

Robert F. Smith, SBN 116235  
Attorney at Law  
16200 Ventura Blvd. Suite 308  
Encino, CA 91436  
(818) 231-2331

Attorney for Danial Danalian Salvage, Inc,  
(Erroneously sued as "Statewide Auto Sales") &  
Deborah Maherl

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES  
CENTRAL DISTRICT

No. BC 499554

Lloyd Morrison III )

Plaintiff, )

vs. )

Carrolandia #1 Auto Sales, Inc., George )  
Largos, Statewide Auto Sales, Deborah )  
Maher, and Does 1-50, Inclusive, )

Defendants. )

**DATE:**

**TIME:**

**DEPT:**

**Assigned to the Honorable** \_\_\_\_\_

**NOTICE OF MOTION AND MOTION FOR SUMMARY JUDG-  
MENT (OR ALTERNATIVELY FOR SUMMARY ADJUDICATION):**

**MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR SUMMARY JUDGMENT  
(OR ALTERNATIVELY FOR SUMMARY ADJUDICATION)**

**DECLARATIONS IN SUPPORT WITH EXHIBITS**

1                                   **NOTICE OF MOTION FOR SUMMARY JUDGMENT OR**  
2                                   **ALTERNATIVELY FOR SUMMARY ADJUDICATION**

---

3  
4                   TO EACH PARTY AND THE ATTORNEY FOR EACH PARTY TO THIS  
5 ACTION:  
6

7  
8               PLEASE TAKE NOTICE that on \_\_\_\_\_, 2014, at  
9 \_\_\_\_\_:\_\_\_\_\_.M, or as soon thereafter as the matter may be heard, in Department \_\_\_\_\_  
10 of the Superior Court in and for the County of Los Angeles, located at the Stanley Mosk  
11 Courthouse, 111 North Hill Street, Los Angeles, California, the Defendants and moving  
12 parties, DANIAL DANIALIAN SALVAGE, INC., dba STATEWIDE AUTO SALES  
13 (hereinafter referred to as “STATEWIDE”) and DEBORAH MAHER (hereinafter referred  
14 to as “MAHER”), will move this Court as follows:

15               (1) For Summary Judgment, in favor of defendants, STATEWIDE and MAHER  
16 (moving parties) and against Plaintiff and for costs of suit incurred herein and such other  
17 relief as may be just; or

18               (2) Alternatively, if for any reason summary judgment cannot be had for an order  
19 adjudicating that there is no merit to the following described causes of action contained in  
20 the complaint filed herein by Plaintiff and that the final judgment in this action shall, in  
21 addition to any matters determined at trial, award judgment as established by such  
22 adjudication:

23  
24 Seventh Cause of Action – Trespass

25 Eighth Cause of Action – Conversion

26 Ninth Cause of Action – Intentional Infliction of Emotional Distress

27 Tenth Cause of Action – Negligent Infliction of Emotional Distress

28 Eleventh Cause of Action – Negligence  
29

1 Said motion will be made upon the ground that there is no triable issue of material  
2 fact as to the summary judgment or summary adjudication sought and therefore the moving  
3 party is entitled to such summary judgment or summary adjudication as a matter of law.  
4 Specifically, moving parties submit that they are the only rightful, legal owners of the BMW  
5 vehicle in question and as such, had the absolute right to the immediate possession of the  
6 BMW vehicle at all times mentioned in the Complaint. Moving parties further assert that  
7 ownership of the vehicle is an absolute defense to the allegations of trespass and conversion.  
8 The remaining causes of action for Intentional Infliction of Emotional Distress, Negligent  
9 Infliction of Emotional Distress and Negligence all have their basis in the false premise that  
10 the moving parties were not the legal owners of the BMW vehicle and must also fail. The  
11 motion will be based upon this notice; and the separate statement of undisputed facts,  
12 declarations of Danial Danialian and Deborah Maher and the memorandum of points and  
13 authorities, all of which are attached hereto or submitted concurrently herewith, and served  
14 and filed herewith.

15  
16  
17 DATED:

18  
19  
20 BY: Robert F. Smith  
21 Attorneys for Defendants,  
22 **Danial Danialian Salvage, Inc.**  
23 **Db a Statewide Auto Sales, and**  
24 **Deborah Maher**  
25  
26  
27  
28  
29

1                   **MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF**  
2                   **MOTION FOR SUMMARY JUDGMENT**  
3                   **(OR ALTERNATIVELY, FOR SUMMARY ADJUDICATION)**

---

4                   The moving party is entitled to judgment as a matter of law because the attached  
5 papers show there is an absolute defense to the causes of action pled against the moving  
6 parties.  
7

8                   **I.**

9                   **INTRODUCTION**

10                  This action arises out of a series of transfers of a 2005 BMW 6 series automobile,  
11 VIN# WDDDJ75X76A026570 (hereinafter referred to simply as the “BWM” or the  
12 “vehicle”).

13                  Danial Danialian Salvage, Inc. dba Statewide Auto Sales (hereinafter “Statewide”) is a used car dealership open to the general public and duly licensed to do business in the  
14 County of Los Angeles, State of California.  
15

16                  On November 24, 2010 Statewide sold the BMW out of its inventory to Kenneth  
17 Lewis. A true and correct copy of the “Sales Agreement and Warranty for Vehicle” is  
18 attached to the Declaration of Danial Danialian, marked Exhibit A and by reference made  
19 a part hereof. The sale involved the financing of a portion of the sale price, which  
20 financing was carried by Statewide as is set forth in the Sales Agreement (Exhibit A).

21                  As part of the sale of the BMW, a new Certificate of Title was requested and  
22 received from the Department of Motor Vehicles (DMV). A true and correct copy of the  
23 Certificate of Title issued by DMV on January 13, 2011 is attached to the Declaration of  
24 Danial Danialian, marked Exhibit B and by reference made a part hereof. That title  
25 reflects that Statewide was the legal owner (lienholder) of the BMW.

26                  On information and belief, defendants assert that Kenneth Lewis and/or other  
27 persons, acted individually and/or in concert and submitted falsified documents to DMV  
28 in order to extinguish Statewide’s lien on the BMW fraudulently and to thereafter transfer  
29

1 title to another person, persons, or organizations. Kenneth Lewis also ceased making  
2 payments to Statewide for the BMW at approximately the same time the fraudulent  
3 transfer of title was effected. Kenneth Lewis failed to fulfill his obligation under the  
4 Sales Agreement with Statewide and as such Statewide was entitled to repossess the  
5 vehicle at that point.

6 When Statewide discovered the aforementioned fraudulent title had been issued, it  
7 filed a Record of Complaint Form on behalf of Statewide with the DMV investigations  
8 unit. A true and correct copy of that document is attached to the Declaration of Danial  
9 Danialian, marked Exhibit C and by reference made a part hereof. Danial Danialian is  
10 the person who signed the Record of Complaint Form on behalf of Statewide and its  
11 parent corporation. In his declaration, Danialian affirmatively states that the information  
12 contained in the Record of Complaint Form is true and correct, except that there was a  
13 misunderstanding as to the location of the BMW when the Record of Complaint Form  
14 was filled in. In fact, the BMW was not in the possession of the police, it was in the  
15 possession of Plaintiff herein, Lloyd Morrison III.

16 Following the illegal and fraudulent transfer of title, and subsequent transfers by  
17 successor owners, the BMW ended up in the possession of Plaintiff, Lloyd Morrison III.  
18 On information and belief defendants acknowledge that Plaintiff may have purchased the  
19 BMW from what he believed to be a reputable used car dealer (Carrolandia Auto Sales).  
20 It is unknown if Carrolandia Auto Sales knew or should have known that the BMW was  
21 in fact, stolen under a fraudulently obtained title and illegally transferred out of the name  
22 of Statewide by Kenneth Lewis and/or others.

23 Regardless of whether any successor “owners” of the BMW knew that the BMW  
24 was obtained through fraud and other illegal means, Statewide’s remained the only valid  
25 legal owner of the BMW as a matter of law. Suburban Motors, Inc. v. State Farm Mutual  
26 Auto Insurance Co. (1990) 218 Cal.App.3d 1354, 268 Cal.Rptr. 16

1 Upon discovering the location of its stolen BMW, Statewide took immediate  
2 action to recover its property. Statewide contracted with \_\_\_\_\_ to  
3 retrieve the vehicle as a repossession pursuant to their legal right as lienholder.

4 On October 14, 2011 \_\_\_\_\_ repossessed the vehicle on behalf  
5 of Statewide and delivered the vehicle to Statewide, the vehicle's only legal owner.

6 Statewide did not act outside of the bounds of reason, nor with malice, fraud, or  
7 oppression. Statewide acted exclusively to protect its interest in property, to wit: the  
8 BMW. Statewide had no contact with Plaintiff prior to repossessing its property and  
9 Statewide's only intent in repossessing the vehicle was to reclaim its stolen property.

10 At all times mentioned in the Complaint, Deborah Maher was an employee of  
11 Statewide, acting within the reasonable course and scope of her employment and  
12 Statewide and Deborah Maher have joined in this motion for summary judgment.

13 After Statewide retrieved its property from Plaintiff, Plaintiff filed suit against  
14 Carrolandia Auto Sales, Statewide Auto Sales and Deborah Maher.

15 Moving parties submit that they are the only rightful, legal owners of the BMW  
16 vehicle in question and as such, had the absolute right to the immediate possession of the  
17 BMW vehicle at all times mentioned in the Complaint. Moving parties further assert that  
18 ownership of the vehicle is an absolute defense to the allegations of trespass and conversion.  
19 The remaining causes of action for Intentional Infliction of Emotional Distress, Negligent  
20 Infliction of Emotional Distress and Negligence all have their basis in the false premise that  
21 the moving parties were not the legal owners of the BMW vehicle and must also fail.

## 22 II.

### 23 STANDARDS FOR SUMMARY JUDGMENT

24 A summary judgment may be granted where it is shown that the "action has no merit  
25 or there is no defense thereto." California Code of Civil Procedure section 437c(a) The  
26 court must determine from the evidence presented that "there is no triable issue as to any  
27 material fact and that the moving party is entitled to judgment as a matter of law..."  
28 California Code of Civil Procedure section 437c(c)

1  
2 The pleadings are determinative of what issues are "material" on a motion for  
3 summary judgment. Therefore, the moving party's declarations or other evidence must be  
4 directed to the claims or defenses raised in his or her own and the opposing party's  
5 pleadings. Dorado v. Knudsen Corp. (1980) 103 CA3d 605, 611, 163 CR 477, 481. In  
6 addition, to be "material," the fact must be in some way essential to the judgment; i.e., if  
7 proved, it could change the outcome of the case. Pettus v. Standard Cabinet Works (1967)  
8 249 CA2d 64, 69, 57 CR 207, 210  
9

10 Neither party can rely on his or her own pleadings (even if verified) to support or  
11 oppose a motion for summary judgment. Weil & Brown, California Practice Guide - Civil  
12 Procedure Before Trial, (The Rutter Group, 1991), Chapter Ten, section 10:19

13 Admissions made by the opposing party in his or her pleadings may be utilized by  
14 the moving party in his or her moving papers. Wilker v. Dorn (1966) 240 CA2d 118, 49  
15 CR 362; Pinewood Investors v. City of Oxnard (1982) 133 CA3d 1030, 184 CR 417

16 Claims for punitive damages require "clear and convincing evidence" that a  
17 defendant has been guilty of "oppression, fraud or malice" in the commission of a tort.  
18 California Civil Code section 3294(a)

19 The party seeking summary judgment has the burden of establishing evidentiary  
20 facts sufficient to entitle him or her to a judgment as a matter of law. California Code of  
21 Civil Procedure section 437c(c); Vesely v. Sager (1971) 5 C3d 153, 169, 95 CR 623, 635.  
22

23 Once the moving party has met the initial burden, the burden shifts to the opposing  
24 party to produce admissible evidence to controvert some material fact in the case. The  
25 opposing party's burden is to show that there is as least one "triable issue of material fact."  
26 California Code of Civil Procedure section 437c(c); University of Southern California v.  
27 Superior Court (Miller) (1990) 222 CA3d 1028, 272 CR 264, 268-269 It is insufficient to  
28 attack the credibility of the moving party's evidence. The opposing party must controvert  
29

1 the facts proved by the moving party. California Code of Civil Procedure section 437c(e)  
2 In order to create a "triable issue of material fact," the opposition evidence must be directed  
3 to issues raised by the pleadings. 580 Folsom Associates v. Prometheus Develop. Co.  
4 (1990) 223 CA3d 1, 272 CR 227, 236

5  
6 Where the defendant seeks summary judgment, his or her declarations and evidence  
7 must either disprove at least one essential element of every cause of action in plaintiff's  
8 complaint or prove an affirmative defense that would bar every cause of action in the  
9 complaint. DeRosa v. Transamerica Title Ins. Co. (1989) 213 CA3d 1390, 1397, 262 CR  
10 370, 373; Twain Harte Associates v. County of Tuolumne (1990) 217 CA3d 71, 79-80, 265  
11 CR 737, 740

12  
13 Unless relying exclusively upon a defense, defendant must rule out all possible merit  
14 in the complaint. This normally requires declarations or other evidence disproving all  
15 causes of action or theories set forth in the complaint. See Brejcha v. Wilson Machinery,  
16 Inc. (1984) 160 CA3d 630, 206 CR 688

17 Defendant's burden is to disprove the complaint. It is not enough simply to show  
18 that plaintiff has no evidence to back up certain claims. Barnes v. Blue Haven Pools (1969)  
19 1 CA3d 123, 126, 81 CR 444, 446 If defendant's declarations leave some portion of the  
20 complaint unchallenged, defendant has not met its burden for summary judgment purposes.  
21 Conn v. National Can Corporation (1981) 124 CA3d 630, 177 CR 445 For summary  
22 judgment purposes, defendant (as moving party) must disprove every claim and theory in  
23 the complaint. Security Pac. Nat'l Bank v. Assoc. Mtr. Sales (1980) 106 CA3d 171, 179,  
24 165 CR 38

25  
26 Plaintiff has the burden to establish evidentiary facts of every element necessary to  
27 entitle it to judgment. [Vesely vs. Sager (1971) 5 Cal.3d 153, 169.] Plaintiff has the burden  
28 of establishing evidentiary facts of every element of the claims contained in its Complaint,  
29



1 and to negate every affirmative defense raised in the Answer. [Dorado vs. Knudsen Corp.  
2 (1980) 103 Cal.App.3d 605, 611, and L.A. Sup. Ct. LDPM, Para.203.]

3 A motion for summary adjudication of the issues lies where one or more causes of  
4 action in the complaint "has no merit or ... there is no defense thereto." Code of Civil  
5 Procedure section 437c(f) Likewise, the court may summarily adjudicate that an affirmative  
6 defense to any cause of action is without merit. Id.

7  
8 Upon a motion for summary adjudication, the burden is on the moving party to  
9 establish evidentiary facts sufficient to prove or disprove the elements of a particular claim  
10 or defense. California Code of Civil Procedure section 437c(c), (f)

11 Summary adjudication is proper only with respect to "ultimate" issues which  
12 establish the elements of a claim or defense. [Beech Aircraft Corp. v. Superior Court (1976)  
13 61 Cal.App.3d 515, 516.] The local rules (for Los Angeles County) specifically prohibit the  
14 use of summary adjudication to resolve purely evidentiary matters. [L.A. Sup. Ct. LDPM,  
15 Para.210.]] The only proper use of summary adjudication is to adjudicate ultimate issues,  
16 i.e., the essential elements of a claim or defense. Evidentiary matters should be resolved  
17 through discovery, stipulation, or requests for admission.

18 If the moving party fails to identify any ultimate issues for summary adjudication,  
19 the motion must be denied if the opposing party raises even a single "triable issue".  
20 Summary adjudication cannot be granted if the moving party did not give notice of specific  
21 ultimate issues as to which adjudication is sought. [Gonzales vs. Superior Court (1987) 189  
22 Cal.3d 1542, 1546.]

23  
24 On a motion for summary adjudication, the test is whether there is any "triable issue  
25 of material fact" as to the particular claim or defense sought to be adjudicated. Weil &  
26 Brown, California Practice Guide - Civil Procedure Before Trial, (The Rutter Group, 1991),  
27 Chapter Ten, section 10:270

1 The analysis is intended to be a two step process. First, the Court determines  
2 whether any of the allegedly undisputed material facts are, in fact, undisputed. If the Court  
3 does find that certain facts are undisputed, it must then determine their legal effect. The  
4 Court must determine whether these undisputed material facts establish any "ultimate  
5 issue". [See Thai v. Stang (1989) 214 Cal.App.3d 1264 and Reid v. State Farm Mut. Auto  
6 Ins. Co. (1985) 173 Cal.App.3d 557.]

7  
8 Summary Adjudication in Los Angeles County:

9 The rules [the local rules for the County of Los Angeles] require that Plaintiff's  
10 notice should identify the precise issues sought to be established without controversy. The  
11 issues should be stated in language which is appropriate for adoption by the Court if the  
12 Motion is granted. Furthermore, there should be a reference from each issue to the allegedly  
13 undisputed facts which establish that issue. [L.A. Sup. Ct. LDPM Para.209.]

14 **III.**

15 **DEFENDANTS OWNERSHIP OF THE BMW VEHICLE PROVIDES AN**  
16 **ABSOLUTE DEFENSE TO THE TRESPASS AND CONVERSION CAUSES OF**  
17 **ACTION.**

18  
19 Defendants rely upon their legal title to the BMW and upon the holding in Suburban  
20 Motors, Inc. v. State Farm Mutual Auto Insurance Co. (1990) 218 Cal.App.3d 1354, 268  
21 Cal.Rtpr. 16.

22 In short, Suburban states unequivocally that:

23  
24 "…title, obtained directly from the lawful owner whom it  
25 insured and from whom the vehicle was stolen, is superior to  
26 the claim of Suburban Motors, a bona fide purchaser for value  
27 under a "chain of title" traceable to the thief. We agree and  
28 shall reverse the judgment."

1 Such is the very case here. In Suburban State Farm Insurance had provided coverage  
2 to the owner of a vehicle, including theft coverage. The vehicle was stolen, State Farm paid  
3 the insured and took lawful title to the vehicle were it to be recovered. Later, the vehicle  
4 was found in the possession of a bona fide purchaser deriving title from a chain of title  
5 beginning with a thief. The court held that State Farm's claim was superior to the bona fide  
6 purchaser.

7  
8 Here, Plaintiff's primary claim against Statewide is that Plaintiff's claim to title as a  
9 bona fide purchaser at the end of a chain of title which began with a fraudulent transfer of  
10 Statewide's lienholder interest in the vehicle, is somehow superior to the claim of Statewide.  
11 Suburban is definitive on the issue. Statewide has the superior claim and was, and is,  
12 entitled to possession of the BMW vehicle.

13 The court was faced with the argument that

14 "State Farm contends its title should prevail over the claim of  
15 Suburban Motors who, although a bona fide purchaser for  
16 value, claims under a title "laundered" through another state  
17 by the thief or a successor to the thief; that title, State Farm  
18 asserts, is not merely voidable, but void notwithstanding that  
19 the documents of title issued by DMV appear facially valid."

20 Suburban Id. 218 Cal.App.3d @ 1359

21 The court concluded:

22 Since the facts are undisputed, the issue is one of law and the  
23 "appellate court is free to draw its own conclusions of law  
24 from the undisputed facts." (Cox Cable San Diego, Inc. v.  
25 City of San Diego (1987) [188 Cal.App.3d 952](#), 958 [233  
26 Cal.Rptr. 735]; Code Civ. Proc., § 437c.) We shall conclude  
27 that State Farm's title is superior to the claim of Suburban  
28 Motors and shall reverse the judgment and order entry of  
29 judgment in favor of State Farm.

Suburban Id. 218 Cal.App.3d @ 1359

1           Statewide (and Maher by agency) assert that their ownership of the vehicle provides  
2 an absolute defense to the Trespass and Conversion causes of action pled against them.

### 3                                   **Trespass**

4           Necessity often justifies an action that would otherwise constitute a trespass, as  
5 where the act is prompted by the motive of preserving life or property and reasonably  
6 appears to the actor to be necessary for that purpose [People v. Roberts (1956) 47 Cal. 2d  
7 374, 377, 303 P.2d 721].

8           Defendants/moving parties have pled necessity as an affirmative defense.

9           In retrieving the BMW, these moving parties acted out of necessity in order to  
10 preserve their property from further theft, conversion, damage, etc.

11           Furthermore, valid ownership of a thing is an essential element of trespass to  
12 personal property. Plaintiff did not enjoy valid legal ownership of the BMW vehicle. As  
13 such, his cause of action for trespass must fail.

### 14                                   **Conversion**

15           Similar to the trespass cause of action, ownership of a thing is necessary in order  
16 to plead conversion of it. Plaintiff cannot escape the fact that despite his position as a  
17 bona fide purchaser of the BMW, Plaintiff's title was the end result of fraud, theft,  
18 conversion and other crimes to chattel. As such, his ownership is invalid, as is his claim  
19 for conversion.

20           Plaintiff's claim does not lie against Statewide or its agents, it lies against Kenneth  
21 Lewis and any co-conspirators who engineered the fraudulent transfer of title.

### 22                                   **Intentional/Negligent Infliction of Emotional Distress Causes of Action**

23           The same set of facts are pled against these moving parties in the IIED, NIED and  
24 Negligence causes of action as are pled in the trespass and conversion causes of action.

25           The intentional infliction of severe mental or emotional distress by willful and  
26 outrageous conduct, in the absence of privilege, constitutes an actionable tort for which  
27 the victim may recover damages [State Rubbish Collectors Ass'n v. Siliznoff (1952) 38  
28

1 Cal. 2d 330, 336,339, 240 P.2d 282; Spackman v. Good (1966) 245 Cal. App. 2d 518,  
2 528,529, 54 Cal. Rptr. 78].

3 Conduct that constitutes the tort of intentional infliction of emotional distress is  
4 often actionable under another theory of liability [see, e.g., Stoiber v. Honeychuck (1980)  
5 101 Cal. App. 3d 903, 913, 926, 162 Cal. Rptr. 194 (same conduct constituted breach of  
6 contract, nuisance, negligence, constructive eviction, and intentional infliction of  
7 emotional distress)]. A plaintiff, however, may recover only one measure of damages for  
8 emotional distress arising from particular conduct. If one recovers general damages for  
9 emotional distress pursuant to another tort cause of action, he or she cannot also recover  
10 for the same damages under a theory of intentional infliction of emotional distress. Thus,  
11 one cannot recover for emotional distress caused by negligent conduct and also recover  
12 for the same distress a second time under the theory that it was intentionally caused  
13 [see Holliday v. Jones (1989) 215 Cal. App. 3d 102, 121, 264 Cal. Rptr. 448].

#### 14 Elements of Tort

15 The elements of a prima facie case of intentional infliction of emotional distress  
16 are the following:

17  
18  
19 Outrageous conduct by the defendant;

20 The defendant's intention of causing, or reckless disregard of the probability of causing,  
21 emotional distress;

22 The plaintiff's suffering severe or extreme emotional distress; and

23 Actual and proximate causation of the emotional distress by the defendant's outrageous  
24 conduct [Hernandez v. General Adjustment Bureau (1988) 199 Cal. App. 3d 999, 1007,  
25 245 Cal. Rptr. 288; Fletcher v. Western Natl Life Ins. Co. (1970) 10 Cal. App. 3d 376,  
26 394, 89 Cal. Rptr. 78; see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 209,  
27 185 Cal. Rptr. 252, 649 P.2d 894; Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946, 160  
28  
29

1 Cal. Rptr. 141, 603 P.2d 58; Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 593,  
2 156 Cal. Rptr. 198, 595 P.2d 975].

3 In addition, the conduct must be directed at the plaintiff, or occur in the presence  
4 of a plaintiff of whom the defendant is aware [Christensen v. Superior Court (1991) 54  
5 Cal. 3d 868, 903, 2 Cal. Rptr. 2d 79, 820 P.2d 181]. It is not sufficient that the defendant  
6 had to have realized that its misconduct was almost certain to cause severe emotional  
7 distress to any person who might foreseeably be affected by the misconduct; the  
8 defendant must have been aware of the particular plaintiffs [see Potter v. Firestone Tire &  
9 Rubber Co. (1993) 6 Cal. 4th 965, 1001, 1003, 25 Cal. Rptr. 2d 550, 863 P.2d  
10 795 (intentional infliction of emotional distress cause of action remanded because  
11 findings of trial court were ambiguous regarding defendant's awareness of particular  
12 plaintiffs)].

13 Whether treated as an element of the prima facie case or as a matter of defense, it  
14 must also appear that the defendant's conduct was unprivileged [Fletcher v. Western  
15 Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78; see Davidson v.  
16 City of Westminster (1982) 32 Cal. 3d 197, 209, 185 Cal. Rptr. 252, 649 P.2d 894;  
17 Cervantez v. J.C. Penney Co. (1979) 24 Cal. 3d 579, 593, 156 Cal. Rptr. 198, 595 P.2d  
18 975].

19 The requirement that, to warrant recovery for mental distress, the conduct must be  
20 outrageous or that the mental distress must be severe is intended to apply only to the  
21 independent tort of intentional infliction of emotional distress. To be distinguished are  
22 those cases in which emotional distress may be an element of damages when other  
23 interests have been invaded, and tort liability has arisen apart from the emotional distress.  
24 The more exacting requirements of outrageousness and severity are applied to the  
25 independent tort (that is, intentional infliction of emotional distress) because of the fear of  
26 fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up  
27 any satisfactory boundaries to liability [Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d  
28 566, 579, 580, 108 Cal. Rptr. 480, 510 P.2d 1032].

1 Liability for intentional infliction of emotional distress exists only if the  
2 defendant's conduct has been so outrageous in character and so extreme in degree as to  
3 go beyond all possible bounds of decency and to be regarded as atrocious and utterly  
4 intolerable in a civilized community [Talice v. Blue Cross of Cal. (1989) 209 Cal. App.  
5 3d 878, 883, 257 Cal. Rptr. 338; see Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946, 160  
6 Cal. Rptr. 141, 603 P.2d 58; Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179,  
7 182,194, 65 Cal. Rptr. 2d 297 (employer's request, that employee take urinalysis test that  
8 employee admitted was not overly intrusive, was not conduct that went beyond all  
9 bounds of decency)]. Behavior may be considered outrageous if a defendant: (1) abuses a  
10 relation or position that gives him or her power to damage the plaintiff's interest; (2)  
11 knows the plaintiff is susceptible to injuries through mental distress; or (3) acts  
12 intentionally or unreasonably with the recognition that the acts are likely to result in  
13 illness through mental distress [Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946, 160 Cal.  
14 Rptr. 141, 603 P.2d 58; Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d  
15 1108, 1130, 228 Cal. Rptr. 591].

16 Whether any particular conduct is sufficiently outrageous to constitute the element  
17 of the tort is a mixed question of law and fact. It is for the court to determine, in the first  
18 instance, whether the defendant's conduct may reasonably be regarded as so extreme  
19 and outrageous that recovery is permissible [Tollefson v. Roman Catholic Bishop (1990)  
20 219 Cal. App. 3d 843, 858, 268 Cal. Rptr. 550]. If reasonable persons might differ, it is  
21 for the jury to determine whether the conduct was, in fact, outrageous [Alcorn v. Anbro  
22 Engg, Inc. (1970) 2 Cal. 3d 493, 499, 86 Cal. Rptr. 88, 468 P.2d 216; see Cross v.  
23 Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 284, 55 Cal. Rptr. 2d 801].

24 The relationship between the parties is significant in determining whether liability  
25 should be imposed [Alcorn v. Anbro Engg, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr.  
26 88, 468 P.2d 216]. The extreme and outrageous character of the conduct may arise from  
27 the actor's abuse of a position or a relation that gives him or her actual or apparent  
28 authority over the other or power to affect his or her interests. Police officers, school  
29

1 authorities, collecting creditors [Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App.  
2 4th 266, 276, 55 Cal. Rptr. 2d 801; Golden v. Dungan (1971) 20 Cal. App. 3d 295,  
3 303 n.5, 97 Cal. Rptr. 577], insurers [Fletcher v. Western Nat'l Life Ins. Co. (1970) 10  
4 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78], hospitals [Bundren v. Superior Court (1983)  
5 145 Cal. App. 3d 784, 791-792, 193 Cal. Rptr. 671], attorneys [McDaniel v. Gile (1991)  
6 230 Cal. App. 3d 363, 372-375, 281 Cal. Rptr. 242], and landlords [Aweeka v. Bonds  
7 (1971) 20 Cal. App. 3d 278, 281-282, 97 Cal. Rptr. 650] have been liable for extreme  
8 abuse of their positions.

9       Such a relationship might exist if the immediate actor proceeds under color of  
10 process issued in a lawsuit [see Golden v. Dungan (1971) 20 Cal. App. 3d 295, 303, 305,  
11 97 Cal. Rptr. 577]. The necessary relationship may also arise between a religious  
12 organization and those persons whose lives it was promising to make more meaningful  
13 [Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1122-1123, 252 Cal. Rptr. 122,  
14 762 P.2d 46]. The special obligation of public utilities and other enterprises affected with  
15 the public interest has been noted as significant in the imposition of liability on such  
16 defendants, even in the absence of outrageous conduct, apparently on a policy basis of  
17 encouraging fair treatment of the public whom the enterprises serve [Fletcher v. Western  
18 Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78].

19       Liability attaches only if the actor intentionally or recklessly causes severe  
20 emotional distress to another [Spackman v. Good (1966) 245 Cal. App. 2d 518, 530, 54  
21 Cal. Rptr. 78; Taylor v. Vallelunga (1959) 171 Cal. App. 2d 107, 109, 339 P.2d 910]. An  
22 actor's conduct is reckless if he or she knows that severe emotional distress is certain, or  
23 substantially certain, to result [Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97  
24 Cal. Rptr. 577]. In other words, if the conduct was not undertaken for the purpose of  
25 causing the resulting harm, proof of the intent of the actor to cause such harm may be  
26 supplied by proof of circumstances showing that the conduct was of a nature that  
27 reasonably should have been recognized as likely to cause the harm sustained [Spackman  
28 v. Good (1966) 245 Cal. App. 2d 518, 530, 54 Cal. Rptr. 78].



1 To justify recovery, the egregious conduct must be directed toward the plaintiff.  
2 The only exception to this rule is if the defendant is aware of, but acts with reckless  
3 disregard of, the plaintiff and the probability that the conduct will cause severe emotional  
4 distress to that plaintiff. If reckless disregard is the basis of recovery, the plaintiff is  
5 usually present at the time of the conduct, and the defendant knows the plaintiff is  
6 present. The presence of the plaintiff at the time of the outrageous conduct is the element  
7 that establishes a higher degree of culpability, which, in turn, justifies recovery of greater  
8 damages by a broader group of plaintiffs than is allowed on a negligent infliction of  
9 emotional distress theory [Christensen v. Superior Court (1991) 54 Cal. 3d 868, 905,906,  
10 2 Cal. Rptr. 2d 79, 820 P.2d 181 (relying on Restatement (Second) of Torts 868, cmt.  
11 g)].

#### 12 Severe Emotional Distress

13 The emotional distress required for liability for intentional infliction of emotional  
14 distress must in fact exist, and it must be severe. The intensity and duration of the distress  
15 are factors to be considered in determining its severity. Severe means, therefore,  
16 substantial or enduring as distinguished from trivial or transitory. Severe emotional  
17 distress denotes emotional distress of such substantial quantity or enduring quality that no  
18 reasonable person in a civilized society should be expected to endure it. It is for the court  
19 to determine whether on the evidence severe emotional distress can be found; it is for the  
20 jury to determine whether, on the evidence, it has in fact existed [Fletcher v. Western  
21 Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78; see also Schild v.  
22 Rubin (1991) 232 Cal. App. 3d 755, 762,763, 283 Cal. Rptr. 533 (severe emotional  
23 distress means highly unpleasant mental suffering or anguish from socially unacceptable  
24 conduct that entails such intense, enduring, and nontrivial emotional distress that no  
25 reasonable person in a civilized society should be expected to endure it)]. A complaint  
26 that defendant's conduct was emotionally upsetting and caused plaintiff to lose sleep and  
27 have stomach upset and generalized anxiety is insufficient to support a recovery for  
28  
29

1 intentional infliction of emotional distress [Wong v. Jing (2010) 189 Cal. App. 4th 1354,  
2 1377, 117 Cal. Rptr. 3d 747].

3 Emotional distress includes all highly unpleasant mental reactions, such as fright,  
4 horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry,  
5 and nausea [Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577;  
6 Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 397, 89 Cal. Rptr.  
7 78].

8 If physical harm has not resulted from the emotional distress, the courts tend to  
9 look for more in the way of extreme outrage as an assurance that the mental disturbance  
10 claimed is not fictitious [Golden v. Dungan (1971) 20 Cal. App. 3d 295, 308, 97 Cal.  
11 Rptr. 577; Grimes v. Carter (1966) 241 Cal. App. 2d 694, 699, 50 Cal. Rptr. 808; Perati  
12 v. Atkinson (1963) 213 Cal. App. 2d 472, 474, 28 Cal. Rptr. 898].

13 For example, a creditor possesses a qualified privilege to protect its economic  
14 interest by collecting a debt, but the privilege may be lost if the creditor uses outrageous  
15 and unreasonable means in seeking payment [Symonds v. Mercury Savings & Loan  
16 Assn. (1990) 225 Cal. App. 3d 1458, 1469, 275 Cal. Rptr. 871; Bowden v. Spiegel, Inc.  
17 (1950) 96 Cal. App. 2d 793, 795, 216 P.2d 571]. The applicable test is whether or not the  
18 creditor goes beyond all reasonable bounds of decency in attempting to collect the debt.

#### 19 Negligent Infliction of Emotional Distress

20 In contrast, negligent infliction of emotional distress refers to the recovery of  
21 damages by a plaintiff who has not otherwise suffered any physical or bodily injury, for  
22 emotional distress arising from a defendant's negligent conduct [see Molien v. Kaiser  
23 Found. Hosps. (1980) 27 Cal. 3d 916, 924, 925, 167 Cal. Rptr. 831, 616 P.2d  
24 813 (discussion of prior rule requiring physical injury)].

25 Negligent infliction of emotional distress is not a tort or a cause of action in and of  
26 itself. Instead, it is simply a recovery of damages under the tort of negligence. The  
27 traditional elements of a negligence cause of action - duty, breach of duty, causation, and  
28

1 damages, must be present [Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989)  
2 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98, 770 P.2d 278].

3 Emotional distress is compensable if it results from a trespass or a nuisance  
4 [Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 271♦275, 288 P.2d 507;  
5 Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 226, 259 P.2d 429; Lew v. Superior Court  
6 (1993) 20 Cal. App. 4th 866, 871♦874, 25 Cal. Rptr. 2d 42

7 **In the present case, Defendants/Moving Parties herein have provided an**  
8 **absolute defense to the crime of trespass as a matter of law.**

9 Courts have generally limited the right to recover for emotional distress concurrent  
10 with property damage or economic loss if the damage or loss was caused only by  
11 negligent conduct [see Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 883♦885, 226  
12 Cal. Rptr. 698; State of California ex rel. Dep't of Transp. v. Superior Court (1984) 159  
13 Cal. App. 3d 331, 337,338, 205 Cal. Rptr. 518; Cooper v. Superior Court (1984) 153 Cal.  
14 App. 3d 1008, 1012, 200 Cal. Rptr. 746; see also Lee v. Bank of America (1990) 218 Cal.  
15 App. 3d 914, 920, 267 Cal. Rptr. 387 (stating that California courts have limited  
16 emotional suffering damages to cases involving either physical impact and injury to  
17 plaintiff, or intentional wrongdoing by defendant)]. Under this view, there can be no  
18 recovery for emotional distress arising solely from property damage, absent a threshold  
19 showing of some preexisting relationship or intentional tort [Erlich v. Menezes (1999) 21  
20 Cal. 4th 543, 554, 87 Cal. Rptr. 2d 886, 981 P.2d 978; Cooper v. Superior Court (1984)  
21 153 Cal. App. 3d 1008, 1012, 200 Cal. Rptr. 746]. Another court has refused to allow  
22 emotional-distress damages resulting from insurance claims practices that were merely  
23 negligent, without rising to the level of bad faith [see Soto v. Royal Globe Ins. Co. (1986)  
24 184 Cal. App. 3d 420, 434, 229 Cal. Rptr. 192; see also Andre v. Superior Court (1991) 2  
25 Cal. App. 4th 11, 20 n.9, 2 Cal. Rptr. 2d 815]. Yet another has refused damages for  
26 emotional distress with regard to negligent misrepresentation of conditions of  
27 employment [Branch v. Homefed Bank (1992) 6 Cal. App. 4th 793, 797♦801, 8 Cal.  
28 Rptr. 2d 182]. The California Supreme Court has held that homeowners were not entitled  
29

1 to recover emotional distress damages for the negligent performance of a contract to  
2 build their home. The Court stressed that a contractual relationship, without more, is  
3 insufficient to support an award of damages for emotional distress if the negligent  
4 conduct resulted only in economic injury to the plaintiff [Erich v. Menezes (1999) 21  
5 Cal. 4th 543, 554, 557, 87 Cal. Rptr. 2d 886, 981 P.2d 978].

#### 6 **Negligence**

7 The elements of negligence are: 1) A duty owed; 2) Breach of the duty owed; 3)  
8 Causation; and 4) Damages

9 In the present case, the moving parties owed no duty whatsoever to Plaintiff.  
10 Plaintiff was in possession of Defendant's stolen property and Defendants acted reasonably  
11 to protect their interest. As such the negligence cause of action must fail and with it, the  
12 intentional and negligent infliction of emotional distress claims.

#### 13 **IV.**

#### 14 **CONCLUSION.**

15 Based upon the holding in Suburban Motors, Inc. v. State Farm Mutual Auto  
16 Insurance Co. (1990) 218 Cal.App.3d 1354, 268 Cal.Rptr. 16., and the other applicable law  
17 to the facts of the present case, Defendants/Moving Parties submit that there is an absolute  
18 defense to each of the causes of action pled against them.

19 Defendants herein request that each of the causes of action pled against them be  
20 dismissed with prejudice.

21 Alternatively, Defendants request that the court make an ultimate factual finding that  
22 Statewide was the legal owner of the BMW vehicle which is the subject of this litigation.

23 Dated:

24 **BY: ROBERT F. SMITH**

25 Attorney for Defendants

26 DANIAL DANIALIAN SALVAGE,

27 INC.

28 Dba STATEWIDE AUTO SALES, and

DEBORAH MAHER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

---

I am a resident of the County aforesaid; I am over the age of eighteen (18) years and not a party to the within entitled action; my business address is

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_, 2013, at Los Angeles, California.