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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MIMI ASH and ROBERT T. ASH,

Plaintiffs,

v.

BANK OF AMERICA N.A; and DOES 1
to 20, INCLUSIVE,

Defendants.

No. 2:10-cv-02821-KJM-KJN

ORDER

This matter is before the court on defendant Bank of America N.A.'s ("BofA") Motion for Summary Judgment. (Def.'s Mot. Summ. J., ECF 69.) Plaintiffs Mimi Ash and Robert T. Ash oppose the motion. (Pls.' Opp'n, ECF 71.) The court held a hearing on the matter on October 25, 2013, at which Andrew Garcia appeared for plaintiffs and Sabrina Rose-Smith for defendant. As explained below, the court GRANTS in part and DENIES in part defendant's motion for summary judgment.

I. RELEVANT BACKGROUND

A. PROCEDURAL BACKGROUND

On October 19, 2010, plaintiff Mimi Ash ("Mrs. Ash") filed a complaint alleging eleven causes of action. (Pls.' Compl., ECF 2.) On November 16, 2010, plaintiff amended her complaint and added a new plaintiff, Robert T. Ash ("Bobby Ash"). (Pls.' First Am. Compl., ECF 9.) The First Amended Complaint alleges eleven causes of action: (1) trespass;

1 (2) conversion; (3) negligence; (4) negligent infliction of emotional distress; (5) intentional
2 infliction of emotional distress; (6) invasion of privacy; (7) breach of contract; (8) breach of the
3 implied covenant of good faith and fair dealing; (9) unjust enrichment; (10) fraud; and
4 (11) violation of California Business and Professions Code section 17200 et seq. (*Id.*) On
5 December 22, 2010, then-defendant Bank of America Corporation (“BAC”) filed an answer to
6 plaintiffs’ amended complaint. (ECF 11.) On September 20, 2013, this court issued a minute
7 order granting the parties’ stipulated request to substitute Bank of America, N.A. (“BofA”) as
8 successor in interest to Countrywide Home Loans Servicing, L.P. (“Countrywide”) in place of
9 BAC as a defendant. (ECF 68.)¹

10 On September 24, 2013, defendant brought the instant motion for summary
11 judgment on all of plaintiffs’ causes of action. (ECF 69.) Plaintiffs filed a response on
12 October 11, 2013. (ECF 70.) On October 18, 2013, defendant filed a reply. (ECF 73.)

13 B. UNDISPUTED FACTUAL BACKGROUND

14 On July 3, 2003, Robert L. Ash (“Mr. Ash”) executed a deed of trust for the
15 property located at 13405 Ski Slope Way, Truckee, California 94161 (“Property”). (ECF 69-10,
16 Ex. A at 5.) Mr. Ash was the sole borrower on the deed of trust. (*Id.*) Section nine of the deed of
17 trust provides as follows, in relevant part:

18 If . . . Borrower fails to perform the covenants and agreements
19 contained in this Security Instrument, . . . then Lender may do . . .
20 whatever is reasonable or appropriate to protect Lender’s interest in
the Property and rights . . . including . . . securing and/or repairing
the Property. [. . .] Securing the Property includes . . . entering the

21 ¹ The Ninth Circuit provides that “[plaintiffs] should be given an opportunity through
22 discovery to identify [] unknown defendants” “in circumstances . . . ‘where the identity of the
23 alleged defendant[] [is] not [] known prior to the filing of a complaint.’” *Wakefield v. Thompson*,
24 177 F.3d 1160, 1163 (9th Cir. 1999) (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.
25 1980)) (modifications in the original). Plaintiff is warned, however, that such defendants will be
26 dismissed where “it is clear that discovery would not uncover the identities, or that the complaint
27 would be dismissed on other grounds.” *Id.* (quoting *Gillespie*, 629 F.2d at 642). Plaintiff is
28 further warned that Federal Rule of Civil Procedure 4(m), which states that the court must dismiss
defendants who have not been served within 120 days after the filing of the complaint unless
plaintiff shows good cause, is applicable to doe defendants. *See Glass v. Fields*, No. 1:09-cv-
00098-OWW-SMS PC, 2011 U.S. Dist. LEXIS 97604 (E.D. Cal. Aug. 31, 2011); *Hard Drive
Prods. v. Does*, No. C 11-01567 LB, 2011 U.S. Dist. LEXIS 109837, at *2-4 (N.D. Cal. Sep. 27,
2011).

1 Property to make repairs, change locks, replace or board up doors
and windows

2 (*Id.* at 12.)

3 On August 17, 2005, Mr. Ash died intestate, survived by his wife Mrs. Ash and
4 son Bobby Ash. (ECF 75 ¶¶ 2-3.) Mrs. Ash was appointed as the administrator of Mr. Ash's
5 estate of which the Property became part. (*Id.* ¶ 2.) There is no evidence to indicate that any of
6 the plaintiffs ever owned the Property in their individual capacities. In 2005, after Mr. Ash's
7 death, Mrs. Ash stopped making the monthly payments for the Property. (ECF 70-5, Ex. C at
8 18:15-19.) However, the loan was brought current once in 2006. (ECF 75 ¶¶ 6, 9.)

9 In April 2007, defendant sent notice of default and election of sale to P.O Box 378
10 in Newcastle, California and recorded the notice of default in Nevada County. (*Id.* ¶ 21.) The
11 foreclosure date was postponed, however, as the parties began negotiations regarding a possible
12 loan modification in November 2007. (*Id.* ¶¶ 9, 13, 21.) The loan modification documents, sent
13 by the Home Retention Department, required Mrs. Ash to sign, notarize, and send them back with
14 the requested funds. (*Id.* ¶ 13.) The requested amount was \$4,000.00. (*Id.*; ECF 69-8, Ex. I at
15 52-53.) Defendant did not receive the documents or the requested amount. (ECF 75 ¶ 13.) On
16 April 5, 2008, defendant closed Mrs. Ash's file for noncompliance. (*Id.* ¶ 17.) On April 26,
17 2008, an employee of defendant's left a phone message for Mrs. Ash. (*Id.* ¶ 18.) Eventually, on
18 May 2, 2008, the Property was sold to the Bank of New York, Mellon, at a public auction. (*Id.* ¶
19 24.)

20 After the foreclosure sale, on May 12, 2008, defendant ordered a lock change to be
21 conducted by a subcontractor. (*Id.* ¶ 31.) Defendant does not dispute that the Property was fully
22 furnished and had clothes and other items in it when defendant's subcontractor entered the
23 Property. (*Id.* ¶ 30.) In dealing with personal property left in a foreclosed property, defendant's
24 procedure, effected by a subcontractor, was to post an eighteen-day notice on the door of the
25 foreclosed property and then send the same notice via certified and regular mail to the property
26 address. (*Id.* ¶ 32.) The subcontractor would also note on top of the mail "[p]lease forward, if
27 forward address is available." (*Id.*)

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1 On June 20, 2008, after the eighteen-day notice period ended, defendant requested
2 that one of its vendors, Central Valley Mortgage, “trash out” the personal property. (*Id.* ¶¶ 34-
3 35.) The vendor, in turn, contracted with its subcontractor to do the work, and the subcontractor
4 partially “trashed out” the personal property on June 20 or 21. (*Id.* ¶ 35.)

5 On January 5, 2009, Mrs. Ash sent an email to defendant’s Home Retention
6 Department complaining about the lock change and the disposal of some of her personal property.
7 (*Id.* ¶¶ 38, 39.) Approximately two weeks later, on January 20, 2009, defendant’s subcontractor
8 trashed out the remaining personal property in the house. (*Id.* ¶ 36.) Defendant kept the records
9 of sale and property preservation in a system called “Equator,” which was not accessible to the
10 Home Retention Department, which had dealt with Mrs. Ash’s request for workout assistance.
11 (*Id.* ¶ 40.)

12 Following the May 2008 foreclosure sale, the parties continued to engage in
13 negotiations. (*Id.* ¶ 41.) In March 2009, defendant rescinded the foreclosure sale. (*Id.*) As part
14 of post-foreclosure negotiations, defendant offered Mrs. Ash workout agreements, in the form of
15 special forbearances. (*Id.* ¶ 42.) Defendant, however, did not receive any payments as required
16 by the special forbearance agreements and received only one signed copy of an agreement. (*Id.*
17 ¶ 43.) Because plaintiffs did not comply with the conditions of the special forbearance
18 agreements, defendant again referred the property to be foreclosed. (*Id.* ¶ 44.)

19 The parties do not dispute that the personal property trashed out of the house
20 included, but was not limited to: the remains of Mr. Ash, Bobby’s deceased father, contained in
21 an urn, Persian rugs, Rolex watches, Bobby’s Junior Olympic Freestyle Skiing medals, videos of
22 Bobby playing football from the ages of six to fourteen, videos of Bobby skiing, and the first half
23 of a demo tape of Bobby skiing during the first ski season following his father’s passing. (*Id.*
24 ¶ 46.)

25 II. STANDARD

26 Summary judgment is appropriate where a court is satisfied “that there is no
27 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
28 FED. R. CIV. P. 56(a). The “threshold inquiry” is whether “there are any genuine factual issues

1 that properly can be resolved only by a finder of fact because they may reasonably be resolved in
2 favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). When the
3 court weighs the evidence presented by the parties, “[t]he evidence of the non-movant is to be
4 believed, and all justifiable inferences are to be drawn in . . . [the] [non-movant’s] favor.” *Id.* at
5 255.

6 The moving party bears the initial burden of demonstrating to the court “that there
7 is an absence of evidence to support the non-moving party’s case.” *Celotex Corp. v. Catrett*,
8 477 U.S. 317, 325 (1986). If the burden of persuasion at trial would be on the non-moving party,
9 the movant may satisfy the initial burden by either (1) introducing affirmative evidence that
10 negates an essential element of the non-moving party’s claim; or (2) showing that the nonmoving
11 party’s evidence is insufficient to establish an essential element of the non-movant’s case. *Id.* at
12 331. When the non-moving party adopts the second option, conclusory statements that the non-
13 moving party lacks any evidence are insufficient to meet the initial burden. *See id.*

14 Once the moving party satisfies this initial burden, the burden then shifts to the
15 non-moving party, who “must establish that there is a genuine issue of material fact”
16 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). A fact is
17 “material” when it might affect the outcome of the suit under the applicable substantive law
18 governing the claim. *Anderson*, 477 U.S. at 248 (“Only disputes over facts that might affect the
19 outcome of the suit under the governing law will properly preclude the entry of summary
20 judgment.”). A factual dispute is “genuine” where the evidence is such that “a reasonable jury
21 could return a verdict for the non-moving party.” *Id.* The non-moving party “must do more than
22 simply show that there is some metaphysical doubt as to the material facts.” *Id.* at 586. Rather,
23 to survive summary judgment, the non-moving party must “make a showing sufficient to
24 establish the existence of [every] element essential to that party’s case, and on which that party
25 will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

26 In carrying their burdens, both parties must “cit[e] to particular parts of materials
27 in the record . . . ; or show [] that the materials cited do not establish the absence or presence of a
28 genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”

1 FED. R. CIV. P. 56(c)(1). Additionally, in resolving the merits of a party's motion for summary
2 judgment, the court's role is not to evaluate the evidence and decide the truth of the matter, but to
3 determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. Thus, for
4 instance, competent testimony by a single declarant may defeat summary judgment though
5 opposed by many other declarants. *United States v. 1 Parcel of Real Prop., Lot 4, Block 5 of*
6 *Eaton Acres*, 904 F.2d 487, 491-92 (9th Cir. 1990). Affidavits and declarations may be used to
7 support a motion, but summary judgment may be granted only "if the movant shows that there is
8 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
9 law." FED. R. CIV. P. 56(a).

10 III. DISCUSSION

11 In support of its motion for summary judgment, defendant raises the following
12 arguments: (1) plaintiffs' trespass claim cannot stand because plaintiffs have no evidence of
13 defendant's unlawful entry; (2) plaintiffs' conversion claim cannot stand because there is
14 evidence of plaintiffs' abandonment; (3) plaintiffs' negligence and negligent infliction of
15 emotional distress claims ("NIED") cannot stand because there is no evidence that defendant
16 owed them a duty; (4) plaintiffs' intentional infliction of emotional distress ("IIED") claim cannot
17 stand because there is no evidence of outrageous conduct; (5) plaintiffs' invasion of privacy claim
18 cannot stand because there is no evidence of defendant's intrusion or disclosure; (6) "there is no
19 evidence of any contract formed between the [p]arties"; (7) unjust enrichment is not recognized
20 as a separate claim under California law; (8) plaintiffs' fraud claim cannot stand because there is
21 no evidence that defendant made "false statements or that [p]laintiffs justifiably relied on any
22 representations . . ."; and (9) plaintiffs have no evidence to support a violation of California
23 Business and Professions Code section 17200. (ECF 69 at 1.) The court will address these
24 arguments in turn. As a federal court sitting in diversity, the court applies the substantive law of
25 California. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Also, as a preliminary matter,
26 the court notes the parties do not dispute that Bobby Ash was a minor at the time of defendant's
27 alleged wrongful conduct and "any dealings with [defendant] were through his mother." (Pls.'
28 Resp. Def.'s Statement Undisputed Facts ¶ 50, ECF 70.)

1 A. Trespass

2 Defendant argues plaintiffs’ “trespass claim fails for two independent reasons
3” (ECF 69-1 at 10.) First, plaintiffs “have no evidence showing a right to ownership or
4 possession” (*Id.* at 11.) Defendant reasons because plaintiffs have never owned the
5 Property, they cannot establish ownership interest in the Property. (*Id.*) Defendant argues
6 plaintiffs cannot establish possessory interest in the Property because there is no evidence
7 plaintiffs had a right to possession: plaintiffs did not reside at the Property, it took plaintiffs eight
8 months to discover “that anything was amiss” with the Property, and Mrs. Ash testified she did
9 not know “if she would be able to keep the Property.” (*Id.*) Second, defendants argue plaintiffs’
10 trespass claim cannot stand because plaintiffs have no evidence that defendant’s entry was
11 unauthorized, “whether or not the foreclosure was valid.” (*Id.*) Defendant argues it had the right
12 to enter the Property under the terms of the deed of trust when Mr. Ash’s estate defaulted on the
13 payments. (*Id.*)

14 Plaintiffs respond ownership interest in a property is not necessary to state a claim
15 for trespass. (ECF 71 at 7.) As to possession, plaintiffs argue, they had “actual possession of . . .
16 [the property]” at the time of the first alleged unauthorized entry in May 2008. (*Id.* at 8.)
17 Moreover, plaintiffs reason defendant’s entry was unauthorized, even if the foreclosure was
18 lawful, because defendant “forcibly entered the Property” and, “without any judicial process” or
19 “prior notice to [p]laintiffs,” “changed the locks in May 2008.” (*Id.* at 9.) As a result of this
20 conduct, plaintiffs argue they have suffered damages in the form of “personal property loss and
21 emotional distress” (*Id.* at 10.)

22 Trespass is the unauthorized or wrongful entry or intrusion onto real property of
23 another that interferes with that person’s right to exclusive possession of the real property. *Civic*
24 *W. Corp. v. Zila Indus., Inc.*, 66 Cal. App. 3d 1, 17 (1977). “The cause of action for trespass
25 affords protection for a possessory, not necessarily an ownership interest.” *Allen v. McMillion*,
26 82 Cal. App. 3d 211, 218 (1978). Indeed, a plaintiff in actual possession does not need to have
27 legal rights in the property to support a trespass claim. *Spinks v. Equity Residential Briarwood*
28 *Apartments*, 171 Cal. App. 4th 1004, 1042 (2009). The fact that a defendant may have title or the

1 right to possession of the property is no defense to a cause of action for trespass by one in
2 peaceable though wrongful possession of real property. *Id.* at 1042-43.

3 Although trespass is an intentional tort, the only intent required is the intent to be
4 present on the real property where trespass occurred. *Meyer v. Pac. Employers Ins. Co.*, 233 Cal.
5 App. 2d 321, 326 (1965). A plaintiff need not show that a defendant intended to cause harm. *Id.*
6 Finally, a plaintiff must prove causation and harm, and in the absence of actual damages, a
7 plaintiff may recover nominal damages. *Staples v. Hoefke*, 189 Cal. App. 3d 1397, 1406 (1987).

8 A claim for trespass may not stand when the entry is consensual, unless the entrant
9 exceeds the scope of consent. *Civic W. Corp.*, 66 Cal. App. 3d at 16-17. An agreement between
10 parties may expressly or impliedly allow entry under certain circumstances, thus affording a
11 defense to trespass. *See Williams v. Gen. Elec. Credit Corp.*, 159 Cal. App. 2d 527, 532 (1958)
12 (finding implied permission to enter the plaintiff's home from the language of the conditional
13 sales agreement).

14 Here, it is undisputed that plaintiffs did not have legal title to the Property. (ECF
15 70 ¶ 4.) As to possession, the court finds there is a genuine dispute whether plaintiffs were in
16 possession of the Property; although defendant states plaintiffs "did not reside in the Property,"
17 plaintiffs aver they did reside in the Property on a part-time basis. (*Id.* ¶ 3.)

18 However, plaintiffs cannot show defendant's entry was unlawful, because they
19 cannot meet the lack of consent element for a trespass claim. *See Civic W. Corp.*, 66 Cal. App. 3d
20 at 16-17. Section nine of the deed of trust, as noted above, allowed defendant to do . . . whatever
21 is reasonable or appropriate to protect Lender's interest . . . including . . . securing and/or
22 repairing the Property," if Mr. Ash (or his estate) failed to abide by the terms of the loan.
23 (Haworth Decl., Ex. A at 12, ECF 69-10.) The deed of trust specifically provided: "[s]ecuring
24 the Property includes . . . entering the Property to make repairs, change locks, replace or board up
25 doors and windows . . ." (*Id.*) It is undisputed that after Mr. Ash's death, Mrs. Ash stopped
26 making payments on the mortgage (ECF 9 ¶ 13; ECF 70 ¶ 5), thus violating the first covenant
27 under the deed of trust (*see* ECF 69-10 at 8). Defendant thus was entitled to exercise its right to
28 secure the Property as provided by the deed of trust. (*See id.* at 12.) Plaintiffs do not provide

1 sufficient evidence to raise a material dispute as to defendant's authority under the deed of trust.
2 The court GRANTS defendant's motion for summary judgment as to plaintiffs' claim for
3 trespass.

4 B. Conversion

5 Defendant argues plaintiffs' claim for conversion fails for two reasons. First,
6 plaintiffs have not offered evidence to prove ownership or right to possession of the personal
7 property located in the house. (ECF 69-1 at 12-13.) Second, even assuming plaintiffs can
8 demonstrate ownership or possessory rights, "the undisputed evidence of their actions after
9 default and after receiving notice that the home would be foreclosed upon show that [p]laintiffs
10 abandoned the property." (*Id.* at 13.) To support its abandonment argument, defendant argues
11 plaintiffs were aware of the foreclosure and did nothing for six months to regain the personal
12 property they now claim was converted. (*Id.*)

13 As to defendant's first argument, plaintiffs respond their testimony establishes they
14 owned most if not all of the personal property at issue. (ECF 71 at 12.) As to defendant's
15 abandonment argument, plaintiffs say, "[t]he only reason [p]laintiffs did not remove their
16 personal property . . . is because they were under the reasonable belief that the Property would not
17 be foreclosed" (*Id.* at 13.) Plaintiffs argue, "[a]t a minimum, the facts of this case establish
18 a material issue as to whether [p]laintiffs intended to abandon their personal property." (*Id.*)

19 Conversion is defined as "the wrongful exercise of dominion over the [personal]
20 property of another." *L.A. Fed. Credit Union v. Madatyan*, 209 Cal. App. 4th 1383, 1387 (2012)
21 (quoting *Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066 (1998)). To establish a conversion
22 claim, a plaintiff needs to show the following: (1) ownership or right to possession of personal
23 property at the time of the conversion; (2) a defendant's exercise of dominion over a plaintiff's
24 personal property by a wrongful act; (3) lack of consent; and (4) causation and harm. *Id.* As in
25 trespass, wrongful intent is not required; the only intent required is the intent to exercise
26 dominion. *See id.* ("Conversion is a strict liability tort."). Similarly, a plaintiff need not have
27 legal title to be able to sue for conversion; possession or right to immediate possession alone may

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1 be sufficient. *Spates v. Dameron Hosp. Assn.*, 114 Cal. App. 4th 208, 222 (2003) (holding next
2 of kin have possessory rights in the remains of a deceased's body).

3 One way to establish lack of possessory or ownership rights is to show a plaintiff's
4 intent to abandon those rights. *Ananda Church of Self-Realization v. Mass. Bay Ins. Co.*, 95 Cal.
5 App. 4th 1273, 1282 (2002) (upholding an abandonment defense to a conversion claim and
6 holding an owner abandons key incidents of ownership by placing personal property in the
7 outdoor trash). Abandonment is present when a person relinquishes all title, possession, or claim
8 to personal property. *CRS Recovery, Inc. v. Laxton*, 600 F.3d 1138, 1146 (9th Cir. 2010) ("A
9 thing is abandoned when the owner throws it away, or leaves it without custody, because [the
10 owner] no longer wishes to account it as his [or her] property." (quoting *Ananda Church of Self-*
11 *Realization*, 95 Cal. App. 4th at 1282)).

12 Defendant's argument that plaintiffs did not own the personal property at issue
13 unavailing because defendant cannot meet its initial burden of demonstrating the absence of
14 evidence to support plaintiffs' right to possession or ownership in the personal property. *See*
15 *Celotex Corp.*, 477 U.S. at 331 (holding conclusory statements that the non-moving party lacks
16 any evidence are insufficient to meet the initial burden). Bobby Ash in his deposition testified he
17 had "[s]kis, clothes, TV, video games . . . , a Rolex watch and golf clubs at the Property. (ECF
18 70-6 at 13:13-21, 34-35.) As to Mrs. Ash's possessory rights, the photographs provided by
19 plaintiffs show the Property furnished with various personal items. (ECF 70-3; ECF 70-4.)
20 Defendant has not met its initial burden of showing no genuine dispute as to plaintiffs' ownership
21 or possessory rights in the personal property.

22 As to defendant's abandonment argument, the court finds there is a genuine
23 dispute as to whether plaintiffs intended to abandon the personal property. Defendant argues
24 plaintiffs' intent to abandon can be inferred because: "Mrs. Ash left the personal property in a
25 house that she knew was in imminent danger of being foreclosed," and even when she learned the
26 house had been sold to a third party, she still did not do anything to retrieve the property for six
27 months. (ECF 69-1 at 13.) Plaintiffs respond there is no evidence to establish plaintiffs' intent to
28 abandon. (ECF 71 at 11-14.)

1 It is undisputed that a foreclosure auction took place on May 2, 2008. (ECF 70
2 ¶ 24.) It is also undisputed that Mrs. Ash spoke with defendant’s representatives twice in March
3 2008. (ECF 70 ¶ 16.) At the same time, the record shows there were various emails exchanged
4 between plaintiffs and defendant’s representatives even after the foreclosure, in which they
5 discuss the modification process and rescission of the foreclosure. (ECF 69-7 at 28-49.) Thus, it
6 is not clear plaintiffs knew the foreclosure was final and voluntarily relinquished any rights they
7 had in their property, or whether plaintiffs thought they could still obtain some relief, and so
8 decided to leave their personal property in the house until they received a definite answer from
9 defendant. Because plaintiffs raise contested issues of material fact as to plaintiffs’ intent to
10 abandon, the court DENIES defendant’s motion for summary judgment as to plaintiffs’
11 conversion claim. *See CRS Recovery, Inc.*, 600 F.3d at 1146 (summary judgment may be
12 inappropriate where facts suggest a party’s intent to abandon are not clear from evidence).

13 C. Negligence

14 Plaintiffs appear to base their negligence claim on defendant’s alleged improper
15 removal of personal property and not on the allegations regarding loan modification negotiations.
16 (ECF 71 at 14-18.) Defendant argues “[a]s to the removal of the personal property, [defendant’s]
17 vendor provided notice of the removal of the personal property pursuant to its normal practices
18 and consistent with California Law.” (ECF 69-1 at 17.)

19 Plaintiffs respond, by relying on the negligence per se doctrine, that defendant
20 owed a duty of care to plaintiffs as prescribed in sections 1983 and 1984 of the California Civil
21 Code. (ECF 71 at 15.) Specifically, plaintiffs argue defendant did not comply with the
22 requirements of section 1983 and 1984 of California Civil Code. (*Id.*)

23 To establish a negligence claim, a plaintiff must show: (1) a duty of care on the
24 defendant’s part; (2) the defendant’s breach of that duty of care; (3) causation; and (4) harm.
25 *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1339 (1998). Because the existence of a
26 duty is a question of law to be decided by a judge, such a claim may be well suited for summary
27 judgment resolution. *Regents of Univ. of Cal. v. Superior Court*, 183 Cal. App. 4th 755, 758
28 (2010).

1 In determining whether a duty exists, the court balances a number of factors often
2 referred to as the *Rowland* factors. See *Melton v. Boustred*, 183 Cal. App. 4th 521, 530 (2010).
3 Major factors include: (1) foreseeability of harm; (2) “the closeness of the connection between
4 the defendant’s conduct and the injury suffered”; (3) “the moral blame attached to the defendant’s
5 conduct”; (4) “the policy of preventing future harm”; (5) “the extent of the burden to the
6 defendant and consequences to the community of imposing a duty to exercise care with resulting
7 liability for breach”; and (6) the availability and cost of insurance against the risk. *Id.* (quoting
8 *Rowland v. Christian*, 69 Cal. 2d 108, 112-13 (1968)).

9 Additionally, a violation of a statute, regulation, or ordinance establishing the
10 standard of appropriate conduct may constitute negligence per se when the violation is the cause
11 of harm. *Satterlee v. Orange Glenn Sch. Dist. of San Diego Cnty.*, 29 Cal. 2d 581, 588 (1947),
12 *disapproved of on other grounds by Alarid v. Vanier*, 50 Cal. 2d 617 (1958). Under this doctrine,
13 statutes “may be borrowed in the negligence context for one of two purposes: (1) to establish a
14 duty of care, or (2) to establish a standard of care.” *Elsner v. Uveges*, 34 Cal. 4th 915, 927 n.8
15 (2004). Where the negligence per se doctrine applies, it creates a rebuttable presumption of
16 negligence affecting the burden of proof. CAL. EVID. CODE § 669. This presumption arises only
17 if the following four requirements are met: “(1) [defendant] violated a statute, ordinance, or
18 regulation of a public entity; (2) [t]he violation proximately caused . . . injury to . . . property; (3)
19 [t]he . . . injury resulted from an occurrence of the nature which the statute, ordinance, or
20 regulation was designed to prevent; (4) [t]he person suffering . . . the injury . . . was one of the
21 class of persons for whose protection the statute, ordinance, or regulation was adopted.” *Id.* The
22 first two elements are questions of fact to be determined by a trier of fact, but the last two
23 elements are questions of law to be determined by the court. *Hoff v. Vacaville Unified Sch. Dist.*,
24 19 Cal. 4th 925, 938 (1998).

25 Here, from the parties’ briefs and arguments at hearing, it is evident that there is no
26 dispute that defendant provided notice about the personal property found in the house. (ECF 69-1
27 at 6 n.7.) Defendant states it “looked to the regulations governing a landlord’s actions” under
28 California Civil Code section 1983 to determine what to do with the personal property. Similarly,

1 plaintiffs argue defendant owed them obligations as articulated in California Civil Code sections
2 1983 and 1984. (ECF 71 at 15 n.7.)

3 Instead, the parties dispute whether defendant’s notice was adequate, which is a
4 question of fact.² Because the record is replete with evidence raising a genuine dispute as to the
5 adequacy of the notice (ECF 70 ¶¶ 32-36), the court DENIES defendant’s request for summary
6 judgment as to plaintiffs’ negligence claim.

7 D. Negligent Infliction of Emotional Distress (NIED)

8 Defendant first argues plaintiffs “have no evidence of any physical harm that
9 resulted directly from the foreclosure or property preservation” as required for a NIED claim.
10 (ECF 69-1 at 18.) Even if physical injury is not required, defendant argues, plaintiffs have not
11 “put forward any real evidence of emotional distress” (*Id.* at 19.) Plaintiffs counter their
12 personal testimony regarding their emotional distress is sufficient evidence to overcome a motion
13 for summary judgment. (ECF 71 at 21.) The court need not address the duty element as
14 explained above.

15 Negligent infliction of emotional distress cases fall into two categories:
16 “bystander” cases in which the plaintiff is not physically impacted or injured, but instead
17 witnesses a third person being injured; and “direct victim” cases where the plaintiff’s claim of
18 emotional distress is based on violation of a duty owed to the plaintiff directly. The present case,
19 plaintiffs claim, is in the “direct victim” category because “they are seeking recovery for
20 emotional distress caused by injuries the [p]laintiffs themselves sustained.” (ECF 71 at 18 n.16.)
21 Accordingly, the court addresses the requirements for a “direct victim” claim only.

22 The negligent causing of emotional distress is not an independent tort, but is a
23 species of negligence. *See Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 48 Cal. 3d 583,

24
25 ² Because plaintiffs conceded at hearing that the complaint has no allegations that a
26 landlord-tenant relationship was formed between the parties, the court does not address plaintiffs’
27 arguments relating to a landlord-tenant relationship on summary judgment. *See Stations W., LLC*
28 *v. Pinnacle Bank of Or.*, 338 F. App’x 658, 660 (9th Cir. 2009) (plaintiffs cannot use opposition
to summary judgment as a back door way to introduce new claims); *see also Gilmour v. Gates,*
McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) (“A plaintiff may not amend her
complaint through argument in a brief opposing summary judgment.”).

1 588 (1989). Accordingly, the traditional elements for negligence apply with equal force. *Id.*
2 In “direct victim” cases, California allows recovery even in the absence of impact and physical
3 injury. *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 919 (1980) (“emotional injury may be
4 fully as severe and debilitating as physical harm, and is no less deserving of redress,” therefore,
5 “the refusal to recognize a cause of action for negligently inflicted injury in the absence of some
6 physical consequence is . . . an anachronism”). However, to recover for emotional distress arising
7 solely out of property damage, there must be a showing of some preexisting relationship or
8 intentional tort. *See Cooper v. Superior Court*, 153 Cal. App. 3d 1008, 1011-13 (1984); *see also*
9 *Michell v. Key*, 21 F.3d 1114 (9th Cir. 1994) (recognizing *Cooper* as the controlling authority in
10 NIED claims resulting from property damage). The preexisting relationship must involve an
11 aspect of trust and confidence that gives rise to a duty of care. *Sher v. Leiderman*, 181 Cal. App.
12 3d 867, 884 (1986). Examples of such relationships include those between an insurer and an
13 insured and between a bailor and a bailee. *Patel v. United States*, 806 F. Supp. 873, 879 (N.D.
14 Cal. 1992).

15 Here, plaintiffs aver they have suffered emotional distress because “[d]efendants,
16 its agents, contractors and/or employees entered the [p]laintiffs’ property and house without
17 permission or authorization” (ECF 9 ¶ 55), and “‘trashed out’ an abundance of personal property
18 belonging to [p]laintiffs” (ECF 71 at 20). Plaintiffs have not, however, presented evidence of a
19 preexisting relationship between the parties as required. Accordingly, California law does not
20 permit the type of damages they seek based on this claim. The court GRANTS defendant’s
21 motion to summary judgment as to the NIED claim.

22 E. Intentional Infliction of Emotional Distress (IIED)

23 Defendant argues plaintiffs’ claim for IIED “fails for three independent reasons.”
24 (ECF 69-1 at 19.) First, defendant argues its conduct “in foreclosing and disposing of abandoned
25 personal property after giving notice does not meet the extreme and outrageous standard ” as
26 required. (*Id.* at 20.) Second, defendant’s conduct was not directed at plaintiffs, rather it “acted
27 in a routine manner when preparing a foreclosed upon property for sale” (*Id.*) Finally,

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1 defendant argues plaintiffs' IIED claim fails because there is no evidence of extreme distress.

2 (*Id.*)

3 Plaintiffs respond that "[t]he circumstances of the present case are highly unusual
4 and go far beyond the typical foreclosure scenario" because defendant completely disposed of "all
5 possessions in a fully furnished home" "without [plaintiffs'] being provided an opportunity to
6 retrieve such property." (ECF 71 at 22-23.)

7 To prevail on an IIED claim, a plaintiff must prove: "(1) extreme and outrageous
8 conduct by the defendant with the intention of causing, or reckless disregard of the probability of
9 causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and
10 (3) actual and proximate causation of the emotional distress by the defendant's outrageous
11 conduct." *Avina v. United States*, 681 F.3d 1127, 1131 (9th Cir. 2012) (applying California law).

12 As to the first element, the conduct must be so extreme, measured by an objective
13 standard, as to exceed all bounds of decency tolerated by a civilized society. *Hughes v. Pair*,
14 46 Cal. 4th 1035, 1051 (2009). Moreover, a defendant's conduct must be with the intent to inflict
15 injury or must be engaged in with the realization that an injury may result. *Id.* That is, the
16 outrageous conduct must be "directed at the plaintiff, or occur in the presence of a plaintiff of
17 whom the defendant is aware." *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991). This
18 is what distinguishes IIED from NIED. *Id.* at 904. With respect to the second element, the
19 California Supreme Court has set a "high bar." *Hughes*, 46 Cal. 4th at 1051. "Severe emotional
20 distress means emotional distress of such substantial quality or enduring quality that no
21 reasonable [person] in civilized society should be expected to endure it." *Id.* (internal quotations
22 omitted).

23 Here, plaintiffs do not allege that defendant's conduct was "primarily directed" at
24 them with the intent of causing emotional distress as required under California law. *Christensen*,
25 54 Cal. 3d at 903. Moreover, nothing in the record shows that plaintiffs were present at the time
26 of the foreclosure or when defendant "trashed out" their personal property, thus, recklessness
27 cannot be a ground for liability. The court GRANTS defendant's motion for summary judgment
28 on the IIED claim.

1 F. Invasion of Privacy

2 Plaintiffs' claim for invasion of privacy is based on an intrusion theory only. (ECF
3 71 at 24 n.18.)

4 Defendants argue this claim fails for three reasons. First, plaintiffs did not have a
5 reasonable expectation of privacy because "they neither owned nor resided in the Property, and
6 they had notice that it was sold to a third party through a foreclosure." (ECF 69-1 at 22.) Second,
7 defendants argue, the intrusion was not offensive because "the Property appeared abandoned."
8 (*Id.*) Finally, plaintiffs' claim fails, defendant reasons, because Mr. Ash, by signing the deed
9 trust, consented to defendant's entry. (*Id.*)

10 As to defendant's first argument, plaintiffs respond, "[p]laintiffs resided in the
11 property part time," and "maintained an abundance of personal property in the home" (ECF
12 71 at 24.) As to defendant's second argument, plaintiffs respond that the property was not
13 abandoned because "it was fully furnished, in neat order, the interior was in excellent condition,
14 and it contained many personal and unique items" (*Id.*) Finally, as to defendant's last
15 argument, plaintiffs respond, "there is a material dispute as to whether Mrs. Ash was relying on
16 the belief that BofA was not foreclosing on the Property and that she certainly would not have
17 consented . . . had she known otherwise." (*Id.* at 25.)

18 A plaintiff alleging a privacy violation based on the common law tort of intrusion
19 must establish two elements: (1) the defendant's intentional intrusion into a place "as to which the
20 plaintiff has a reasonable expectation of privacy" and (2) "the intrusion must occur in a manner
21 highly offensive to a reasonable person." *Hernandez v. Hillside, Inc.*, 47 Cal. 4th 272, 286
22 (2009). As to the first element of the common law tort, a plaintiff must show "the defendant
23 penetrated some zone of physical or sensory privacy" *Shulman v. Grp. W Prods., Inc.*, 18
24 Cal. 4th 200, 232 (1998). The reasonableness of the privacy expectation is determined by an
25 objective standard. *Id.* The reasonableness of privacy expectations may be linked to such factors
26 as: (a) "the identity of the intruder"; (b) "the extent to which other persons had access to the
27 subject place, and could see or hear the plaintiff"; and (c) "the means by which the intrusion
28 occurred." *Hernandez*, 47 Cal. 4th 272 at 287.

1 As to the second element, the determination of offensiveness depends on a
2 case-by-case analysis, and each case must be decided on its own facts. Relevant factors include:
3 (a) “the degree and setting of the intrusion” and (b) “the intruder’s motives and objectives.” *Id.*
4 Finally, voluntary consent is a defense to a common law invasion of privacy claim. *Hill v. Nat’l*
5 *Collegiate Athletic Ass’n.*, 7 Cal. 4th 1, 26 (1994).

6 As to defendant’s first argument that plaintiffs did not have ownership or
7 possessory interest, as explained above with respect to trespass, there is a genuine dispute as to
8 whether plaintiffs had a possessory interest in the Property. Moreover, plaintiffs have presented
9 sufficient evidence to establish a genuine dispute as to whether plaintiffs had a reasonable
10 expectation of privacy. A reasonable jury could find plaintiffs had a reasonable expectation of
11 privacy in the home while Mrs. Ash was seeking to assume the loan to prevent it from being
12 foreclosed. As discussed with respect to conversion, there is a genuine dispute as to plaintiffs’
13 intent to abandon. Finally, as to consent, the court finds defendant has not met its burden.
14 *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (“If the movant bears the burden of
15 proof on an issue, . . . because . . . as a defendant he is asserting an affirmative defense,
16 [defendant] must establish beyond peradventure *all* of the essential elements of . . . defense to
17 warrant judgment in [defendant’s] favor.” (emphasis in original)); *see also S. Cal. Gas Co. v. City*
18 *of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). Accordingly, the court DENIES defendant’s
19 request for summary judgment with respect to this claim.

20 G. Breach of Contract

21 At the hearing, plaintiffs conceded they could not demonstrate a breach of contract
22 claim. Therefore, the court, without further discussion, GRANTS defendant’s motion for
23 summary judgment as to Mrs. Ash’s claim for breach of contract.

24 H. Breach of the Implied Covenant of Good Faith and Fair Dealing

25 For the same reasons set forth above in the breach of contract section, the court
26 GRANTS defendant’s motion for summary judgment as to plaintiffs’ claim for breach of the
27 implied covenant of good faith and fair dealing.

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1 I. Unjust Enrichment

2 Also for the reasons set forth above in discussing breach of contract, the court
3 GRANTS defendant's motion as to plaintiffs' claim for unjust enrichment to the extent it is pled
4 as an independent cause of action.

5 J. Fraud

6 Plaintiffs' allegations of fraud are alleged by Mrs. Ash only. (ECF 9 ¶¶ 87-92.)
7 Defendant argues the fraud claim cannot succeed because "they cannot provide evidence that
8 [defendant] made a false representation regarding: (1) the loan modifications or the forbearance;
9 or (2) the status of the estate's account." (ECF 69-1 at 26.) "[Mrs. Ash] could not have
10 justifiably relied on [defendant] not to foreclose," defendant argues, because Mrs. Ash "knew she
11 had failed to meet the modification conditions, and that [defendant] had closed her file for non-
12 compliance." (*Id.* at 27.)

13 Plaintiffs respond there are genuine disputes as to defendant's alleged
14 misrepresentation because defendant did not tell Mrs. Ash about "the impending foreclosure sale
15 in May 2008 and left her believing that she was still in the workout process." (ECF 71 at 25.)
16 Even assuming there were disclosures in the documents, plaintiffs argue, defendant led Mrs. Ash
17 to believe "that it would not foreclose on the property without first notifying her that it was so
18 doing." (*Id.*) As a result of defendant's alleged fraud, plaintiffs say, "the resulting damage to
19 [them] is clear and undeniable in the loss of their valuable, and in some instances priceless,
20 personal property." (*Id.* at 26.)

21 In California, a claim of fraud has five elements: (1) the defendant made a false
22 representation as to a past or existing material fact; (2) the defendant knew the representation was
23 false at the time it was made; (3) in making the representation, the defendant intended to deceive
24 the plaintiff; (4) the plaintiff justifiably and reasonably relied on the representation; and (5) the
25 plaintiff suffered resulting damages. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996).

26 The first element may consist of: (a) a knowing false representation;
27 (b) concealment or nondisclosure of facts; or (c) a promise made with no intent to perform. CAL.
28 CIV. CODE § 1710. The second element is the requirement of showing scienter: it must be shown

1 that defendant knew the statement was false or acted with reckless disregard of its truth or falsity.
2 *Lazar*, 12 Cal. 4th at 638. To satisfy the third element, a plaintiff must show defendant intended
3 to induce reliance on the false information. *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173-
4 74 (2003). A plaintiff can meet the fourth element, reliance, by proving plaintiff actually and
5 justifiably relied on defendant's misrepresentation. *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1091
6 (1993).

7 The court finds plaintiffs have not met their burden of showing a genuine dispute
8 as to their fraud claim. As to defendant's alleged misrepresentations during the loan modification
9 negotiations, defendant cites to an email dated November 1, 2007, where defendant notifies
10 Mrs. Ash that "[w]hen loans are reviewed for work out, and the loan is in foreclosure, the
11 foreclosure sale date is not cancelled but extended in order for the loan to be reviewed." (ECF
12 69-7, Ex. I at 4.) Defendant also cites to Mrs. Ash's deposition testimony where she states she
13 understood that if she did not comply with the requirements of the loan modification, the
14 foreclosure would continue. (ECF 69-4, Ex. A at 23.) Accordingly, defendant concludes there
15 was no misrepresentation as to foreclosure because Mrs. Ash was on notice that if the
16 modification did not succeed, as it did not, the foreclosure would not be canceled. (ECF 69-1 at
17 27.)

18 Mrs. Ash argues defendant's representatives "led her to believe that [defendant]
19 would not foreclose on the property without first notifying her that it was so doing." (ECF 71 at
20 25.) She does not cite to any evidence in the record to support her argument. FED. R. CIV. P.
21 56(c)(1)(A); *see Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1058 (9th Cir. 2009) ("The party
22 opposing summary judgment must direct [the court's] attention to specific, triable facts, and the
23 reviewing court is not required to comb through the record to find some reason to deny a motion
24 for summary judgment.") (citations and internal quotations omitted); *Hernandez v. Spacelabs*
25 *Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003) ("[The nonmoving party] cannot defeat summary
26 judgment with allegations in the complaint, or with unsupported conjecture or conclusory
27 statements."). Accordingly, because defendant has met its initial burden of showing no genuine
28 dispute as to the first element of a fraud claim, and plaintiffs have not produced specific evidence

1 raising a dispute, the court GRANTS defendant’s motion for summary judgment as to plaintiffs’
2 fraud claim.

3 K. California Business and Professions Code Section 17200

4 Defendant argues plaintiffs’ claim under section 17200 of California Business and
5 Professions Code cannot succeed as a matter of law. (ECF 69-1 at 28.) First, defendant argues
6 “[p]laintiffs have not alleged any violation of law or regulatory provision,” thus, “they cannot
7 proceed under the unlawful prong” (*Id.* at 30.) As to the unfairness prong, defendant
8 argues, “the utility of the foreclosure and removal of the personal property . . . to sell the Property
9 for a better price is greater than any harm [p]laintiffs may have suffered in losing possessions
10 they had neglected for years.” (*Id.*) Moreover, “[p]laintiffs have been unable to tie [defendant’s]
11 behavior to any violation of a statute, regulation or constitutional provision.” (*Id.*) Finally, as to
12 the fraudulent prong, “[p]laintiffs cannot identify a statement by [defendant] that was likely to
13 mislead them” (*Id.*)

14 As to the unlawful prong, plaintiffs allege defendant’s “agents, contractors, and/or
15 employees . . . entered into . . . [p]laintiffs’ home without reasonable justification, trespassed on
16 her property and disposed of . . . [p]laintiffs’ possessions” (ECF 9 ¶ 72.) As to the
17 unfairness prong, plaintiffs respond defendant’s “foreclosure and seizing . . . [p]laintiffs’ home
18 and disposing of all of their possessions in the home while leading Mrs. Ash to believe that she
19 was in the process of negotiating a work-out or a loan modification are unfair acts and practices.”
20 (ECF 71 at 27.) Finally, as to the fraudulent prong, plaintiffs respond “the bait and switch tactics
21 associated with the dual track system constitute fraud under the consumer protection statute as
22 they deceived Mrs. Ash and are the type of conduct likely to deceive the public at large.” (*Id.*)

23 California Business and Professions Code section 17200 prohibits unfair
24 competition, which is defined as prohibiting any “unlawful, unfair or fraudulent business act or
25 practice.” CAL. BUS. & PROF. CODE § 17200. The statute’s language has been construed as
26 prohibiting three distinct types of practices: (1) unlawful acts or practices; (2) unfair acts or
27 practices; and (3) fraudulent acts or practices. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*,
28 20 Cal. 4th 163, 180 (1999). Accordingly, the court will address each prong in turn.

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1. “Unlawful” Business Acts

In determining whether a practice is “unlawful” within the meaning of the statute, courts consult federal, state, local, or common law as a predicate for a section 17200 violation. *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992). Hence, to allege a cause of action under the “unlawful” prong, a plaintiff must show a violation of some independent law. *Id.* (section 17200 “borrows” violations of other laws and treats them as unlawful practices actionable separately under section 17200).

Here, because the court has denied defendant’s motion as to plaintiffs’ claims for conversion, negligence, and invasion of privacy, which are common law claims, the court DENIES defendant’s motion for summary judgment as to plaintiffs’ section 17200 claim to the extent it is based on the unlawful practices prong. *See Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994) (“The ‘unlawful’ practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.”).

2. “Unfair” Business Acts

As to the “unfairness” prong, the proper definition “is currently in flux” among California courts. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007). Before the California Supreme Court’s decision in *Cel-Tech*, courts held that unfair conduct is shown by conduct that “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999). “‘Unfair’ simply means any practice whose harm to the victim outweighs its benefits.” *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994). Essentially, courts applied a balancing test. *Id.*

However, in *Cel-Tech*, the California Supreme Court held that “unfair” means “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” 20 Cal. 4th at 187. The court further

1 required that “any finding of unfairness to competitors under section 17200 be tethered to some
2 legislatively declared policy or proof of some actual or threatened impact on competition.” *Id.* at
3 186-87. Yet the court expressly limited the new test to actions by competitors alleging
4 anticompetitive practices by stating that “[n]othing we say relates to actions by consumers”
5 *Id.* at 187 n.12. Following *Cel-Tech*, “[t]he California courts have not yet determined how to
6 define ‘unfair’ in the *consumer* action context” *Lozano*, 504 F.3d at 736 (emphasis in
7 original). Some courts have applied the *Cel-Tech* test to consumer actions, while others have
8 applied the old balancing test. *Id.* at 735 (balancing test involves balancing harm to consumer
9 against utility of defendant's practice).

10 Here, the court does not address the question of which test to apply because the
11 court finds plaintiffs have not met their burden of directing the court to specific evidentiary facts.
12 Plaintiffs thus have not met their burden of establishing a genuine dispute as to the unfairness
13 prong of their section 17200 claim. *See S. A. Empresa De Viacao Aerea Rio Grandense (Varig*
14 *Airlines) v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982) (holding “a party cannot
15 manufacture a genuine issue of material fact merely by making assertions in its legal
16 memoranda”).

17 3. Fraudulent Acts

18 The third type of conduct proscribed by section 17200 is “fraudulent” business
19 practices. The type of “fraud” contemplated by this section does not refer to common law fraud
20 or deception. “Fraudulent,” as used in the statute, “only requires a showing [that] members of the
21 public are likely to be deceived.” *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th
22 638, 645 (2008) (citing *Saunders*, 27 Cal. App. 4th at 839). The “reasonable person” standard is
23 used in determining whether the public is likely to be deceived. *Aron v. U-Haul Co. of Cal.*,
24 143 Cal. App. 4th 796, 806 (2006).

25 Here, plaintiffs argue “the bait and switch tactics associated with the dual track
26 system constitute fraud under the consumer protection statute as they deceived Mrs. Ash and are
27 the type of conduct likely to deceive the public at large.” (ECF 71 at 27.) For the same reasons

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1 set forth above, the court finds plaintiffs have not met their burden of establishing a genuine
2 dispute as to the fraudulent prong of plaintiffs' section 17200 claim.

3 IV. CONCLUSION

4 For the foregoing reasons, the court orders as follows:

- 5 1. Defendant's motion for summary judgment is GRANTED as to plaintiffs'
6 claims for trespass, negligent infliction of emotional distress, intentional
7 infliction of emotional distress, breach of contract, breach of the implied
8 covenant of good faith and fair dealing, unjust enrichment, and fraud.
- 9 2. Defendant's motion for summary judgment is DENIED as to plaintiffs' claims
10 for conversion, negligence, invasion of privacy, and California Business and
11 Professions Code section 17200 to the extent it is based on the unlawful
12 practices prong.

13 IT IS SO ORDERED.

14 DATED: January 27, 2014.

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18 UNITED STATES DISTRICT JUDGE
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