., Sherman v. Stryker Corp., 2009 WL  
10 2241664, at \*2 (C.D. Cal. 2009) (citing Lee v. City of Los  
11 Angeles, 250 F.3d 668, 688 (9th Cir. 2001) and Fed. R. Evid.  
12 201). Plaintiffs have not objected to the request for judicial  
13 notice and the Court finds that it is appropriate to take such  
14 notice of all the requested exhibits other than exhibits K and L  
15 since they are not relevant to the Court's determination of this  
16 motion.

17 B. Sanctions for late filing of Plaintiffs' Opposition

18 Local Rule 230(c) provides that opposition to the granting  
19 of a motion shall be filed and served not less than fourteen days  
20 preceding the hearing date. The hearing date set for this motion  
21 was October 15, 2014. Plaintiffs' counsel filed the opposition  
22 on October 7, 2014, nearly a week late. Plaintiffs' counsel  
23 filed a declaration (Doc. #10) the following day, placing the  
24 blame for noncompliance on their email service "somehow" moving  
25 the deadline. Only the Court has the power to move the deadline  
26 for briefing. The Court will consider the arguments presented in  
27 the opposition and address the motion on its merits. However,  
28 pursuant to Local Rule 110, the Court hereby sanctions Mellen Law

1 Firm, \$150 for noncompliance with Local Rule 230(c).

2 C. Discussion

3 1. Tender

4 Defendants contend Plaintiffs are not entitled to relief  
5 because they have failed to allege an adequate tender. MTD at  
6 pp. 5-6; Reply pp. 3, 10. Plaintiffs contend the tender rules do  
7 not apply and that their claims are viable because they have  
8 alleged they would have been able to reinstate the loan and cure  
9 the default if they had known of the intent to foreclose. Opp.  
10 at pp. 5-7.

11 This Court has recently addressed the requirements regarding  
12 tender in the context of a wrongful foreclosure claim:

13 For a wrongful foreclosure claim, a plaintiff must  
14 allege that "(1) Defendants caused an illegal,  
15 fraudulent, or willfully oppressive sale of the  
16 property pursuant to a power of sale in a mortgage or  
17 deed of trust; (2) Plaintiffs suffered prejudice or  
18 harm; and (3) **Plaintiffs tendered the amount of the  
19 secured indebtedness or were excused from tendering.**"  
20 Nugent v. Fed. Home Loan Mortgage Corp., 2:12-CV-00091-  
21 GEB, 2013 WL 1326425, at \*7 (E.D. Cal. 2013). . . . A  
22 plaintiff may be able to state a wrongful foreclosure  
23 claim without full tender, "[i]f, after a default, the  
24 trustor and beneficiary enter into an agreement to cure  
25 the default and reinstate the loan, no contractual  
26 basis remains for exercising the power of sale."  
27 [Barroso v. Ocwen Loan Servicing, LLC, 208 Cal.App.4th  
28 1001, 1017 (2012)].

22 Gilliland v. Chase Home Fin., LLC, No. 2:13-CV-02042 JAM-AC, 2014  
23 WL 325318, at \*5 (E.D. Cal. 2014) (emphasis added). The Court  
24 has also addressed the requirement in the context of a quiet  
25 title claim concluding that "[a] mortgagor cannot quiet his  
26 title against the mortgagee without paying the debt secured."  
27 Hall v. Mortgage Investors Grp., No. 2:11-CV-00952-JAM, 2011 WL  
28 4374995, at \*8 (E.D. Cal. 2011) (quoting Dyachishin v. America's

1 Wholesale Lenders, No. 2:09-CV-02639-JAM-GGH, 2010 WL 1525703, at  
2 \*2 (E.D. Cal. 2010)).

3 Plaintiffs have failed to allege their ability to tender the  
4 full amount of their indebtedness. They also have not alleged  
5 any agreement with Defendants to cure the default and/or  
6 reinstate the loan prior to the foreclosure and sale of the  
7 property. The Court therefore grants Defendants' motion to  
8 dismiss Plaintiffs' first cause of action for wrongful  
9 foreclosure and fifth cause of action for quiet title.

## 10 11 2. Negligent Misrepresentation and Fraud

12 Defendants contend Plaintiffs' claims for negligent  
13 misrepresentation and fraud fail on the merits. MTD at pp. 8-10;  
14 Reply at pp. 4-8. Among other arguments, Defendants contend the  
15 claims should fail because Plaintiffs cannot adequately allege  
16 damages. Plaintiffs respond that they have alleged damages for  
17 loss of their property, negative credit history, and emotional  
18 damages. Opp. at pp. 11-12. Plaintiffs contend they were able  
19 to, and would have, brought their loan current if not for  
20 Defendants' misrepresentations.

21 The essential elements of fraud are (1) a misrepresentation;  
22 (2) knowledge of falsity; (3) intent to induce reliance;  
23 (4) actual and justifiable reliance; and (5) resulting damage.  
24 Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). "The  
25 essential elements of a count for negligent misrepresentation are  
26 the same except that it does not require knowledge of falsity,  
27 but instead requires a misrepresentation of fact by a person who  
28 has no reasonable grounds for believing it to be true." Chapman

1 v. Skype Inc., 220 Cal. App. 4th 217, 230-31 (2013). A  
2 plaintiff's claim for fraud must also satisfy the heightened  
3 requirements of Federal Rule of Civil Procedure 9(b):

4 Rule 9(b) demands that, when averments of fraud are  
5 made, the circumstances constituting the alleged fraud  
6 "be 'specific enough to give defendants notice of the  
7 particular misconduct . . . so that they can defend  
8 against the charge and not just deny that they have  
9 done anything wrong.'" Bly-Magee [v. California], 236  
10 F.3d [1014,] 1019 [(9th Cir. 2001)] (quoting Neubronner  
11 v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)). Averments  
12 of fraud must be accompanied by "the who, what, when,  
13 where, and how" of the misconduct charged. Cooper v.  
14 Pickett, 137 F.3d 616, 627 (9th Cir. 1997). "[A]  
15 plaintiff must set forth more than the neutral facts  
16 necessary to identify the transaction. The plaintiff  
17 must set forth what is false or misleading about a  
18 statement, and why it is false." Decker v. GlenFed,  
19 Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541,  
20 1548 (9th Cir. 1994).

21 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.  
22 2003).

23 Plaintiffs' negligent misrepresentation and fraud claims  
24 rely on two alleged misrepresentations: (1) Defendants told them  
25 that while a HAMP modification application was being processed,  
26 no foreclosure sale would take place; and (2) Defendants told  
27 Plaintiffs that if Plaintiffs appealed a loan modification  
28 denial, no foreclosure sale would take place during the appeal  
period. Comp. ¶ 30; Opp. at p. 9.

The Court finds that these allegations are insufficient to  
maintain these causes of action because Plaintiffs have failed to  
adequately allege that they were damaged as a result of these  
misrepresentations. There are no allegations that either  
Defendant ever promised Plaintiffs that they would receive a loan  
modification or that their failure to pay on the loan was

1 excused. By their own allegations, Plaintiffs had the ability to  
2 cure their arrearage but failed to do so. Plaintiffs were  
3 already contractually obligated to make loan payments and were  
4 aware of the consequences of failing to do so--default and  
5 foreclosure.

6 "In the context of mortgage foreclosures, courts applying  
7 California law have generally been reluctant to permit borrowers  
8 to assert claims arising out of forbearance agreements . . . ,  
9 whether styled as claims for breach of contract, conversion or  
10 fraud. Reyes v. Wells Fargo Bank, N.A., No. C-10-01667 JCS, 2011  
11 WL 30759, at \*13 (N.D. Cal. 2011). Other courts facing similar  
12 claims have granted motions to dismiss on these grounds. See  
13 Newgent v. Wells Fargo Bank, N.A., 09CV1525 WQH, 2010 WL 761236,  
14 at \*6-7 (S.D. Cal. 2010) (finding that because the "Plaintiff was  
15 already legally obligated to make payments on her mortgage . . .  
16 reliance on the promise that Wells Fargo would delay the  
17 trustee's sale was not detrimental"); Zierolf v. Wachovia  
18 Mortgage, C-12-3461 EMC, 2012 WL 6161352, at \*5-7 (N.D. Cal.  
19 2012), appeal dismissed (July 31, 2013) (finding "[t]he risk that  
20 one's home loan could go into default and one's home be sold at a  
21 foreclosure auction for nonpayment is a remedy provided in the  
22 loan agreement itself, not a consequence of allegedly relying on  
23 promises to process a loan modification").

24 Applying these cases to the instant case, the Court is  
25 compelled to grant Defendants' motion to dismiss Plaintiffs'  
26 second cause of action for negligent misrepresentation and third  
27 cause of action for fraud based on Plaintiffs' failure to  
28 adequately allege damages as a result of the misrepresentations,



1 a necessary element of each claim.

2 3. Breach of Implied Covenant

3 Defendants contend Plaintiffs have failed to articulate an  
4 actionable claim for relief in their fourth cause of action for  
5 breach of the implied covenant of good faith and fair dealing.  
6 MTD at pp. 10-11. In their opposition, Plaintiffs concede the  
7 deficiencies in this cause of action and merely request leave to  
8 amend. Opp. at p. 12. The Court grants Defendants' motion to  
9 dismiss Plaintiffs' fourth cause of action.

10 4. Request for Leave to Amend

11 Leave to amend must be freely given, however, the Court is  
12 not required to allow futile amendments. See DeSoto v. Yellow  
13 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992); Dick v.  
14 Am. Home Mortgage Servicing, Inc., CIV. 2:13-00201 WBS, 2013 WL  
15 5299180, at \*6 (E.D. Cal. 2013). At this early stage of the  
16 proceedings, it is not clear to the Court that amendment would be  
17 futile. Therefore leave to amend the complaint is granted.  
18 However, "plaintiffs are admonished that failure to cure the  
19 defects identified in this Order will be grounds for dismissal  
20 without further leave to amend." Dick, at \*6.


21  
22 III. ORDER

23 For the reasons set forth above, the Court GRANTS  
24 Defendants' motion to dismiss WITH LEAVE TO AMEND. Plaintiffs  
25 must file their Amended Complaint within twenty days from the  
26 date of this Order and Defendants responsive pleading is due  
27 within twenty days thereafter. It is further ordered that  
28 within twenty days of this Order, Mellen Law Firm shall pay

1 sanctions of \$150 to the Clerk of the Court for failure to comply  
2 with Local Rule 230(c).

3 IT IS SO ORDERED.

4 Dated: November 14, 2014

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6 JOHN A. MENDEZ,  
7 UNITED STATES DISTRICT JUDGE  
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