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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY TYRONE BRANTLEY, SR., ELLEN BRANTLEY,)	Case No. 07-6139 SC
)	
Plaintiffs,)	ORDER RE PLAINTIFFS'
v.)	MOTIONS FOR PARTIAL SUMMARY
)	<u>JUDGMENT</u>
)	
GARRETT BOYD, MODO REALTY, INC.,)	
ROYAL CROWN MORTGAGE, INC.,)	
SERGEI KLYAZMIN, ACADEMY ESCROW,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

Before the Court are two Motions for Partial Summary Judgment filed by Plaintiffs Larry Brantley and Ellen Brantley ("Plaintiffs"). Plaintiffs' first Motion seeks partial summary judgment against Defendant Academy Escrow ("Academy"). ECF No. 159 ("First MSJ"). The Motion is fully briefed. ECF Nos. 177 ("First Opp'n"), 183 ("First Reply"). Plaintiffs' second Motion seeks partial summary judgment against Defendants Modo Realty, Inc. ("Modo Realty"), Royal Crown Mortgage, Inc. ("Royal Crown Mortgage"), and Sergei Klyazmin ("Klyazmin") (collectively, "the Klyazmin Defendants"). ECF No. 169 ("Second MSJ"). This Motion is also fully briefed. ECF Nos. 178 ("Second Opp'n"), 194 ("Second Reply").

Upon consideration of all the papers submitted, the Court concludes that the matter is appropriate for decision without oral

1 argument. For the following reasons, the Court GRANTS IN PART and
2 DENIES IN PART Plaintiffs' Motion for Partial Summary Judgment
3 against Academy, and the Court DENIES Plaintiffs' Motion for
4 Partial Summary Judgment against the Klyazmin Defendants.

5

6 **II. BACKGROUND**

7 The Court has previously detailed the procedural and factual
8 background of this dispute. See ECF No. 129 ("Nov. 19, 2009
9 Order"). This Order will therefore assume familiarity with the
10 background of this case and will provide only a brief summary here.

11 In short, at the urging of Defendant Garrett Boyd ("Boyd"), a
12 friend of Plaintiffs' niece, Plaintiffs took out a loan in the
13 amount of \$180,000 from Praveen Chandra ("Chandra") secured by
14 their real property located at 3120 San Andreas, Union City,
15 California. Nov. 19, 2009 Order at 3. Plaintiffs allege that Boyd
16 promised to pay them \$25,000 if they took out the loan and held the
17 funds in escrow for sixty days so that Boyd could use the escrow
18 account to "show some money on paper" to help him obtain a loan to
19 purchase a \$2.1 million property. ECF No. 125 ("FAC") ¶ 10; Second
20 MSJ at 17.

21 Boyd, representing himself to be Plaintiffs' nephew, contacted
22 Klyazmin, a real estate broker and sole owner of Modo Realty and
23 Royal Crown Mortgage, to request a \$180,000 loan against
24 Plaintiffs' property and a \$2.1 million loan for Boyd's personal
25 use in purchasing another property. Nov. 19, 2009 Order at 2-3;
26 Guillory Decl.¹ Ex. C ("Klyazmin Dep.") at 87:11-88:3. Klyazmin's

27

28 ¹ Dorothy Guillory, attorney for Plaintiffs, filed a declaration,
ECF No. 160, and a supplemental declaration, ECF No. 161, in

1 employee Jessica Skiff ("Skiff") then contacted Chandra and secured
2 his agreement to loan Plaintiffs \$180,000 to be secured by their
3 Union City property. Nov. 19, 2009 Order at 3. Boyd was not a
4 party to the loan. Id.

5 Academy served as the escrow agent for the loan. Academy
6 prepared the Escrow Instructions, which provided that the funds
7 would be disbursed to Plaintiffs at the end of the escrow period.
8 Nov. 19, 2009 Order at 4, 12; Supp. Guillory Decl. Ex. 11 ("Escrow
9 Instructions").² The instructions provided, in block capitals,
10 that "NO NOTICE, DEMAND OR CHANGE OF INSTRUCTIONS SHALL BE OF ANY
11 EFFECT IN THIS ESCROW UNLESS GIVEN IN WRITING BY ALL PARTIES
12 AFFECTED THEREBY." Escrow Instructions at 2; Nov. 19, 2009 Order
13 at 4. Nevertheless, on May 4, 2007, after receiving oral
14 instructions from Boyd, Academy wired the funds in escrow to Boyd's
15 bank account. Nov. 19, 2009 Order at 5.

16 The loan came due on July 1, 2007. Id. at 6. Plaintiffs
17 refused to repay the loan claiming they never received the loan
18 funds. Id. They sued various entities, including Academy and the
19 Klyazmin Defendants, after Chandra attempted to foreclose on their
20 home due to their failure to repay the loan. See FAC. Plaintiffs
21 assert five claims against the Klyazmin Defendants: violations of
22 the Truth in Lending Act ("TILA") and the Real Estate Settlement

23
24 support of Plaintiffs' First MSJ. She also filed a third
25 declaration, ECF Nos. 170-172 ("Third Guillory Decl."), in support
26 of Plaintiffs' Second MSJ, and a fourth declaration, ECF No. 195
27 ("Fourth Guillory Decl."), in support of Plaintiffs' Second Reply.

28 ² Academy objects that the Escrow Instructions, along with all of
Plaintiffs' evidence submitted in support of the First MSJ, is not
properly before the Court because of various defects in the
Guillory Declarations. First Opp'n at 3. These objections are
addressed in section IV.A.1 below.

1 Procedures Act ("RESPA"), breach of fiduciary duty, negligent
2 failure to supervise, and intentional infliction of emotional
3 distress. Id. Plaintiffs assert these same claims -- as well as a
4 claim for conversion -- against Academy. Id.

5 In their first Motion, Plaintiffs seek summary adjudication of
6 their breach of fiduciary duty, conversion, and RESPA claims
7 against Academy. First MSJ at 2. In their second Motion,
8 Plaintiffs seek summary adjudication of their breach of fiduciary
9 duty and negligent supervision claims against the Klyazmin
10 Defendants. Second MSJ at 2.

11
12 **III. LEGAL STANDARD**

13 "The standards and procedures for granting partial
14 summary judgment, also known as summary adjudication, are the
15 same as those for summary judgment." Mora v. Chem-Tronics,
16 Inc., 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998). Entry of
17 summary judgment is proper "if the pleadings, the discovery
18 and disclosure materials on file, and any affidavits show that
19 there is no genuine issue as to any material fact and that the
20 movant is entitled to judgment as a matter of law." Fed. R.
21 Civ. P. 56(c). The movant bears the initial burden of
22 demonstrating the absence of a genuine issue of fact. See
23 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To
24 survive a motion for summary judgment, the responding party
25 must present competent evidence that creates a genuine issue
26 of material fact. See Anderson v. Liberty Lobby, Inc., 477
27 U.S. 242, 248-52 (1986). "The evidence of the nonmovant is to
28

1 be believed, and all justifiable inferences are to be drawn in
2 his favor." Id. at 255.

3

4 **IV. DISCUSSION**

5 **A. Plaintiffs' First Motion for Summary Adjudication**

6 In their first Motion, Plaintiffs seek partial summary
7 judgment against Academy Escrow on their claims for RESPA
8 violations, breach of fiduciary duty, and conversion.³ First
9 MSJ at 2.

10 1. Academy's Evidentiary Objections

11 As a preliminary matter, Academy has raised numerous
12 evidentiary objections in its Opposition. It has also filed a
13 separate document further explicating those objections. ECF
14 No. 177-2. As Civil Local Rule 7-3(b) requires evidentiary
15 objections to a motion to be contained within the opposition
16 brief, the Court only considers Academy's evidentiary
17 objections raised in their Opposition and disregards the
18 separate filing of objections.

19 In its Opposition, Academy argues that all of Plaintiffs'
20 evidence should be excluded on the grounds that Plaintiffs
21 have failed to properly authenticate or establish sufficient
22 foundation for their exhibits. First Opp'n at 3, 10.

23 First, Academy argues that the authenticating
24 declarations filed by Plaintiffs' counsel do not comply with
25 the requirements for such declarations set forth in 28 U.S.C.

26

27 ³ Plaintiffs' Notice of Motion and Re-Notice of Motion stated that
28 they would seek summary judgment on their TILA claim. See ECF Nos.
158, 164. Plaintiffs admit that this was an error and they do not
seek summary judgment on that claim. First Reply at 2.

1 § 1746 because they do not include the language "under the
2 laws of the United States of America." First Opp'n at 9.
3 Contrary to Academy's assertion, 28 U.S.C. § 1746 does not
4 require such language if declarations are executed within the
5 United States. 28 U.S.C. § 1746(2). In the declarations at
6 issue, Plaintiffs' counsel states: "I certify under penalty of
7 perjury under the laws of the State of California that the
8 foregoing is true and correct." Guillory Decl. at 3; Supp.
9 Guillory Decl. at 3. The declarations were executed in
10 Oakland, California. Id. They meet the requirements set
11 forth in 28 U.S.C. § 1746. This objection is OVERRULED.

12 Academy next contends that Plaintiffs' exhibits have not
13 been properly authenticated because Guillory's declarations do
14 not lay proper foundation to establish that the attached
15 exhibits -- deposition excerpts and various exhibits used
16 during depositions -- are what they purport to be. First
17 Opp'n at 10. Academy notes that Guillory's declarations do
18 not attest that the exhibits are "true and correct copies" and
19 do not indicate who excerpted the depositions or how the
20 excerpting process was done. Id.

21 "A deposition or an extract therefrom is authenticated in
22 a motion for summary judgment when it identifies the names of
23 the deponent and the action and includes the reporter's
24 certification that the deposition is a true record of the
25 testimony of the deponent." Orr v. Bank of America NT & SA,
26 285 F.3d 764, 774 (9th Cir. 2002). Each of the deposition
27 excerpts attached to Guillory's declaration meets these
28 requirements. See Guillory Decl. Exs. A-E. Academy's

1 objection is therefore OVERRULED with regard to the deposition
2 excerpts attached as exhibits A-E to the Guillory Declaration.

3 Next, Academy objects to Exhibit F attached to Guillory's
4 Supplemental Declaration, which contains documents used as
5 exhibits at depositions of the witnesses in this case. These
6 documents include a number of email communications, as well as
7 documents from the escrow transaction such as the escrow
8 instructions, deed of trust, note secured by deed of trust,
9 and wire transfer receipts. See Supp. Guillory Decl. Ex. F.
10 Academy contends that these documents have not been properly
11 authenticated. First Opp'n at 10. Most of these documents
12 are not necessary to Plaintiffs' Motion against Academy, and
13 the Court therefore does not address Academy's objections to
14 them.

15 However, one document in Exhibit F -- the Escrow
16 Instructions -- is necessary to Plaintiffs' Motion. The Court
17 OVERRULES Academy's objection that the Escrow Instructions
18 have not been properly authenticated. Federal Rule of
19 Evidence 901(a) provides that authentication requires
20 "evidence sufficient to support a finding that the matter in
21 question is what its proponent claims." Fed. R. Evid. 901(a).
22 Thus, to comply with Rule 901(a), Plaintiffs must provide
23 evidence sufficient to support a finding that the Escrow
24 Instructions attached to Guillory's Supplemental Declaration
25 are an accurate copy of the Escrow Instructions produced by
26 Academy in relation to Plaintiffs' loan. Plaintiffs meet this
27 relatively low burden in two steps. First, Guillory's
28 Supplemental Declaration attests under penalty of perjury that

1 the Escrow Instructions attached to her declaration are the
2 same Escrow Instructions that were introduced as Exhibit 11 at
3 depositions in this case. Supp. Guillory Decl. ¶ 3. Second,
4 in his deposition testimony, Larry Brantley testifies that
5 Exhibit 11, bearing the same Bates stamp as the document
6 submitted by Guillory, is an accurate copy of the Escrow
7 Instructions prepared in connection with his escrow account
8 and bearing his and his wife's initials and signatures.
9 Guillory Decl. Ex. B ("L. Brantley Dep.") at 78:6-25, 79:1-25.
10 Taken together, Guillory's Supplemental Declaration and Larry
11 Brantley's testimony are sufficient to support a finding that
12 the Escrow Instructions submitted by Plaintiffs in Exhibit F
13 are a true and correct copy of the instructions at issue in
14 this case.⁴

15 2. Plaintiffs' Third Claim for Violation of the
16 RESPA

17 Plaintiffs' third claim alleges violation of the RESPA.⁵
18

19 ⁴ The Court further notes that an identical copy of the Escrow
20 Instructions was submitted by Sheryl Traum, attorney for Praveen
21 Chandra, as Exhibit 9-d to Traum's Declaration in support of
22 Chandra's Motion for Summary Judgment against Academy. ECF Nos.
23 108, 109. Academy did not object at that time. The Court found
24 the Escrow Instructions admissible and relied heavily on them in
awarding partial summary judgment against Academy in its November
19, 2009 Order. See Nov. 19, 2009 Order at 4, 9. The law of the
case doctrine bars Academy from relitigating the admissibility of
the contents of this document to the extent they have already been
incorporated into the Court's November 19, 2009 Order.

25 ⁵ Academy contends that Plaintiffs' request for summary
26 adjudication of their RESPA claim is not properly before the Court
27 because Plaintiffs' Notice of Motion and Re-Notice of Motion did
not state that they would seek summary judgment on that claim.
First Opp'n at 2. The Court rejects this argument. Plaintiffs'
28 Memorandum of Points and Authorities, filed one day after their
Notice of Motion, makes unmistakably clear that Plaintiffs move for

1 The RESPA requires that lenders and their non-exclusive agents
2 provide borrowers with a good faith estimate of costs, known
3 as an "estimated HUD-1," and a final settlement statement,
4 known as a "final HUD-1." 12 U.S.C. §§ 2603(b), 2604(c); 24
5 CFR §§ 3500.7, 3500.8; see also Plaza Home Mortg., Inc. v. N.
6 American Title Co., Inc., 184 Cal. App. 4th 130, 133 n.1 (Ct.
7 App. 2010). Plaintiffs contend that Academy violated the
8 RESPA by failing to provide them with these documents. First
9 MSJ at 23. Academy does not contend otherwise.

10 It is well established that the RESPA does not provide a
11 private right of action for violations of the disclosure
12 provisions in 12 U.S.C. §§ 2603-2604. See, e.g., Bloom v.
13 Martin, 865 F. Supp. 1377, 1385 (N.D. Cal. 1994) (holding no
14 private right of action exists under 12 U.S.C. § 2403);
15 Spurlock v. Carrington Mortg. Servs., No. 09-cv-2273, 2010
16 U.S. Dist. LEXIS 80221, *26-27 (N.D. Cal. Aug. 4, 2010)
17 (holding no private right of action exists under 12 U.S.C. §
18 2604(c) or any related regulations). Plaintiffs' third claim
19 for RESPA violations is therefore DISMISSED as to all
20 Defendants.

21 3. Plaintiffs' Fifth Claim for Breach of Fiduciary
22 Duty

23 Plaintiffs move for summary adjudication of their fifth
24 claim for breach of fiduciary duty. First MSJ at 15. Escrow
25 holders owe fiduciary duties to all parties to the escrow,
26 including the duty to strictly comply with the escrow

27
28 summary adjudication on their RESPA claim. Academy therefore had
ample notice of the grounds for Plaintiffs' motion.

1 instructions. Kangarlou v. Progressive Title Co., Inc., 128
2 Cal. App. 4th 1174, 1179 (Ct. App. 2005). Here, there can be
3 no dispute that the Brantleys were parties to the escrow. L.
4 Brantley Dep. at 78:6-25, 79:1-25; Escrow Instructions.
5 Moreover, as the Court already determined in its November 19,
6 2009 Order, there is no genuine issue that Academy failed to
7 comply with the escrow instructions when it disbursed the
8 funds to Boyd. Nov. 19, 2009 Order at 13. Academy therefore
9 breached its fiduciary duties to Plaintiffs. Plaintiffs have
10 offered evidence that the disbursement to Boyd caused them
11 injury. As a result of Academy's disbursement of the funds to
12 Boyd, Plaintiffs were unable to repay the loan and were
13 subjected to foreclosure proceedings. Guillory Decl. Ex. A
14 ("E. Brantley Dep.") at 88:5-25, 89:1-11. Plaintiffs claim an
15 assortment of resultant damages, as discussed below. While
16 there are genuine issues of fact as to the amount of damages
17 Plaintiffs incurred, there is no genuine issue that they
18 incurred at least some damages as a result of Academy's
19 actions. For example, there is no genuine issue of fact that
20 they were forced to pay costs and attorneys' fees to defend
21 against the foreclosure proceedings. Guillory Decl. ¶ 3.

22 Therefore, the Court GRANTS Plaintiffs' motion for
23 summary adjudication as to liability against Academy on their
24 fifth claim for breach of fiduciary duty.

25 4. Plaintiffs' Eighth Claim for Conversion

26 Plaintiffs also seek summary adjudication against Academy
27 of their eighth claim for conversion. First MSJ at 20.
28 Conversion is an intentional tort that consists of the

1 wrongful exercise of dominion or control over the property of
2 another. Farmers Ins. Exch. v. Zerlin, 53 Cal. App. 4th 445,
3 451 (Ct. App. 1997) (internal quotations omitted). Three
4 elements are required to establish a cause of action for
5 conversion: (1) the plaintiff's ownership or right to
6 possession of the property at the time of the conversion; (2)
7 the defendant's conversion by a wrongful act or disposition of
8 property rights; and (3) damages. Id. It is not necessary
9 that there be a manual taking of the property; it is only
10 necessary to show an assumption of control or ownership over
11 the property. Id. Money can be the subject of an action for
12 conversion if a specific sum capable of identification is
13 involved. Id. at 452.

14 Although it is an intentional tort, conversion does not
15 require a showing of wrongful intent. Rather, the intent
16 required for conversion is merely "an intent to exercise a
17 dominion or control over the goods which is in fact
18 inconsistent with the plaintiff's rights." Varela v. Wells
19 Fargo Bank, 15 Cal. App. 3d 741, 749-50 (Ct. App. 1971)
20 (internal quotations omitted). As stated in Varela:

21 The foundation for the action of conversion rests
22 neither in the knowledge nor the intent of the
23 defendant. It rests upon the unwarranted
24 interference by defendant with the dominion over
25 the property of the plaintiff from which injury
26 to the latter results. Therefore, neither good
27 nor bad faith, neither care nor negligence,
28 neither knowledge nor ignorance, are of the gist
of the action.

26 Id. (internal quotations omitted).

27 Plaintiffs contend that, by distributing the escrow funds
28 to Boyd, Academy wrongfully exercised control over the funds,

1 depriving Plaintiffs of their right to possession and
2 resulting in their injury. First MSJ at 21-22. The Court
3 finds that the evidence supports Plaintiffs' claim and that no
4 genuine issue of fact exists with regard to Academy's
5 liability for conversion.

6 First, there is no genuine issue of fact that Plaintiffs
7 had the right to possession of the escrow funds at the time
8 the funds were transferred to Boyd. Plaintiffs were the
9 borrowers entitled to the loan funds under a note and deed of
10 trust securing their real property, and they signed written
11 escrow instructions directing the disbursement of the funds to
12 themselves. L. Brantley Dep. at 78:6-25, 79:1-25; Escrow
13 Instructions. The Escrow Instructions provide that all "funds
14 due the respective parties herein are to be mailed to the
15 addresses set out below their respective signatures, unless
16 otherwise instructed." Escrow Instructions at 2; Nov. 19,
17 2009 Order at 4. The same document identifies Larry Brantley
18 and Ellen Brantley as the borrowers, and it provides their
19 mailing address. Id. at 3.

20 Second, there is no genuine issue of fact that Academy
21 intentionally exercised control over the funds in a manner
22 that deprived Plaintiffs of their right of possession.
23 Academy admits that it wired the funds to Boyd's bank account.
24 Guillory Decl. Ex. D ("Lyon Dep.") at 224:19-225:16. Academy
25 also admits that one of its agents manually entered Boyd as
26 the recipient. Id. at 216:13-217:21. Thus, Academy's
27 exercise of control over the funds was an intentional act.

28

1 Lastly, there is no genuine issue of fact that Academy's
2 actions caused injury to Plaintiffs. When Chandra sought to
3 have his loan repaid by Plaintiffs, they were unable to do so
4 because the loan funds had never been sent to them. L.
5 Brantley Dep. at 102:4-11. Plaintiffs were therefore
6 subjected to foreclosure proceedings and were forced to pay
7 costs and attorneys' fees to defend against the foreclosure.
8 Guillory Decl. ¶ 3.

9 Academy does not offer evidence to contradict Plaintiffs'
10 evidence cited above. Rather, Academy argues that Plaintiffs'
11 conversion claim is barred by the doctrines of the law of the
12 case and collateral estoppel because the Court denied summary
13 judgment on a conversion claim brought by Chandra against
14 Academy in its November 19, 2009 Order. First Opp'n at 11.
15 The Court disagrees. The law of the case doctrine bars a
16 court from reconsidering an issue already decided by the same
17 court, or a higher court, in the identical case.⁶ United
18 States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). The
19 issue decided in the Court's November 19, 2009 Order differs
20 from the issue decided here. Unlike Plaintiffs, Chandra
21 alleged that Academy was liable for conversion because it
22 "participated in Boyd's theft of the loan funds." ECF No. 107
23 ("Chandra's MSJ"). In denying summary adjudication of

24 ⁶ The doctrine of collateral estoppel is inapplicable in this
25 context because, among other reasons, it bars relitigation of
26 certain issues decided in prior actions. See United States v.
27 Hernandez, 572 F.2d 218, 220 (9th Cir. 1978) (explaining that the
28 collateral estoppel doctrine holds that "[w]hen an issue of fact or
law is actually litigated and determined by a final and valid
judgment, and the determination is essential to the judgment, the
determination is conclusive in a subsequent action between the
parties, whether on the same or a different claim").

1 Chandra's conversion claim, the Court held that "there are
2 genuine issues of material fact as to whether Academy Escrow
3 participated in Boyd's theft of the funds because Boyd has not
4 been found guilty of theft and the evidence suggests Academy
5 Escrow had no prior knowledge that Boyd would spend the
6 money." Nov. 19, 2009 Order at 15. Here, Plaintiffs do not
7 allege that Academy participated in a theft at all. Rather,
8 they allege that the act of releasing escrow funds to Boyd was
9 itself a wrongful exercise of control over Plaintiffs'
10 property, which deprived Plaintiffs of their right to possess
11 the property and thus constituted conversion. First MSJ at
12 21-22. The Court has not previously decided this issue.

13 Academy also points to testimony by Angie Lyon, Academy's
14 escrow officer in charge of Plaintiffs' transaction, stating
15 that she did not know that Boyd had lied about being related
16 to Plaintiffs. First Opp'n at 12. Academy presumably offers
17 this testimony to show that it lacked knowledge of Boyd's
18 misrepresentations. While this may have been relevant to a
19 claim such as Chandra's, which alleged that Academy knowingly
20 participated in Boyd's theft, it has no relevance to
21 Plaintiffs' conversion claim.

22 Accordingly, the Court GRANTS summary adjudication against
23 Academy as to liability on Plaintiffs' eighth claim for
24 conversion.

25 5. Damages

26 Plaintiffs allege the following damages.⁷ First, they

27 _____
28 ⁷ The Court again rejects Academy's argument that Plaintiffs did not sufficiently clarify in their Notice of Motion that they were

1 seek \$200,000 due to the alleged lost use of equity in their
2 home. First MSJ at 25. They assert that they relied on home
3 equity loans to pay living expenses in the past and have been
4 unable to obtain such loans since foreclosure proceedings were
5 implemented against them. E. Brantley Dep. at 45:1-5, 88:21-
6 89:2. Second, they seek attorneys' fees and costs from the
7 instant lawsuit and from the prior lawsuit brought by
8 Plaintiffs to enjoin the foreclosure proceedings against them.
9 Id. at 26-27. Third, they seek prejudgment interest at a rate
10 of ten percent per annum from the date on which the funds were
11 disbursed to Boyd. Id. at 27. Finally, it is unclear whether
12 they also seek additional damages due to the humiliation and
13 embarrassment they allegedly suffered because of the
14 foreclosure action. Id. at 13.

15 The Court finds that genuine issues of fact exist as to
16 the amount of damages Plaintiffs are entitled to from Academy.
17 Plaintiffs have provided no basis for their calculation of
18 \$200,000 in damages from lost use of equity. They have
19 further stated that the attorneys' fees and costs associated
20 with this litigation are still accruing. Guillory Decl. ¶ 4.
21 Furthermore, Plaintiffs have not clarified whether they seek
22 further damages for their emotional distress. Therefore, the
23 Court finds that summary adjudication as to damages is
24 improper and Plaintiffs shall prove their damages at trial.

25
26
27 seeking summary adjudication not just as to liability but as to
28 damages as well. First Opp'n at 13. The Court finds that
Plaintiffs' brief in support of their Motion, filed the following
day, provided Academy with sufficient notice of Plaintiffs'
intentions.

1 Plaintiffs' request for summary adjudication as to damages is
2 DENIED.

3 **B. Plaintiffs' Second Motion for Summary Adjudication**

4 In their second Motion, Plaintiffs seek summary
5 adjudication of their breach of fiduciary duty and negligent
6 failure to supervise claims against the Klyazmin Defendants.
7 Second MSJ at 2. As a preliminary matter, the Klyazmin
8 Defendants have filed a separate document stating objections
9 to the Third Guillory Declaration. ECF No. 180. This filing
10 violates Civil Local Rule 7-3(b), which requires all
11 evidentiary objections to a motion to be contained within the
12 opposition brief. Accordingly, the Court disregards this
13 filing and only considers evidentiary objections raised in the
14 Opposition.

15 1. Plaintiffs' Fifth Claim for Breach of Fiduciary
16 Duty

17 Plaintiffs first seek summary adjudication of their fifth
18 claim against the Klyazmin Defendants for breach of fiduciary
19 duty. Second MSJ at 2. The elements of a cause of action for
20 breach of fiduciary duty are: (1) existence of a fiduciary
21 duty; (2) breach of the fiduciary duty; and (3) damage
22 proximately caused by the breach. Stanley v. Richmond, 35
23 Cal. App. 4th 1070, 1086 (Ct. App. 1995). Plaintiffs contend
24 that the Klyazmin Defendants served as their real estate
25 agents and mortgage brokers for the \$180,000 loan transaction
26 and owed Plaintiffs fiduciary duties as such. FAC ¶ 12;
27 Second MSJ at 15-16. The Klyazmin Defendants do not dispute
28 that they were brokers for the Brantleys and owed them

1 fiduciary duties. Rather, they contend that they did not
2 breach any duties owed to Plaintiffs and, in the alternative,
3 that even if they did breach fiduciary duties owed to
4 Plaintiffs, any such breach was not the proximate cause of
5 Plaintiffs' damages. Second Opp'n at 9, 11.

6 When a real estate agent or mortgage broker acts as a
7 borrower's agent in negotiating a loan, the agent or broker
8 owes a variety of fiduciary duties to the borrower. Wyatt v.
9 Union Mortg., 24 Cal. 3d 773, 782 (1979). Among these duties
10 are the duty to disclose all material facts concerning the
11 transaction that might affect the principal's decision and the
12 duty to refrain from representation of multiple parties in the
13 same transaction without full disclosure to and consent from
14 all principals involved. Loughlin v. Idora Realty Co., 259
15 Cal. App. 2d 619, 629 (Ct. App. 1968). The broker or agent
16 also has a duty to investigate the material facts of the
17 transaction; "he cannot accept information received from
18 others as being true, and transmit it to the principal,
19 without either verifying the information or disclosing to the
20 principal that the information has not been verified."
21 Salahutdin v. Valley of Calif., Inc., 24 Cal. App. 4th 555,
22 562 (Ct. App. 1994). A real estate agent or broker breaches
23 his or her duties by failing to exhibit the degree of care and
24 skill ordinarily shown by professionals in the industry.
25 Carleton v. Tortosa, 14 Cal. App. 4th 745, 754-55 (Ct. App.
26 1993). The degree of care and skill required to fulfill a
27 professional duty ordinarily is a question of fact that may
28 require testimony by professionals in the field if the matter

1 is within the knowledge of experts only.⁸ Id.; see also
2 Carson v. Facilities Development Co., 36 Cal.3d 830, 844-845
3 (Ct. App. 1984).

4 Plaintiffs contend that the Klyazmin Defendants breached
5 their fiduciary duties in three ways. First, Plaintiffs
6 allege that they breached the duty to disclose material facts
7 by failing to inform Plaintiffs that Boyd's attempt to secure
8 financing to purchase the \$2.1 million property had failed
9 prior to Plaintiffs executing their loan agreement with
10 Chandra. Second MSJ at 17; Second Reply at 7. Plaintiffs
11 offer deposition testimony showing that the Klyazmin
12 Defendants knew that the sole reason for Plaintiffs pursuing
13 the loan from Chandra was to assist Boyd in purchasing the
14 \$2.1 million property (Skiff Dep. at 79:21-25, 80:1-25, 121:1-
15 25), that the Klyazmin Defendants were unable to secure
16 financing for Boyd's \$2.1 million loan (Skiff Dep. at 81:7-
17 18), and that the Klyazmin Defendants nevertheless proceeded
18 to obtain the \$180,000 loan for the Brantleys without
19 informing them that they had been unable to secure Boyd's \$2.1

21 ⁸ The Klyazmin Defendants contend that expert testimony is always
22 required to establish a professional standard of care. Second
23 Opp'n at 12. Accordingly, they assert that summary adjudication
24 should be granted in their favor because Plaintiffs have not
25 produced expert testimony regarding the appropriate standard of
26 care in this case. Id. at 23. As Carleton and Carson make clear,
27 the Klyazmin Defendants misconstrue the law on this point. While
28 expert testimony may be necessary to establish professional
negligence, it is not a per se requirement. 14 Cal. App. 4th at
754-55. Lysick v. Walcom, 258 Cal. App. 2d 136, 155-56 (Ct. App.
1968), on which the Klyazmin Defendants rely, does not hold
otherwise. The Lysick court held that, where the trial court had
decided that expert testimony was required to determine the
applicable standard of care based on the facts of the case, the
trial court later erred by instructing the jury that it could
reject the expert testimony if it chose to do so. Id.

1 million loan (E. Brantley Dep. at 186:2-15).

2 Second, Plaintiffs assert that, in addition to
3 representing Plaintiffs, the Klyazmin Defendants represented
4 Chandra regarding the \$180,000 loan and represented Boyd in
5 his quest to secure financing for the \$2.1 million property.
6 Plaintiffs allege that this multiple representation without
7 obtaining Plaintiffs' consent violated the Klyazmin
8 Defendants' duty of undivided loyalty. Second MSJ at 17;
9 Reply at 8. As evidence in support of this claim, Plaintiffs
10 cite Skiff's testimony that she considered both the Brantleys
11 and Chandra to be her clients with regard to the loan
12 transaction. Skiff Dep. at 71:6-25, 72:1-5.⁹ Perplexingly,
13 they also cite Skiff's testimony that she did not consider
14 Boyd to be her client with regard to the transaction. Skiff
15 Dep. at 109:6-16. Plaintiffs assert that Skiff did not inform
16 the Brantleys of any dual representation, but the testimony
17 they cite to support this claim is silent on the matter.
18 Reply at 8 (citing Skiff Dep. at 67:4-24, 68-1-10). The cited
19 testimony establishes that Skiff knew she had a duty to
20 disclose dual representation, but it does not establish that
21 she failed to do so.

22 Third, Plaintiffs allege that the Klyazmin Defendants
23 breached their duty to investigate material facts of the
24 transaction by failing to investigate Boyd's claims that he
25 was Plaintiffs' nephew or that he was their real estate
26 broker. Second MSJ at 18. They cite Skiff's testimony that

27 _____
28 ⁹ Plaintiffs also cite Skiff Dep. at 95:24-25, 96:1-5. Second
Reply at 8. However, these portions of Skiff's testimony are not
included in the excerpt provided by Plaintiffs.

1 she never took any steps to confirm Boyd's representations.
2 Skiff Dep. at 81:19-25, 82:1-3, 83:14-25.

3 The only evidence the Klyazmin Defendants offer to
4 counter Plaintiffs' assertion of breach is a sworn report and
5 declaration from their expert witness Harold A. Justman
6 opining that their conduct comported with industry custom and
7 practice and did not constitute a breach of their fiduciary
8 duties. See ECF No. 181 ("Justman Report"). However, as
9 Plaintiffs note in their Second Reply, Justman's testimony is
10 not admissible evidence in support of the Opposition because
11 the Klyazmin Defendants did not comply with the disclosure
12 requirements of Federal Rule of Civil Procedure 26(a)(2).

13 Under Rule 26(a)(2)(A), a party must disclose the
14 identity of any witness it may use at trial to present expert
15 testimony. Unless otherwise stipulated or ordered by the
16 court, the disclosure must be accompanied by a written report
17 prepared and signed by the expert witness and containing,
18 among other things, a complete statement of all opinions the
19 witness will express and the basis for them. Fed. R. Civ. P.
20 26(a)(2)(B). These disclosures must be made by the deadline
21 set by the court. Fed. R. Civ. P. 26(a)(2)(D). If a party
22 fails to make the required disclosures by the court-imposed
23 deadline, then it may not use the witness to supply evidence
24 on a motion, at a hearing, or at a trial, unless the failure
25 was substantially justified or harmless. Fed. R. Civ. P.
26 37(c)(1).

27 On May 13, 2009, the Klyazmin Defendants disclosed their
28 intention to offer Justman's opinions as expert testimony at

1 trial. Fourth Guillory Decl. ¶ 3, Ex. A ("Expert Witness
2 Designation"). The Expert Witness Designation stated that
3 Justman would "offer opinions regarding the conduct of the
4 parties and their agents involved with the various real estate
5 transactions at issue in this case." Id. at 2:11-12. It
6 further stated that Justman would opine on such matters as
7 whether the Klyazmin Defendants owed any duty to Plaintiffs in
8 the transactions at issue, the applicable standard of care,
9 whether the Klyazmin Defendants breached any duty owed to
10 Plaintiffs, whether Plaintiffs suffered damages, and whether
11 Plaintiffs acted reasonably. Id. at 2. After producing the
12 Expert Witness Designation, the Klyazmin Defendants failed to
13 provide Plaintiffs with a written report prepared by Justman
14 containing a complete statement of his opinions and the basis
15 and reasons for them before the discovery deadline set by the
16 Court. Fourth Guillory Decl. ¶ 3. Discovery closed on
17 December 1, 2010. ECF No. 148. The Klyazmin Defendants
18 finally filed Justman's report along with their Opposition on
19 January 28, 2011. They have offered no justification for
20 their failure to disclose the report during discovery. The
21 Court finds that this failure was not harmless, as it deprived
22 Plaintiffs of the opportunity to depose Justman on the basis
23 for his opinions and seek rebuttal testimony if desired.
24 Accordingly, the Court finds Justman's testimony inadmissible.

25 Aside from Justman's testimony, Defendants do not offer
26 evidence to support their argument that they did not breach
27 any duties owed to Plaintiffs. Instead, the bulk of their
28 argument contends that even if they did breach fiduciary

1 duties owed to Plaintiffs, any such breach was not a proximate
2 cause of Plaintiffs' injuries. Second Opp'n at 9-12. They
3 argue that Academy's disbursement of the funds to Boyd was the
4 sole proximate cause of harm to Plaintiffs.¹⁰ Id. By
5 contrast, Plaintiffs offer two theories of how the Klyazmin
6 Defendants' actions caused Plaintiffs' damages. First, they
7 contend that if the Klyazmin Defendants had informed them that
8 Boyd did not obtain financing for the \$2.1 million loan, they
9 would not have proceeded to borrow the \$180,000 from Chandra
10 because the sole purpose for doing so was to assist Boyd with
11 his purchase. Second MSJ at 17. In support of this theory,
12 Plaintiffs cite Larry Brantley's testimony stating the same.
13 L. Brantley Dep. at 100:9-16. Second, Plaintiffs argue that
14 Skiff's failure to investigate Boyd's misrepresentations
15 "enabled Boyd to pass himself off as the Brantleys' nephew and
16 to obtain the monies from escrow." Second Reply at 9.

17 Causation is generally a question of fact reserved for
18 the jury. Ulloa v. McMillin Real Estate & Mortg., Inc., 149
19 Cal. App. 4th 333, 337 (Ct. App. 2007). To prove proximate
20 cause in a breach of fiduciary duty claim, the plaintiff must
21 show that the defendant's conduct was "a substantial factor"
22 in causing the plaintiff's harm. Stanley, 35 Cal. App. at

23
24 ¹⁰ The Klyazmin Defendants imply that this Court, by finding
25 Academy liable for breach of fiduciary duty to Chandra in its
26 November 19, 2009 Order, held that Academy's actions were the sole
27 proximate cause of "the damages in this action." Second Opp'n at
28 13. This misconstrues the Court's holding. The Court held that
Academy's actions were a proximate cause of Chandra's injury, and
the Court holds today that Academy's actions were a proximate cause
of Plaintiffs' injury. These holdings do not preclude a finding
that actions of other defendants also proximately caused injury to
Plaintiffs.

1 1095. Here, Plaintiffs' evidence has not met their burden of
2 proving that no genuine issue of material fact exists under
3 this standard of causation. Plaintiffs' causation arguments
4 involve hypothetical determinations of what Plaintiffs and
5 other parties would have done if Skiff had taken certain
6 actions. Reasonable jurors could disagree about these
7 determinations. The jury should have the opportunity to hear
8 Plaintiffs' testimony and evaluate these arguments firsthand.

9 For the foregoing reasons, the Court DENIES Plaintiffs'
10 motion for summary adjudication of Plaintiffs' claim against
11 the Klyazmin Defendants for breach of fiduciary duty.

12 2. Plaintiffs' Sixth Claim for Negligent
13 Supervision

14 Lastly, Plaintiffs seek summary adjudication of their
15 claim against the Klyazmin Defendants for negligent failure to
16 supervise. Second MSJ at 18. An employer is liable for
17 negligent supervision of an employee if it "knew or should
18 have known that hiring the employee created a particular risk
19 or hazard, and that particular harm materializes." Delfino v.
20 Agilent Tech., Inc., 145 Cal. App. 4th 790, 815 (Ct. App.
21 2006).

22 Plaintiffs allege that Klyazmin negligently failed to
23 supervise Skiff, and that as a result Skiff's actions --
24 specifically her failure to disclose that she was representing
25 multiple parties to the transaction and to inform Plaintiffs
26 that Boyd's attempt to secure funding for the \$2.1 million
27 property had failed -- injured Plaintiffs. Second MSJ at 19.

28

1 Skiff's alleged actions underlying this claim are the same
2 actions that Plaintiffs allege constituted a breach of fiduciary
3 duty. As explained above, a genuine issue of material fact exists
4 as to whether these actions were the proximate cause of any injury
5 to Plaintiffs. Therefore, at a minimum, a genuine issue of fact
6 exists here as to whether Klyazmin's alleged failure to properly
7 supervise Skiff was the proximate cause of any injury to
8 Plaintiffs, i.e., whether Klyazmin's actions led any "particular
9 harm [to] materializ[e]." Agilent, 145 Cal. App. 4th at 815.
10 Summary adjudication of Plaintiffs' negligent supervision claim
11 against the Klyazmin Defendants is therefore inappropriate.

12 Accordingly, the Court DENIES Plaintiffs' motion for summary
13 adjudication of their negligent supervision claim against the
14 Klyazmin Defendants.

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1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiffs Larry Brantley and Ellen
3 Brantley's Motion for Summary Adjudication against Defendant
4 Academy Escrow is GRANTED IN PART and DENIED IN PART. The Motion
5 is GRANTED in favor of Plaintiffs as to liability only with regard
6 to Plaintiffs' fifth claim for breach of fiduciary duty and eighth
7 claim for conversion against Academy Escrow. The Motion is DENIED
8 as to damages. Plaintiffs shall prove their damages at trial.
9 Plaintiffs' third claim for violation of the RESPA is not a
10 cognizable claim and is therefore DISMISSED with regard to all
11 Defendants.

12 Plaintiffs' Motion for Summary Adjudication against Modo
13 Realty, Inc., Royal Crown Mortgage, Inc., and Sergei Klyazmin is
14 DENIED.

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16 IT IS SO ORDERED.

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18 Dated: April 1, 2011

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UNITED STATES DISTRICT JUDGE

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