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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
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9 TERA VANCE, an individual,
10 Plaintiff,
11 v.
12 BERKSHIRE HATHAWAY LIFE
13 INSURANCE COMPANY OF
14 NEBRASKA, an entity, and KRISTIN
15 BARNETT, an individual,
Defendants.

Case No.: 3:20-cv-01480-BEN-KSC

**ORDER GRANTING IN PART
DEFENDANTS' MOTIONS TO
DISMISS**

[ECF Nos. 3, 4]

16 Plaintiff Tera Vance filed suit in San Diego County Superior Court against
17 Defendants Berkshire Hathaway Life Insurance Company of Nebraska ("BHLN") and
18 Kristin Barnett alleging ten causes of action arising in tort and contract. Defendants
19 removed the case to this Court. ECF No. 1. Thereafter, each Defendant filed a motion to
20 dismiss. ECF Nos. 3, 4. For the reasons that follow, the motions are granted in part.

21 **I. Background¹**

22 This case concerns a structured settlement annuity. In May 2016, John Eutsler
23 settled a personal injury claim with a third-party. Compl., ECF No 1-4, ¶ 7. The third-
24 party then assigned its obligations to Eutsler to Berkshire Hathaway Group Structured
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28 ¹ The Court here is not making any findings of fact, but rather summarizing the relevant
allegations of the Complaint for purposes of evaluating Defendants' motions to dismiss.

1 Settlements, Inc. (“BHG”), and BHG purchased an Annuity Contract (the “Annuity”)
2 from Defendant BHLN to fund its obligation to make periodic structured settlement
3 payments to Eutsler. *Id.* at ¶ 8. The Annuity specifies that BGH is the “Owner” of the
4 Annuity, Eutsler is the “Optional Payee” and Defendant Barnett, Eutsler’s sister, is the
5 “Contingent Payee.” *Id.* at Ex. 1. Eutsler later became engaged to Vance. *Id.* at ¶ 17.

6 On April 19, 2019, Eutsler changed his address with BHLN to Vance’s address in
7 Carlsbad, California, which BHLN acknowledged by letter on April 26, 2019. *Id.* at Ex.
8 2. Also on April 19, 2019, Eutsler executed a Beneficiary Designation or Change
9 Request (“Change Request”), which was notarized in San Diego, California. *Id.* at Ex. 3.
10 The Change Request indicated Eutsler named Vance as a “primary beneficiary” under the
11 Annuity and that he allocated her fifty percent of the benefits thereof. *Id.* The Change
12 Request also clearly indicated Eutsler named his mother, Lenora, as a “contingent
13 beneficiary” and that he allocated her fifty percent of the benefits thereof. *Id.* The
14 remainder of the Change Request is less clear.

15 Importantly, the Change Request contains two spaces for the payee (here, Eutsler)
16 to name a “primary beneficiary.” *Id.* While Vance’s name is clearly indicated,
17 Defendant Barnett is listed in the second space and the section is entirely crossed-out. *Id.*
18 Initials appear next to the crossed-out portions. *Id.*

19 Eutsler sent the Change Request to BHLN sometime after it was notarized. *Id.* at ¶
20 22. On April 29, 2019, Vance alleges BHLN rejected the Change Request.² *Id.* at ¶ 23.
21 Though knowing of his new address, Vance alleges the rejection letter was sent to
22 Eutsler’s old address. *Id.* No further action was taken on the Change Request. *Id.* at ¶¶
23 24-29. On November 22, 2019, Eutsler died in an automobile accident. *Id.* at 28.

24 Vance alleges Eutsler did everything he could to change the designated beneficiary
25 of the Annuity to be her, but that Barnett and BHLN continue to refuse to recognize the
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28 ² The Parties dispute whether BHLN or BHG sent the rejection letter. This is immaterial, as it would not
change the Court’s analysis and conclusions below.

1 Change Request. *Id.* at ¶¶ 30-32. She alleges BHLN was negligent in not properly
2 notifying Eutsler of the Change Request rejection, that Barnett is intentionally and
3 maliciously attempting to keep the proceeds, and that BHLN and Barnett have caused her
4 emotional distress. *Id.* at ¶¶ 32-33.

5 **II. Legal Standard**

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests whether
7 the pleadings fail to state a claim upon which relief can be granted. When considering a
8 Rule 12(b)(6) motion, the Court “accept[s] as true facts alleged and draw[s] inferences
9 from them in the light most favorable to the plaintiff.” *Stacy v. Rederite Otto Danielsen*,
10 609 F.3d 1033, 1035 (9th Cir. 2010). A plaintiff must not merely allege conceivably
11 unlawful conduct but must allege “enough facts to state a claim to relief that is plausible
12 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim is facially
13 plausible ‘when the plaintiff pleads factual content that allows the court to draw the
14 reasonable inference that the defendant is liable for the misconduct alleged.’” *Zixiang Li*
15 *v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678
16 (2009)). “Threadbare recitals of the elements of a cause of action, supported by mere
17 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. “[W]hen assessing a
18 complaint’s allegations, the court may [also] consider any document incorporated by
19 reference in the complaint.” See *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998),
20 superseded by statute on other grounds as recognized in *Abrego v. Dow Chem. Co.*, 443
21 F.3d 676, 681-82 (9th Cir. 2006).

22 **III. Analysis**

23 Vance originally brought ten claims against BHLN and Barnett. The first claim is
24 against BHLN for negligence. Claims Two, Four, Five, and Six are also against BHLN
25 and sound in contract. Claim Seven alleges Barnett committed conversion. Claim Eight
26 is for declaratory relief against both parties and Claims Nine and Ten allege both
27 Defendants committed torts involving emotional distress. In her briefing, Vance
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1 withdrew Claim Three alleging BHLN committed Unfair Business Practices. See Opp'n,
2 ECF No. 6, 17.

3 **A. Negligence**

4 Vance's First Claim alleges BHLN was negligent in that it failed to notify Eutsler
5 that it considered the Change Request he signed and had notarized insufficient. Compl.,
6 ECF No. 1-4, ¶¶ 25, 29, 38. She argues BHLN's negligence arises from a fiduciary duty
7 BHLN owed her as a "third-party beneficiary" to the Annuity. *Id.* at ¶ 38. BHLN argues
8 it does not owe a fiduciary duty to Vance because she is not a third-party beneficiary, and
9 therefore her claim necessarily fails. Mot., ECF No. 3-1, 9-10.

10 In California, negligence comprises "(1) a legal duty to use reasonable care, (2)
11 breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the
12 plaintiff's injury." *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1062 (E.D.
13 Cal. 2010) (citing *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1339 (Cal. Ct.
14 App. 1998)).

15 Addressing the first element, Vance alleges she is a "third-party beneficiary of
16 [Eutsler]" and thus BHLN had a fiduciary obligation to her. Compl., ECF No. 1-4, ¶¶ 37-
17 38. In California, "[a] contract, made expressly for the benefit of a third person, may be
18 enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code § 1559.
19 "[A]lthough the contract may not have been made to benefit him alone, [the third-party]
20 may enforce those promises directly made for him." *Murphy v. Allstate Ins. Co.*, 17 Cal.
21 3d 937, 943 (Cal. 1976). In the insurance context, California also "allows a direct action
22 against an insurance company to enforce the terms of a contract which were intended to
23 benefit the third-party." *Harper v. Wausau Ins. Co.*, 56 Cal. App. 4th 1079, 1087 (Cal.
24 Ct. App. 1997) (citing *Murphy*, 17 Cal. 3d at 943). This is true whether or not the third-
25 party is named in the contract. *Id.* However, despite Vance's allegations, this is not a
26 traditional insurance dispute. Instead, it involves a structured settlement annuity.

27 Here, the Complaint and the Annuity attached thereto unequivocally indicate
28 Vance is not a third-party beneficiary. Compl., ECF No 1-4, Ex. 1. The Owner of the

1 Annuity is BHG, and the Optional Payee is John Eutsler. *Id.* Vance’s name does not
2 appear anywhere on the Annuity, but rather only appears in the Change Request that was
3 ultimately rejected. *Id.* at Ex. 1, 3. A plain reading of the Annuity conveys no rights to
4 Vance that would allow her to plead she is a third-party beneficiary under California
5 Civil Code Section 1559 or that BHLN owed her a fiduciary duty. She was not a party to
6 the Annuity, rather she can only argue that Eutsler tried to make her a third-party
7 beneficiary to the Annuity. Her claim to the contrary in the Complaint is contradicted by
8 the Annuity, which is attached to her Complaint, and therefore the Court is not bound to
9 accept her claim as fact. See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th
10 Cir. 2001) (a court is not required to accept allegations contradicted by exhibits attached
11 to the Complaint). The limited authority addressing these situations in California has
12 likewise settled against finding claimants such as Vance to be third-party beneficiaries.
13 See *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi*, 51 Cal. App. 4th
14 1302, 1309 (Cal. Ct. App. 1996) and *Ramirez v. Am. General Life Ins. Co.*, 2018 WL
15 300374 (Cal. Ct. App. Jan. 5, 2018).³

16 As pleaded, the Court finds Vance’s negligence claim to be deficient because
17 Vance cannot show BHLN owed her a fiduciary duty. Nonetheless, the Court grants
18 leave to amend this claim as Vance may be able to otherwise plausibly plead BHLN
19 owed her a duty of care that was breached by its rejection of the Change Request even
20 though she was not a third-party beneficiary to the Annuity.

21 **B. Contract Claims**

22 Claims Two, Four, Five, and Six allege various breach of contract theories against
23 BHLN. Vance argues that she “is a third-party beneficiary to the contract/Annuity with
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25 ³ The Court notes that *Ramirez* is an unpublished decision of the California Court of Appeal, but it can
26 cite such cases as persuasive authority. See *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 942
27 n.4 (9th Cir. 1997). The Court does so here because the particular facts in *Ramirez* involving a non-
28 party asserting third-party beneficiary status in a structured settlement annuity contract are largely
analogous to Vance’s claims here and the court’s reasoning in *Ramirez* is consistent with a plain reading
of the annuity agreement.

1 BHLN” and that BHLN negligently failed to notify Eutsler that the Change Request was
2 insufficient, causing her harm. Compl., ECF No. 1-4 ¶¶ 31, 43-46. BHLN argues Vance
3 is not a third-party beneficiary to the Annuity, has failed to allege a provision of the
4 Annuity that it has breached, and that even if Vance did make such an allegation, the
5 Annuity did not impose any duty on BHLN to respond to Eutsler’s request to change the
6 beneficiary. Mot., ECF No. 3-1, 10-11. Because Vance is not a party or third-party
7 beneficiary of the contract, the Court need only address BHLN’s first argument.

8 As discussed above, Vance is not a party or third-party beneficiary to the Annuity
9 and therefore cannot bring claims under these theories. In *Sisco*, the California Court of
10 Appeal rejected a mother’s claim that she was the beneficiary under a structured
11 settlement annuity her minor son entered into as follows:

12 The annuity issued in this case named son as the annuitant and payee. Son
13 was not, however, the owner of the annuity. The annuity was owned by
14 New York Life Insurance and Annuity Corporation. By the terms of the
15 policy, the right to designate a beneficiary was held by the owner of the
16 annuity, not the annuitant or payee. Thus, whether son was prohibited by his
17 minority from exercising his rights under the annuity contract is irrelevant;
18 he had no right under the annuity contract to designate a beneficiary.

19 *Sisco*, 51 Cal. App. 4th at 1309.

20 Here, BHG, which is not a party to this action, owned the Annuity. Compl., ECF
21 No. 1-4, Ex. 1. Per the terms of the Annuity, BHG has “the right at any time to designate
22 the payee to whom benefits are payable under the annuity.” *Id.* While Vance argues this
23 is “nonsensical,” *opp’n*, ECF No. 6, 12, the terms of the Annuity are clear and the tax
24 advantages for entering into a structured settlement annuity can be a substantial incentive
25 for the recipients of personal injury settlements, like Eutsler, to agree to them. See 26
26 U.S.C. § 130(c).

27 Applying the reasoning above, Claims Two, Four, Five, and Six must be
28 dismissed. Based on the specific terms of the Annuity, Eutsler had no right to designate a

1 beneficiary but only the right to request a change to the beneficiary. Compl., ECF No. 1-
2 4, Ex. 1. Since the Change Request was rejected, Vance could not be a third-party
3 beneficiary and therefore BHLN owed her no contractual duties.

4 In considering whether to grant Vance leave to amend, the Court is mindful that
5 Federal Rule of Civil Procedure 15(a)(2) provides that such leave shall be freely given.
6 However, the Court need not grant leave to amend where “the allegation of other facts
7 consistent with the challenged pleading could not possibly cure the deficiency.”
8 *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th
9 Cir. 1986). That is the case here. Vance is simply not a party to the Annuity and by the
10 Annuity’s terms Eutsler did not have the unilateral right to make her a party to it.
11 Accordingly, Claims Two, Four, Five, and Six are dismissed with prejudice.

12 **C. Conversion**

13 Vance’s Seventh Claim is against Barnett for conversion. Vance argues Eutsler
14 intended to transfer the structured payments to her and his mother in the event of his
15 death, giving her a property right in the payments. Compl., ECF No. 1-4, ¶ 74. She
16 argues Barnett has attempted to take the funds and misappropriated them for her own
17 personal use. *Id.* at ¶ 76. Barnett argues she holds title to the funds, and therefore she
18 cannot commit conversion. Mot., ECF No. 4-1, 8.

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

27 Vance argues she has alleged facts establishing each element of a conversion
28 claim. Opp’n, ECF No. 7, 10-11. However, her allegations contain only legal

1 conclusions and no factual details of how Barnett “misappropriated the funds for her own
2 personal use and enjoyment.” Id. at 11. Moreover, Vance alleges BHLN “never
3 effect[ed] the change Mr. Eutsler desired” on the Change Request. Compl., ECF No. 1-4,
4 ¶ 31. If BHLN never made the change Vance cannot argue Barnett “is wrongfully
5 assuming ownership” of her interest because Barnett would continue to be the beneficiary
6 of the proceeds. Opp’n, ECF No. 8, 12. While at this stage in litigation the Court does
7 not consider Barnett’s factual arguments against the Complaint, Vance’s conversion
8 claim remains woefully deficient.

9 Accordingly, Barnett’s motion to dismiss Vance’s Seventh Claim is granted with
10 leave to amend.

11 **D. Declaratory Relief**

12 Vance’s Eighth Claim seeks declaratory relief holding “she is the rightful third-
13 party beneficiary under the BHLN contract/Annuity.” Compl., ECF No. 1-4, ¶ 79.
14 BHLN and Barnett again argue that Vance lacks standing to request declaratory relief.
15 Mot., ECF No. 3-1, 8-9; Mot. ECF No. 4-1, 6-8.

16 California Code of Civil Procedure Section 1060 provides that “[a]ny person
17 interested under a written instrument . . . or under a contract, or who desires a declaration
18 of his or her rights or duties with respect to another, or in respect to, in, over or upon
19 property . . . may, in cases of actual controversy relating to the legal rights and duties of
20 the respective parties, bring [such an action].” Where a plaintiff “is not legally interested
21 in the contracts as to which [she] seeks a declaration of validity . . . [she] does not and
22 cannot state a cause of action for declaratory relief.” *Blank v. Kirwan*, 39 Cal. 3d 311,
23 331 (Cal. 1985).

24 As above, Vance cites to California Civil Code Section 1559, arguing she is a
25 third-party beneficiary of the Annuity. The Court again rejects this contention for the
26 reasons set forth in Sections III A and B of this Order. Despite Vance’s vigorous
27 contentions, this case does not involve a typical insurance dispute. *Contra* *Murphy*, 17
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1 Cal. 3d at 943. Instead, it is a structured settlement annuity where Eutsler was not the
2 owner and Vance is not a third-party beneficiary.

3 This deficiency cannot be cured through an amended pleading. Accordingly,
4 Vance's Eighth Claim is dismissed with prejudice. See *Schreiber Distributing Co.*, 806
5 F.2d at 1401.

6 **E. Intentional Infliction of Emotional Distress**

7 Vance's Ninth Claim is against BHLN and Barnett for intentional infliction of
8 emotional distress. Vance argues the Defendants intentionally harassed and intimidated
9 her with a malicious motive, causing her to suffer humiliation, mental anguish, and
10 emotional distress. Compl., ECF No. 1-4, ¶¶ 83-86. Both Defendants argue there are no
11 factual allegations in the Complaint to support Vance's claim. Mot., ECF No. 3-1, 17;
12 Mot., ECF No. 4-1, 9-10.

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

20 The Complaint contains only boilerplate legal conclusions and fails to allege any
21 facts showing that Defendants' conduct was intentional or that Vance suffered severe
22 emotional distress as the actual and proximate cause of the Defendants' conduct. See
23 Compl., ECF No. 1-4, ¶¶ 32-33, 35, 83-86. The Court finds that these allegations fail to
24 allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550
25 U.S. at 570. Accordingly, Vance's Ninth Claim is dismissed with leave to amend.

26 **F. Negligent Infliction of Emotional Distress**

27 Vance's Tenth Claim is against BHLN and Barnett for negligent infliction of
28 emotional distress. Vance argues Defendants engaged in the same conduct alleged above

1 but did so negligently. Compl., ECF No. 1-4, ¶¶ 89-90. BHLN argues Vance has not
2 alleged any facts of how BHLN might have committed the alleged tort. Mot., ECF No.
3 3-1, 17-18. Barnett argues she owed no duty of care to Vance, and therefore the claim
4 must fail. Mot., ECF No. 4-1, 11.

5 In California, “recovery of emotional distress damages has been allowed, absent
6 impact or physical injury, in certain specialized classes of cases.” *Chaconas v. JP*
7 *Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1186 (S.D. Cal. 2010) (citing *Branch v.*
8 *Homefed Bank*, 6 Cal.App.4th 793, 800, 8 Cal.Rptr.2d 182 (1992)). “In these actions,
9 ‘[n]egligent infliction emotional distress is not an independent tort in California, but the
10 tort of negligence with the traditional elements of duty, breach of duty, causation, and
11 damages.’” *Id.* (citing *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1072 (Cal. 1992)).

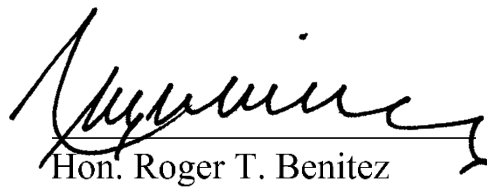
12 Here, the Complaint again merely recites boilerplate legal conclusions. Further, it
13 is devoid of any allegations that Barnett owed a duty to Vance which was breached by
14 her alleged conduct. The claim fails to meet Twombly’s plausibility standard. 550 U.S.
15 at 570. Accordingly, Vance’s Tenth Claim is dismissed with leave to amend.

16 **IV. Conclusion**

17 For the foregoing reasons, Defendants’ Motions to Dismiss (ECF Nos. 3, 4) are
18 **GRANTED in part**. Plaintiff is granted leave to file a First Amended Complaint within
19 fourteen (14) days that cures the pleading deficiencies identified in this Order.
20 Amendments must be contained within the claims the Court has found deficient and are
21 limited to those claims for which the Court has granted leave to amend. Plaintiff may not
22 add other claims or parties without seeking leave from the Court.

23 **IT IS SO ORDERED.**

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25 Dated: November 5, 2020

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Hon. Roger T. Benitez
United States District Judge