

1 March 23, 2020, plaintiffs filed a request for clerk’s entry of default against defendant as well as a
2 motion for entry of default judgment and a statement in support thereof. (Doc. Nos. 9-11.) To
3 date, no opposition to that request and motion has been filed by defendant. Below, the court will
4 first address defendant’s motion to dismiss and then turn to plaintiffs’ filings.

5 **LEGAL STANDARD**

6 “A Rule 12(b)(6) motion tests the legal sufficiency of a claim.” *Navarro v. Block*, 250
7 F.3d 729, 732 (9th Cir. 2001). That is, “[a]ll factual allegations in the complaint are accepted as
8 true, and the pleadings construed in the light most favorable to the nonmoving party.” *Doe I v.*
9 *Nestle USA, Inc.*, 766 F.3d 1013, 1018 (9th Cir. 2014) (internal quotation marks and citation
10 omitted). A legally sufficient claim must be “plausible on its face” in order to survive a Rule
11 12(b)(6) challenge, meaning there are sufficient facts alleged to allow “the court to draw the
12 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
13 556 U.S. 662, 678 (2009). While a cognizable claim “does not need detailed factual allegations,”
14 “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than
15 labels and conclusions, and a formulaic recitation of the element of a cause of action will not do.”
16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “In reviewing the sufficiency of a
17 complaint, [courts are limited] to the complaint itself and its attached exhibits, documents
18 incorporated by reference, and matters properly subject to judicial notice.” *In re NVIDIA Corp.*
19 *Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014) (citations omitted).

20 **ANALYSIS**

21 Plaintiffs’ *pro se* complaint asserts four claims for (1) declaratory relief, (2) violation of
22 usury law, (3) fraud, and (4) breach of contract. (Doc. No. 1, Ex. B at 2.) In moving to dismiss,
23 defendant contends that the complaint is not reasonably comprehensible, so it is “not possible for
24 Defendant to understand what [its] alleged obligations might be or might have been in those
25 regards or the extent to which Plaintiffs are claiming that Defendant may have failed to perform”
26 based on the agreements at issue. (Doc. No. 3 at 2) (alteration in original.) Base on this
27 contention defendant argue that plaintiffs have failed to state a claim upon which relief can be
28 granted. (*Id.* at 1.)

1 For purposes of this motion to dismiss, “[a]ll allegations of material fact are taken as true
2 and construed in the light most favorable” to plaintiffs. *Cousins v. Lockyer*, 568 F.3d 1063, 1067
3 (9th Cir. 2009). It appears from their complaint that plaintiffs are mortgagors seeking relief based
4 on their “real estate sales contract” or the “Bankruptcy Modification Plan,” but it is unclear which
5 is relevant as to each of the injuries alleged by plaintiffs. (Doc. No. 1, Ex. B at ¶¶ 4-7.)
6 Defendant, who is “the assignee of right to receive principal and interest” on the real estate sales
7 contract and a party to the Bankruptcy Modification Plan, is alleged by plaintiffs to be
8 withholding certain escrow payments, failing to credit certain payments made by plaintiffs,
9 imposing unreasonable fees and charges, and furnishing adverse information about plaintiffs to
10 consumer-reporting agencies. (*Id.*, Ex. B at ¶¶ 11-12; *id.*, Ex. B, Ex. A at 15.)

11 **A. Defendant’s Motion to Dismiss**

12 In moving to dismiss plaintiffs’ complaint, defendant contends that plaintiffs’ first claim
13 for declaratory relief under California law is not sufficiently alleged. (Doc. No. 3 at 4.)
14 “Declaratory relief pursuant to [California Code of Civil Procedure § 1060] has frequently been
15 used as a means of settling controversies between parties to a contract regarding the nature of
16 their contractual rights and obligations.” *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 647–48
17 (2009) (alteration in original). In their first claim plaintiffs appear to seek a declaration that their
18 “contract or agreement” with defendant violated 12 U.S.C. §§ 1785, 1831. (Doc. No. 1, Ex. B at
19 ¶¶ 17, 25). But as defendant correctly points out (Doc. No. 3 at 4), § 1785 applies to “insured
20 credit union” and § 1831 applies to “insurance of the deposits,” 12 U.S.C. §§ 1785, 1831, which
21 are not applicable here since plaintiffs have failed to allege that defendant is an insured credit
22 union or that insurance of a deposit is at stake. The court also notes that plaintiffs have also failed
23 to specify in their complaint which provisions of the real estate sales contract and/or the
24 Bankruptcy Modification Plan require declaratory adjudication. Therefore, the court concludes
25 that plaintiffs have failed to sufficiently allege their first claim.

26 Plaintiffs’ second claim is based on an alleged violation of the usury provisions set forth
27 in the California Constitution, article XV, section 1. (Doc. No. 1, Ex. B at ¶¶ 8, 13.) Indeed,

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1 California Constitution, article XV, section 1 limits the interest rate
2 for a ‘loan or forbearance’ of money not primarily for personal,
3 family or household purposes, to the higher of: (1) 10 percent per
4 annum or (2) 5 percent plus the rate of interest prevailing on the 25th
5 day of the month preceding the earlier of the date of the extension of
the contract to make the loan or forbearance or the date of making
the loan or forbearance . . .

6 *Hardwick v. Wilcox*, 11 Cal. App. 5th 975, 978 (2017). However, the California Constitution also
7 exempts “any obligations of, loans made by” “any person licensed as a real estate broker.”

8 *Moore v. Hill*, 188 Cal. App. 4th 1267, 1279–80 (2010) (citing Cal. Const. Art. 15, § 1).

9 Generally, a real estate sales contract is made or arranged by a person licensed as a real estate
10 broker. Here, plaintiffs have failed to allege that the real estate sales contract in question was not
11 made or arranged by such a broker so as to trigger potential liability under the California
12 Constitution. Defendant also contends that plaintiffs have failed to specify the violative interest
13 rate and where that rate is described in the real estate sales contract. (Doc. No. 3 at 5.)

14 Defendant’s arguments in this regard are persuasive. The court concludes that plaintiffs’ second
15 claim, premised on the usury provisions of the California Constitution, is also deficient.

16 Next, in order for plaintiffs to sufficiently plead their third claim for fraud, they must
17 allege “(1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the
18 misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages.”

19 *Hasso v. Hapke*, 227 Cal. App. 4th 107, 129 (2014). Under Rule 9 of the Federal Rules of Civil
20 Procedure, a “complaint must specify such facts as the times, dates, places, benefits received, and
21 other details of the alleged fraudulent activity.” *McMaster v. United States*, 731 F.3d 881, 897
22 (9th Cir. 2013) (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). Here, plaintiffs
23 have failed to allege defendant’s knowledge of falsity and how plaintiffs justifiably relied on the
24 misrepresentation. Plaintiffs have also failed to plead with particularity what misrepresentation
25 was made, the name of defendant’s representative who made it, when it was made, and how it
26 was made. *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (holding that broad
27 allegations of fraud with “no particularized supporting detail” do not suffice). Instead, in their
28 complaint plaintiffs merely allege that defendant “defrauded [the] Federal Housing

1 Administration” and submitted false claim to the Federal Housing Administration, (Doc. No. 1,
2 Ex. B at ¶¶ 13, 15), a claim plaintiffs do not appear to have standing to bring. *See Spokeo, Inc. v.*
3 *Robins*, 136 S. Ct. 1540, 1548 (2016) (holding that Article III of the Constitution requires the
4 plaintiff to allege a “particularized” injury that affected him “in a personal and individual way”).
5 For these reasons, the court finds that plaintiffs have failed to sufficiently allege their fraud claim
6 with particularity.

7 Finally, to maintain a claim for breach of contract, plaintiffs must plead “(1) the existence
8 of the contract, (2) the [plaintiffs’] performance or excuse for nonperformance, (3) the
9 defendant’s breach, and (4) resulting damages” to plaintiffs. *Maxwell v. Dolezal*, 231 Cal. App.
10 4th 93, 97-98 (2014) (alteration in original) (citation omitted). Here, the complaint alleges that
11 plaintiffs were only required “to pay a reasonable principal payment to cover taxes and insurance
12 at the fair market value for the property,” but defendant “accepted excessive payments from
13 [plaintiffs] beyond the reasonable value of said monthly payment and interest and has refused to
14 correctly credit [plaintiffs’] loan account.” (Doc. No. 1, Ex. B at ¶¶ 36-37) (alteration in
15 original.) Plaintiffs cite to paragraphs 1 to 9 of their complaint as alleging the existence of a
16 contract, (*id.*, Ex. B at ¶¶ 1-9, 23, 36), but those paragraphs allege both the existence of the real
17 estate sales contract and the Bankruptcy Modification Plan, so it is unclear which agreement
18 plaintiffs are claiming was breached. Moreover, plaintiffs must also “identify the specific
19 provision of the contract allegedly breached by the defendant.” *Donohue v. Apple, Inc.*, 871 F.
20 Supp. 2d 913, 930 (N.D. Cal. 2012) (citation omitted). Again, there is no specific allegation in
21 plaintiffs’ complaint as to which provision of the contract defendant supposedly breached.
22 Relatedly, “the breach by one party of his covenant does not excuse the performance by the other
23 party of his covenant or relieve him of liability for damages for a breach thereof.” *Colaco v.*
24 *Cavotec SA*, 25 Cal. App. 5th 1172, 1183 (2018). Here, plaintiffs have failed to allege that they
25 fulfilled their contractual obligations or had an excuse for their nonperformance. Therefore, the
26 court concludes that plaintiffs have also failed to sufficiently allege their breach of contract claim.

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1 **B. Leave to Amend**

2 “A district court ordinarily must grant leave to amend when it dismisses claims under
3 Rule 12(b)(6),” but it “need not grant leave if it determines that the pleading could not possibly be
4 cured by the allegation of other facts.” *Yagman v. Garcetti*, 852 F.3d 859, 863 (9th Cir. 2017)
5 (internal quotation marks and citation omitted). Given that this is plaintiffs’ first complaint, the
6 court cannot say there is no possibility that they could cure the defects identified above, nor has
7 defendant demonstrated such impossibility.² Accordingly, the court will grant plaintiffs leave to
8 amend.

9 **C. Plaintiffs’ Request for Entry of Default and Motion for Default Judgment**

10 The court now considers plaintiffs’ request for entry of default and motion for default
11 judgment. (Doc. Nos. 9-10.) An entry of default under Federal Rule of Civil Procedure 55(b)(1)
12 “applies only to parties who have never appeared in the action.” *Direct Mail Specialists, Inc. v.*
13 *Eclat Computerized Techs., Inc.*, 840 F.2d 685, 689 (9th Cir. 1988) (citation omitted).
14 “Normally, an appearance in an action involves some presentation or submission to the court,”
15 but “because judgments by default are disfavored, a court usually will try to find that there has
16 been an appearance by defendant.” *Id.* (citations omitted). The court notes that defendant made
17 an appearance in this action by filing the notice of removal and the pending motion to dismiss
18 which will be granted by this order. Accordingly, plaintiffs’ request for entry of default and
19 motion for default judgment are not well-taken and must be denied.

20 **CONCLUSION**

21 For the reasons set forth above, defendant’s motions to dismiss (Doc. No. 3) is granted
22 and, if they wish to pursue this action, plaintiff’s will be granted leave to file an amended
23 complaint curing the deficiencies noted above within twenty days (20) from the date of service of

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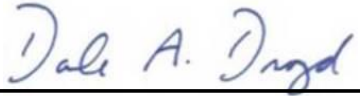
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27 ² If plaintiffs are unsuccessful in curing the defects identified above in any amended complaint
28 they elect to file, the court may well conclude that the granting of further leave to amend would
be futile.

1 this order. In addition, plaintiffs' request for entry of default (Doc. No. 9) and motion for default
2 judgment (Doc. No. 10) are denied.

3 IT IS SO ORDERED.

4 Dated: April 6, 2020


5 UNITED STATES DISTRICT JUDGE

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