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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

TERA VANCE, an individual,  
Plaintiff,  
v.  
BERKSHIRE HATHAWAY LIFE  
INSURANCE COMPANY OF  
NEBRASKA; KRISTIN BARNETT, an  
individual; and BHG STRUCTURED  
SETTLEMENTS, INC., an unknown  
entity, and DOES 1 through 50 inclusive,  
Defendants.

Case No.: 3:20-cv-01480-BEN-KSC  
**ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS**  
**[ECF Nos. 24, 25]**

Plaintiff Tara Vance, the fiancé of a deceased structured settlement annuity holder, brings this action for damages based on the allegation that she would have received half of the annuity had the annuity owner not rejected the decedent's change of beneficiary form and mailed the rejection notice to the decedent's previous address. Before the Court are the motions to dismiss Vance's Second Amended Complaint ("SAC") for failure to state a claim brought by Defendant Kristin Barnett, seeking to dismiss claims 7, 9, and 10 of the SAC, ECF No. 24, and Defendants BHG Structured Settlements, Inc. ("BHG") and Berkshire Hathaway Life Insurance Company of Nebraska ("BHLN"), seeking to dismiss claims 1, 9, and 10 of the SAC, ECF No. 25. Vance opposed. ECF Nos. 26, 27.

1 Defendants BHG, BHLN, and Barnett (collectively, “Defendants”) replied. ECF Nos.  
 2 29, 30. The motions were submitted on the papers without oral argument pursuant to  
 3 Civil Local Rule 7.1(d)(1) and Rule 78(b) of the Federal Rules of Civil Procedure. ECF  
 4 No. 30. For the reasons set forth below, the motions to dismiss are **GRANTED**.

## 5 **I. BACKGROUND**

### 6 **A. Factual Background<sup>1</sup>**

7 This case concerns a structured settlement annuity. In May 2016, John Eutsler  
 8 settled a personal injury claim with a third-party. SAC, ECF No. 21, ¶ 7. The third-party  
 9 then assigned its obligations to pay Eutsler to Defendant BHG. *Id.* at ¶ 8. BHG, in turn,  
 10 purchased an Annuity Contract (the “Annuity”) from Defendant BHLN to fund its  
 11 obligation to make periodic structured settlement payments to Eutsler. *Id.* The Annuity  
 12 specifies that BHG is the “Owner” of the Annuity, Eutsler is the “Optional Payee,” and  
 13 Defendant Kristin Barnett, Eutsler’s sister, is the “Contingent Payee.” *Id.* (citing a copy  
 14 of the Annuity filed on the docket at ECF No. 3-5).<sup>2</sup>

15 The SAC alleges that on April 19, 2019, Eutsler “changed the beneficiary of the  
 16 Annuity from Barnett to both Ms. Vance as a 50% beneficiary and his mother, Lenora  
 17 Eutsler, as a 50% beneficiary.” ECF No. 21, ¶ 23. Eutsler allegedly made this change by  
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 20 <sup>1</sup> The following overview of the facts is drawn from Vance’s SAC, ECF No. 21,  
 21 which the Court assumes true in analyzing Defendants’ Motions to Dismiss. *Erickson v.*  
 22 *Pardus*, 551 U.S. 89, 94 (2007). The Court is not making factual findings.

23 <sup>2</sup> Although a Court ordinarily limits its review on a motion to dismiss to the contents  
 24 of the complaint and material properly submitted along with it, *Van Buskirk v. Cable*  
 25 *News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v.*  
 26 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), courts may  
 27 “augment” the facts in the complaint “with ‘data points gleaned from documents  
 28 incorporated by reference into the complaint, matters of public record, and facts  
 susceptible to judicial notice” without converting a motion to dismiss into a motion for  
 summary judgment, *Rosen v. Uber Techs., Inc.*, 164 F. Supp. 3d 1165, 1171 (N.D. Cal.  
 2016). In this case, the SAC pleads the contents of the Annuity, and neither party  
 questions its authenticity. Thus, the Court takes judicial notice of the contents of the  
 Annuity for purposes of ruling on the instant motion to dismiss.

1 sending a notarized “Beneficiary Designation or Change Request form” to BHLN. *Id.*  
2 BHLN received the Change Request form but rejected it because it was filled out  
3 incorrectly. *Id.* at ¶ 24. BHLN attempted to notify Eutsler of the rejection but sent notice  
4 to his old address in Nevada despite knowing he had since moved to California. *Id.*  
5 Vance argues BHLN and BHG were negligent in that they did not notify Eutsler that his  
6 Change Request form was filled out incorrectly. *Id.* at ¶ 25, 37-41.

7 On November 22, 2019, Eutsler died in an automobile accident. SAC, ECF No.  
8 21, ¶ 28. Thereafter, pursuant to the Annuity’s beneficiary designation (and ignoring the  
9 rejected Change Request form), BHG and BHLN made payments on the Annuity to  
10 Barnett. *Id.* at ¶ 33. Barnett has refused to give any portion of those payments to Vance.  
11 *Id.* Vance alleges BHLN and BHG’s continued payment to Barnett along with Barnett’s  
12 continued withholding of Annuity funds from Vance have caused Vance severe economic  
13 and emotional distress. *Id.* at ¶ 34.

#### 14 **B. Procedural Background**

15 This is Vance’s third attempt at pleading her claims. *See* Compl., ECF No. 1-4;  
16 First Amended Complaint (“FAC”), ECF No. 12; SAC, ECF No. 21. The Court  
17 dismissed several of Vance’s contract-based claims in her original complaint with  
18 prejudice, finding that “[b]ased on the specific terms of the Annuity, Eutsler had no right  
19 to designate a beneficiary but only the right to *request* a change to the beneficiary.”  
20 Order, ECF No. 11, 6-7. Accordingly, Vance’s FAC removed the contract-based claims  
21 and renewed only her claims for negligence, conversion, intentional infliction of  
22 emotional distress, and negligent infliction of emotional distress. *See generally*, FAC,  
23 ECF No. 12. Vance then sought leave to file her SAC, adding BHG as a defendant to her  
24 negligence and emotional distress claims. *See* Mot., ECF No. 13. The Court granted  
25 Vance leave to file her SAC. *See* Order, ECF No. 19

26 On January 13, 2021, Vance filed the SAC, re-alleging her first claim for relief for  
27 negligence; seventh claim for conversion, ninth claim for intentional infliction of  
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1 emotional distress, and negligent infliction of emotional distress.<sup>3</sup> SAC, ECF No. 21.  
2 Defendants BHG and BHLN seek to dismiss Claims 1, 9, and 10, ECF No. 25, while  
3 Defendant Barnett seeks to dismiss Claims 7, 9, and 10, ECF No. 24.

4 The Court addresses all four of Vance's claims in the SAC. As set forth below,  
5 however, her revised pleading fails to show how on these facts Defendants could be  
6 liable for their conduct as a matter of law. Accordingly, the Court dismisses the SAC  
7 with prejudice.

## 8 **II. LEGAL STANDARD**

9 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) ("Rule  
10 12(b)(6)") tests whether the pleading plausibly states a claim upon which relief can be  
11 granted. When considering a Rule 12(b)(6) motion, the Court "accept[s] as true facts  
12 alleged and draw[s] inferences from them in the light most favorable to the plaintiff."  
13 *Stacy v. Rederite Otto Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010). A plaintiff must  
14 not merely allege conceivably unlawful conduct but must allege "enough facts to state a  
15 claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
16 570 (2007). "A claim is facially plausible 'when the plaintiff pleads factual content that  
17 allows the court to draw the reasonable inference that the defendant is liable for the  
18 misconduct alleged.'" *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting  
19 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Threadbare recitals of the elements of a  
20 cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556  
21 U.S. at 678. "[W]hen assessing a complaint's allegations, the court may [also] consider  
22 any document incorporated by reference in the complaint." *See Parrino v. FHP, Inc.*,

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25 <sup>3</sup> For clarity, the Court notes the following: Although generally, when claims are  
26 dismissed, the party removes those claims entirely from the subsequent amended  
27 complaint and re-numbers the claims for relief, Vance filed an amended complaint with  
28 the original ten claims for relief, striking through the claims the Court had dismissed.  
Thus, even though the defendants only collectively seek to dismiss Claims 1, 7, 9, and 10,  
these are the only remaining claims in this case.

1 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds as recognized*  
2 *in Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681-82 (9th Cir. 2006).

3 In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of  
4 the complaint and material properly submitted with it. *Van Buskirk v. Cable News*  
5 *Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard*  
6 *Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, under the  
7 incorporation by reference doctrine, the Court may also consider documents “whose  
8 contents are alleged in a complaint and whose authenticity no party questions, but which  
9 are not physically attached to the pleading” without converting a motion to dismiss to a  
10 motion for summary judgment. *Branch*, 14 F.3d at 454. Consequently, “[p]laintiffs may  
11 plead themselves out of court by attaching exhibits inconsistent with their claims because  
12 the court may disregard contradictory allegations.” Phillips & Stevenson, *California*  
13 *Practice Guide: Federal Civil Procedure Before Trial* § 9:212a (The Rutter Group April  
14 2020) Phillips, § 9:212a; *Johnson v. Fed. Home Loan Mortg. Corp.*, 793 F.3d 1005,  
15 1007–08 (9th Cir. 2015) (noting that courts “need not accept as true allegations  
16 contradicting documents that are referenced in the complaint”).

17 When a motion to dismiss is granted, the court must decide whether to grant leave  
18 to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus, leave to  
19 amend should be freely granted. *DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655,  
20 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a  
21 plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J.*  
22 *Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (“Denial of leave to amend is not an  
23 abuse of discretion where . . . further amendment would be futile.”).

### 24 **III. ANALYSIS**

25 Vance’s SAC realleges the negligence, conversion, intentional infliction of  
26 emotional distress, and negligent infliction of emotional distress claims from her original  
27 complaint and FAC, adding some factual support as well as adding BHG as a defendant  
28 to her negligence and emotional distress claims. The Court addresses each claim in turn.

1           **A. Negligence**

2           Vance's SAC alleges Defendants BHLN and BHG negligently failed to notify the  
3 insured, John Eutsler, that it considered the submitted Change Request to be insufficient.  
4 SAC, ECF No. 12, ¶ 37. She further argues that "as an intended beneficiary" under the  
5 Annuity, she can bring a claim against those "whose negligence caused her to lose her  
6 rights." *Id.* Here, BHG joins BHLN in renewing BHLN's prior argument that neither  
7 party owed Vance a duty of care under these circumstances, and therefore they cannot be  
8 held negligent for the alleged notification error. Mot., ECF No. 25, 6.

9           In California, negligence comprises "(1) a legal duty to use reasonable care, (2)  
10 breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the  
11 plaintiff's injury." *Saldade v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1062 (E.D.  
12 Cal. 2010) (citing *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1339 (1998)).  
13 In granting BHLN's first motion to dismiss, the Court observed that "the Complaint and  
14 the Annuity attached thereto unequivocally indicate Vance is not a third-party  
15 beneficiary." Order, ECF No. 11, 4. The Court nonetheless granted Vance leave to  
16 amend because "Vance may be able to otherwise plausibly plead BHLN owed her a duty  
17 of care that was breached by its rejection of the Change Request even though she was not  
18 a third-party beneficiary to the Annuity." *Id.* at 5.

19           Given two opportunities to amend, Vance has failed state a viable negligence  
20 claim. Vance previously argued she was a "third-party beneficiary" of the Annuity. *See*  
21 Compl., ECF No. 1-4, ¶ 42. The Court rejected that argument. Order, ECF No. 11, 5.  
22 Now, Vance instead argues she was an "intended beneficiary" of the insured, and that  
23 once "BHLN/BHG were put on notice by Mr. Eutsler that he wished to change his  
24 beneficiaries, BHLN/BHG had a duty of care/fiduciary obligation to [Vance]." Opp'n,  
25 ECF No. 26, 5.

26           The semantic distinction between "third-party beneficiary" and "intended  
27 beneficiary" in the context of a structured settlement Annuity makes no substantive  
28 difference. Vance cites no additional authority establishing an Annuity owner owes a



1 duty of care to someone in Vance's position, and the Court is not aware of any. Instead,  
2 the Court's previous analysis remains applicable: the limited authority addressing these  
3 situations in California has settled against finding that claimants, such as Vance, are  
4 owed a duty of care by Annuity owners such as BHG. *See* Order, ECF No. 11, 5 (citing  
5 *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi*, 51 Cal. App. 4th 1302,  
6 1309 (1996) ("By the terms of the policy, the right to designate a beneficiary was held by  
7 the owner of the annuity, not the annuitant or payee. Thus, whether [the holder] was  
8 prohibited . . . from exercising his rights under the annuity contract is irrelevant; he had  
9 no right under the annuity contract to designate a beneficiary."); *Ramirez v. Am. General*  
10 *Life Ins. Co.*, No. B276316, 2018 WL 300374, \*1 (Cal. Ct. App. Jan. 5, 2018) (holding  
11 that the second amended complaint failed to allege sufficient facts to state a claim for  
12 negligence where the defendants "did nothing more than provide an annuity as requested  
13 by the parties to the . . . action," and "a non-party to that action may not now collaterally  
14 attack the terms of the settlement agreement by purporting to challenge the terms of the  
15 annuity"). On these facts, if BHG owed a duty to properly notify Eutsler of its rejection,  
16 it owed that duty to Eutsler himself or now, perhaps, his estate. However, no California  
17 authority provides Vance, as opposed to Eustler or his estate, the right to recover for that  
18 negligent act. In short, Vance is not an appropriate plaintiff for these facts. *See, e.g.*,  
19 CAL. CIV. PROC. CODE § 377.30 (providing that "[a] cause of action that survives the  
20 death of the person entitled to commence an action . . . passes to the decedent's successor  
21 in interest, . . . and an action may be commenced by the decedent's personal  
22 representative").

23 The SAC is Vance's third attempt to allege negligence. The Court finds  
24 "allegation[s] of other facts consistent with the challenged pleading could not possibly  
25 cure the deficiency." *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806  
26 F.2d 1393, 1401 (9th Cir. 1986). This is because on these alleged facts, BHLN and BHG  
27 never owed a duty of care to Vance, and therefore they are not liable to Vance for  
28 negligence as a matter of law. *See Albrecht v. Lund*, 845 F.2d 193, 195-96 (9th Cir.

1 1988). Accordingly, the First Claim for Relief is **DISMISSED with prejudice**.

2 **B. Conversion**

3 Vance's SAC alleges Barnett committed conversion. SAC, ECF No. 21, ¶¶ 73-77.  
4 The Court previously dismissed this claim because Vance's allegations contained only  
5 legal conclusions and no factual details plausibly alleging how Barnett misappropriated  
6 the Annuity proceeds for her own use. Order, ECF No. 11, 8. Barnett again argues the  
7 SAC fails to plausibly state a claim for relief. Mot., ECF No. 24, 7.

8 In California, conversion is the wrongful exercise of dominion over the property of  
9 another. *Lee v. Hanley*, 61 Cal. 4th 1225, 1240 (Cal. 2015). To prove conversion, Vance  
10 must show (1) her ownership or right to possession of the property; (2) Barnett's  
11 conversion by a wrongful act or disposition of property rights; and (3) damages. *Id.* Put  
12 differently, Vance "must establish an actual interference with [her] ownership or right of  
13 possession." *Moore v. Regents of the Univ. of Cal.*, 51 Cal.3d 120, 136 (1990) (citations  
14 omitted). "Where plaintiff neither has title to the property alleged to have been  
15 converted, nor possession thereof, [she] cannot maintain an action for conversion." *Id.*

16 Vance's SAC adds only the following to her conversion claim: "By way of Mr.  
17 Eustler's desired change of beneficiary, Ms. Vance has the right to 50% of the annuity.  
18 By not allowing Ms. Vance 50% of the annuity, Ms. Barnett has engaged in a wrongful  
19 act by wrongfully exercising dominion over the property intended for Ms. Vance." ECF  
20 No. 21, ¶ 76. However, the Court has already concluded "Vance is not a party or a third-  
21 party beneficiary" of the contract. Order, ECF No. 11, 6. Because Vance is not a party  
22 or a third-party beneficiary of the contract, she cannot argue she owns or has the right to  
23 possess the proceeds of that contract and therefore cannot establish Barnett committed  
24 conversion by exercising dominion over the Annuity proceeds.

25 As noted above, this is Vance's third attempt to allege conversion. The Court  
26 likewise finds this claim cannot be cured by revised pleading and that Barnett is not liable  
27 for conversion of the Annuity proceeds as a matter of law. *See Albrecht*, 845 F.2d at 195-  
28 96. Accordingly, the Seventh Claim for Relief is **DISMISSED with prejudice**.



1           **C. Intentional Infliction of Emotional Distress**

2           Vance's SAC alleges BHLN, BHG, and Barnett committed intentional infliction of  
3 emotional distress. ECF No. 21, ¶¶ 82-89. Vance argues the Defendants intentionally  
4 harassed and intimidated her with a malicious motive, causing her to suffer humiliation,  
5 mental anguish, and emotional distress. SAC., ECF No. 1-4, ¶¶ 83-89. Defendants argue  
6 Vance has failed to allege any "outrageous" conduct. Mot., ECF No. 24, 8; Mot., ECF  
7 No. 25, 7-8.

8           In California, the elements of intentional infliction of emotional distress are "(1)  
9 extreme and outrageous conduct by the defendant; (2) the defendant's intention of  
10 causing, or reckless disregard of the probability of causing, emotional distress; (3) the  
11 plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate  
12 causation of the emotional distress by the defendant's outrageous conduct." *Robles v.*  
13 *Agreserves, Inc.*, 158 F. Supp. 3d 952, 977 (E.D. Cal. 2016) (citing *Hughes v. Pair*, 46  
14 Cal. 4th 1035, 1050-51 (2009)).

15           The Court previously dismissed this claim against Defendants because the  
16 complaint contained "only boilerplate legal conclusions and fails to allege any facts  
17 showing that Defendants' conduct was intentional." Order, ECF No. 11, 9. In the SAC,  
18 Vance adds four paragraphs of support to her claim. SAC, ECF No. 21, ¶¶ 84-87. The  
19 sum of the revised allegations is that Defendants knew Eutsler intended to change the  
20 beneficiary of the Annuity to add Vance, but that Defendants intentionally denied the  
21 change request, causing Vance "humiliation, mental anguish and emotional distress." *Id.*  
22 at ¶ 84.

23           A defendant's conduct is only "outrageous" when it is so "extreme as to exceed all  
24 bounds of that usually tolerated in a civilized community." *Hughes*, 46 Cal. 4th at 1050-  
25 1051. Here, the Court already held that Vance "is not a party or a third-party  
26 beneficiary" of the contract. Order, ECF No. 11, 6. Accordingly, Vance cannot plausibly  
27 allege Defendants acted "outrageously" by refusing to give Vance fifty percent of the  
28 Annuity proceeds. Even if there were a dispute about whether Vance was a beneficiary

1 of the Annuity, it would hardly be “outrageous” for Defendants refrain from giving  
2 Vance the proceeds of the Annuity before the matter was decided by the Court.

3 Vance spends much of her opposition arguing that the SAC contains plausible  
4 allegations of her emotional distress. *See* Opp’n, ECF No. 27, 7. However, these  
5 arguments miss the threshold element of “outrageous” conduct required for the tort.  
6 Defendant Barnett’s refusal to give fifty percent of the proceeds to Vance and the other  
7 Defendants’ “ratification” of that refusal is the gravamen of Vance’s claim, and that  
8 conduct cannot plausibly be considered outrageous under the circumstances alleged. *See*  
9 *Robles*, 158 F. Supp. 3d at 977. Accordingly, the Ninth Claim for Relief for intentional  
10 infliction of emotional distress is **DISMISSED with prejudice**. *See Albrecht*, 845 F.2d  
11 at 195-96 (holding leave to amend is not required where the facts are not in dispute, and  
12 there is no liability as a matter of substantive law).

#### 13 **D. Negligent Infliction of Emotional Distress**

14 Finally, Vance’s SAC alleges a claim for negligent infliction of emotional distress  
15 against BHLN, BHG, and Barnett. ECF No. 21, ¶¶ 90-97. Defendants argue Vance  
16 again fails to allege they owed her a duty of care, which is required to plead the tort. *See*  
17 *Mot.*, ECF No. 24, 9; *Mot.*, ECF No. 25, 9.

18 “[N]egligent infliction emotional distress is not an independent tort in California,  
19 but the tort of negligence with the traditional elements of duty, breach of duty, causation,  
20 and damages.” *Chaconas v. JP Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1186 (S.D.  
21 Cal. 2010) (quoting *Burgess v. Super. Ct.*, 2 Cal. 4th 1064, 1072 (1992)) (internal  
22 quotation marks omitted).


23 As discussed above, the Court has already found Defendants do not owe Vance a  
24 duty of care on these facts. Accordingly, Vance cannot establish the first element of  
25 negligence, and therefore cannot plausibly plead Defendants committed negligent  
26 infliction of emotional distress. *See Chaconas*, 713 F. Supp. 2d at 1186. Because Vance  
27 cannot cure this deficiency through amended pleading, the Tenth Claim for Relief is  
28 **DISMISSED with prejudice**. *See Albrecht*, 845 F.2d at 195-96.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendants' Motions to Dismiss (ECF Nos. 24, 25) are  
3 **GRANTED**. Plaintiff's SAC is **DISMISSED with prejudice**. Because no other claims  
4 for relief remain in this case, the Court dismisses the entire action and directs the Clerk of  
5 the Court to close the case.

6 **IT IS SO ORDERED.**

7 Dated: March *17*, 2021

  
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8 **HON. ROGER T. BENITEZ**  
9 United States District Judge

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