O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHADI BISHARA, an individual dba HAVANA SPORT BAR AND GRILL, Plaintiff, v. CENTURY SURETY COMPANY; CENTURY INSURANCE GROUP; PROCENTURY CORPORATION, and DOES 1 to 30, Inclusive, Defendants.	Case No. EDCV 09-01745-VAP (JCx) **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Before the Court is a Motion for Summary Judgment ("Motion") filed by Defendant Century Surety Company ("Defendant"). After consideration of the papers in support of, and in opposition to, the Motion, the Court GRANTS Defendant's Motion.

I. PROCEDURAL HISTORY

On August 11, 2009, Plaintiff "Shadi Bishara d.b.a. Havana Sport [sic] Bar and Grill" ("Bishara" or

"Plaintiff") filed a Complaint ("Complaint") in the California Superior Court for the County of San Bernardino, asserting claims for (1) declaratory relief; (2) breach of contract, (3) bad faith denial of an insurance claim, and (4) breach of the implied covenant of good faith and fair dealing, arising out of an insurance coverage dispute. (See Doc. No. 1 (Not. of Removal), Ex. A.) On September 14, 2009, Defendant removed the action to this Court on the basis of the Court's diversity jurisdiction. (See id., ¶ 3.)

On December 17, 2010, Defendant filed its Motion for Summary Judgment for Partial Summary Judgment. (Doc. No. 19.) In support of its Motion, Defendant attached the following documents and exhibits:

1. Statement of Uncontroverted Facts ("SUF");
2. Declaration of H. Douglas Galt ("Galt Declaration");
3. Declaration of Michael C. Phillips ("Phillips Declaration");
4. Declaration of Rande L. Kaufman ("Kaufman Declaration");
5. Contract for Sale of Personal Property ("Ex. 1");

6. Articles of Incorporation for Havanas Inc.[1] ("Ex. 2");
7. Statement of Information (Havanas Inc.) ("Ex. 3");
8. Application for Seller's Permit (Havanas Inc.) ("Ex. 4");
9. Rialto Fire Department Report ("FIR");
10. Advanced Analysis, Inc., Report ("Ex. 6");
11. Commercial Insurance Application on ACORD Form 128 ("Ex. 7" or "ACORD Form");
12. Century Surety Group Liquor Liability Application ("Ex. 8" or "LLA");
13. Restaurant/Bar/Tavern/Nightclub Supplemental Questionnaire ("Ex. 9" or "Supplemental Questionnaire");
14. Century Surety Co., Policy No. CCP 55947 ("Ex. 10" or "Policy");
15. Sworn Proof of Loss from October 5, 2008, Fire[2]
16. November 14, 2007, Richdon Metals Invoices ("Ex. 12");

---

[1] The parties' references to "Havanas" are inconsistent, and alternate between "Havana," "Havanas," "Havana's," and "Havanas'." Accordingly, where the Court refers to a document, the spelling used is the spelling from the referenced document.

[2] Defendant inadvertently attached the wrong proof of loss as Exhibit 11. The attached proof of loss is dated May 2, 2006, and pertains to the theft of car and home audio equipment from a different address. Accordingly, on January 31, 2011, Defendant filed a notice of errata attaching the proper Proof of Loss ("Ex. 11."). (See Doc. No. 27 (Not. of Errata re: Ex. 11), at 1-2.)

17. January 12, 2010, letter to Mr. Witsoe, attorney for Bishara ("Ex. 13");
18. July 21, 2010, letter to Bishara ("Ex. 14");
19. July 21, 2010, letter to Havana's Inc. ("Ex. 15");
20. Deposition of Ashraf Swidan given in Swidan v. Allied Insurance Company on September 23, 2008 ("Swidan Dep.");
21. Ashraf Swidan Examination under Oath given on December 4, 2009 ("Swidan EUO");
22. Shadi Bishara Examination under Oath given on April 9, 2009 ("Bishara April EUO");
23. Shadi Bishara Examination under Oath given on December 4, 2009 ("Bishara December EUO"); and
24. April 2, 2010, Deposition of Richard Ragsdale ("Ragsdale Dep.")

On February 10, 2011, by stipulation of the parties, the Court permitted Plaintiff to file an Opposition by March 7, 2011, and Defendant to file a Reply no later than March 14, 2011. (Doc. No. 31.) On March 7, 2011, Plaintiff filed his Opposition. (Doc. No. 35.) In support of his Opposition, Plaintiff submitted the following documents and exhibits:

1. "Statement of Response to Uncontroverted Facts" ("SGI");

2. Declaration of Shadi Bishara ("Bishara Declaration");
3. Declaration of D. Scott Mohney ("Mohney Declaration");
4. Century Surety Group Liquor Liability Application;[3]
5. Restaurant/Bar/Tavern/Nightclub Supplemental Questionnaire;[4]
6. Page 4 of the ACORD Form, bearing Bates label CS 02557;[5]
7. Notice of Cancellation, dated November 26, 2008 ("Ex. D"); and
8. Page 50 of the Swidan EOU.

On March 14, 2011, Defendant filed its Reply. (Doc. No. 37.)

II. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show

---

[3] Included as Defendant's Ex. 8.

[4] Included as Defendant's Ex. 9.

[5] The ACORD Form Plaintiff attaches is also included as page 5 of Defendant's Ex. 7.

that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

When the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Celotex, 477 U.S. at 325. Instead, the moving party's burden is met by pointing out there is an absence of evidence supporting the non-moving party's case. Id.

The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all

matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252; see also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial, 14:144. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (citing Anderson, 477 U.S. at 252). "The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." In re Oracle, 627 F.3d at 387 (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991); T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. FACTS

A. Uncontroverted Facts

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of Defendant's Motion.[6] See L.R. 56-3.

1. Havana's Sports Bar and Restaurant

Havana's Sports Bar and Restaurant ("Restaurant") was owned by Ashraf Swidan ("Swidan") since late 2005. (Swidan Dep. 13:6-21; Swidan EUO 21:8-9.) Swidan held a Liquor License, number 434322, in his own name. (SUF ¶ 2; SGI ¶ 2.) From late 2005 until at least October 5, 2008, the Restaurant operated under the Liquor License. (SUF ¶ 3; SGI ¶ 3.)

In a contract dated October 1, 2007, Swidan agreed to sell the Restaurant to Plaintiff for $150,000.00. (Bishara April EUO 27:25-28:5; Swidan EUO 43:24-45:2; Ex. 1; SUF ¶ 4; SGI ¶ 4.) Under the terms of the contract, Plaintiff was required to make two payments of $75,000.00 each; Plaintiff made the first payment of $75,000.00 to Swidan in cash. (SUF ¶ 5; SGI ¶ 5.) Swidan did not give

[6]To the extent any proposed uncontroverted facts are not mentioned here, the Court has not relied on them in reaching its decision. The Court independently has considered the admissibility of the evidence underlying the SUF, and has not considered irrelevant or inadmissible evidence.

Plaintiff a receipt for the cash, and neither Plaintiff nor Swidan have written records evidencing the cash transaction. (SUF ¶ 5; SGI ¶ 5.) The parties dispute whether Plaintiff paid the remaining $75,000.00 he owed Swidan under the sale contract. (See Section III.B., infra.) Nevertheless, the uncontroverted evidence demonstrates that at the time of the October 5, 2008, fire, Plaintiff had not paid Swidan the second $75,000.00 he owed under the sale contract. (Swidan EOU 50:10-13.)

In approximately January or February 2008, a person broke into the Restaurant, poured gasoline on the floor, and ignited a fire. (Bishara April EUO 92:4-21; SUF ¶ 7; SGI ¶ 8.) In June or July 2008, another person broke into the Restaurant and stole a plasma television. (SUF ¶ 8; SGI ¶ 8.) When the arson and the burglary occurred, the Restaurant was not insured. (SUF ¶ 9; SGI ¶ 9.)

2. Havanas Inc.

On March 18, 2008, the California Secretary of State filed the Articles of Incorporation for "Havanas Inc.," ("Havanas") which listed Swidan as the agent for service of process. (Swidan EUO 37:20-25; Ex. 2; SUF ¶ 11; SGI ¶ 11.) On April 17, 2008, the California Secretary of State filed a "Statement of Information," which listed Plaintiff as the Secretary of Havanas and Swidan as the

Chief Executive Officer and Chief Financial Officer. (SUF ¶ 11; SGI ¶ 11.)

On April 22, 2008, the State of California Board of Equalization processed an Application for Seller's Permit, which identified the applicant as Havanas and stated sales would begin on May 1, 2008. (SUF ¶ 12; SGI ¶ 12; Ex. 4.) The Application for Seller's Permit identifies Swidan as the President, and Plaintiff as the Secretary. (Ex. 4.) The Application for Seller's Permit contains a "Certification" portion, which requires the names and signatures of "All Corporate Officers, LLC Managing Members, Partners, or Owners." (Id.) Both Swidan and Bishara are listed as signatories in the Certification portion. (Ex. 4 at 2.)

Plaintiff and Swidan testified under oath that Havanas was formed for the purpose of holding the Restaurant's assets. (SUF ¶ 13; SGI ¶ 13.) Although the Restaurant operated under Havanas' Seller's Permit issued on April 22, 2008, the lease, Liquor License, and other assets of the Restaurant were never transferred to either Havanas or Plaintiff. (SUF ¶ 13; SGI ¶ 13.)

In September 2008, and through the time of the fire, Swidan worked four to five days a week at the Restaurant, helping to manage it. (SUF ¶ 14; SGI ¶ 14;

Swidan Dep. 22:12-17; Swidan EUO 74:6-75:14.) Swidan also holds between twenty and fifty percent of Havanas's stock.[7]

3. The Insurance Policy

From the time Swidan began running the Restaurant in late 2005 until July 2008, it was uninsured. (Swidan Dep. 13:6-21; Swidan EUO 21:8-9, 59:6-18.) On August 7, 2008, Defendant received an application for insurance ("Insurance Application") to cover the Restaurant. (SUF ¶ 23; SGI ¶ 23.) The Insurance Application consisted of: (1) the ACORD Form; (2) a Liquor Liability Application ("LLA"); and (3) a Restaurant/Bar/Tavern/Nightclub Supplemental Questionnaire ("Supplemental Questionnaire"). (SUF ¶ 23; SGI ¶ 23.)

The ACORD Form, dated August 7, 2008, lists the applicant as "Havanas." (Ex. 7.) A separate page of the ACORD Form, however, lists the applicant as "Shadi N Bishara dba Havanas Bar." (Id. at 270; SUF ¶ 24; SGI ¶ 24.) In response to question 18 on the ACORD Form, asking: "have any crimes occurred or been attempted on

[7] The percentage of Havana's Swidan owns is unclear. Plaintiff asserts Swidan owns 50%; Swidan's testimony, however, indicates he owns 20%. (Compare Bishara's April EUO 32:13-18 with Swidan Dep. 14:5-10.) Nevertheless, it is undisputed that Swidan owned a portion of Havana's stock.

your premises within the last three years," The box marked "no" is checked. (Id. at 269; SUF ¶ 27; SGI ¶ 27.)

The LLA, dated August 7, 2008, asks for the "Name of Applicant (include dba)." (Ex. 8; SUF ¶ 24; SGI ¶ 24.) The applicant listed is "Shadi N Bishara / Havana Bar & Restaurant." (Ex. 8.) The LLA describes the applicant as a "corporation." (Id.) Question 21 on the LLA form asks for the "liquor liability insurer(s) for past three (3) years;" the phrase "new adventure" (sic) is the hand-written response. (Id.)

The Supplemental Questionnaire lists the "insured" as "Shadi N Bishara / Havana Bar & Restaurant." (Ex. 9.) The Supplemental Questionnaire asks for the "number of years this business has been in operation"; the response is "new." (Id.; SUF ¶ 26; SGI ¶ 26.) Similarly, the Supplemental Questionnaire asks for the financial information for the past three years; the response is "new." (Id.)

In reliance on the Insurance Application, including the ACORD Form, LLA, and Supplemental Questionnaire, Defendant issued insurance policy number CCP 559467 ("Policy"), for the period of August 7, 2008, through August 7, 2009. (SUF ¶ 28; SGI ¶ 28.) The Policy lists the named insured as "Havana's Sports Bar & Restaurant,"

and describes the business as an "Organization (Other than Partnership, LLC or Joint Venture)." (Ex. 10; SUF ¶ 29; SGI ¶ 29). Plaintiff's name does not appear anywhere in the Policy or the Policy's declarations page. (SUF ¶ 30.)[8]

Under the Policy, Defendant agrees to "pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (Policy at 334.) Under "Causes of Loss - Special Form," the Policy excludes

> loss or damage caused by or resulting from . . . [a] [d]ishonest or criminal act by you, any of your partners, members, officers, managers, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose: (1) Acting alone or in collusion with others; or (2) Whether or not during the hours of employment.
>
> This exclusion does not apply to acts of destruction by your employees (including leased employees); but theft by employees (including leased employees) is not covered.

(Policy at 351-52.)

[8] Plaintiff disputes this fact, contending his name appears repeatedly in the Insurance Application. (SGI ¶ 30.) Whether or not Plaintiff's name appears in the Insurance Application does not controvert whether his name appears in the Policy itself. Accordingly, the Court deems this fact admitted without controversy.

> The Policy also provides that the coverage is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:
>
> 1. This Coverage Part;
> 2. The Covered Property;
> 3. Your interest in the Covered Property; or
> 4. A claim under this Coverage Part.

(Policy at 331.)

4. The October 5, 2008, Fire

On October 5, 2008, Plaintiff left the restaurant at about 2:15 a.m. (SUF ¶ 15; SGI ¶ 15.) Between 2:25 a.m. and 2:50 a.m., Swidan set the alarm to the Restaurant and left the building. (Swidan EUO 79:24-81:16; FIR at 15; SUF ¶ 15; SGI ¶ 15.) At the time Plaintiff left the building, all of the Restaurant's windows and doors were closed and locked. (Bishara's April EUO 100:11-23; SUF ¶ 15; SGI ¶ 15.)

According to the Rialto Fire Department's Fire Investigation Report, at 2:50 a.m., six minutes after Swidan left the Restaurant, a motion detector inside the Restaurant was set off; a second motion detector was set off four minutes later, at 2:54 a.m. (SUF ¶ 17; SGI ¶ 17; FIR at 15.)[9] The fire was reported at

[9] The FIR does not contain independent page numbers. (continued...)

3:17 a.m. (FIR at 15.) The Rialto Fire Department responded to the fire at 3:27 a.m., and found all of the doors and windows locked and secured when they arrived. (SUF ¶ 19; SGI ¶ 19; FIR at 37-38.)

The Rialto Fire Department investigated the fire, and concluded that Swidan intentionally set fire to the inside of the Restaurant. (SUF ¶ 21; SGI ¶ 21; FIR at 41.) The Rialto Fire Department based its conclusion on, inter alia:

1. Swidan was the last person seen leaving the building on October 5, 2008; ten minutes after he leaves, smoke is seen coming from inside the building;
2. No one was seen entering the building on video surveillance cameras after Swidan left the building, and the Rialto Fire Department found no indications that someone tried to force open the doors or windows; and
3. All accidental and natural ignition sources were ruled out.

(FIR at 41.)

[9](...continued)
Accordingly, for ease of reference, the Court cites to the continuous page number on the bottom right-hand corner of Defendant's exhibits.

Advanced Analysis, Inc., a private investigation company Defendant hired, reached a similar conclusion, finding "that [Plaintiff] and Joe Swidan conspired and intentionally set fire to the [Restaurant]." (SUF ¶ 20; Ex. 6 at 31; Kaufman Decl. ¶ 8.)[10]

5. Claim for Coverage

On an unspecified date, Plaintiff submitted a claim for coverage ("Coverage Claim") as a result of the fire. (SUF ¶ 34; SGI ¶ 34; Ex. 11.) As part of Plaintiff's Coverage Claim, Plaintiff represented that at the time of the loss, no one other than Plaintiff had an interest in the property. (SUF ¶ 34; SGI ¶ 34; Ex. 11.)

To support the amount Plaintiff requested in his Coverage Claim, he submitted two invoices to Defendant from Richdon Metals, dated November 14,

---

[10] Plaintiff disputes this fact, contending that he did not intentionally set fire to the Restaurant. (SGI ¶ 20.) In support of this contention, Plaintiff submits his declaration stating that he was not involved in the fire. (Bishara Decl. ¶ 6.) Whether Plaintiff was actually involved in setting the fire is a distinct question from whether Advanced Analysis, Inc., reached a conclusion that Plaintiff was involved in the fire. Plaintiff offers no evidence controverting Defendant's adequately-supported fact that Advanced Analysis, Inc., reached the conclusion that Plaintiff was involved in the fire. Accordingly, the Court deems the fact admitted without controversy. See L.R. 56-3. To be clear, the Court does not reach the issue of whether Plaintiff was involved in the fire.

2007. (SUF ¶ 35.)[11] The Richdon Metals documents appear to be invoices reflecting purchases made by "Havana's Sports Bar & Grill." (Ex. 12.) When deposed, Richard Ragsdale admitted he prepared the Richdon Metals invoices after the fire "so [Plaintiff] could have invoices to give to the insurance company for payment." (Ragsdale Dep. 20:4-21:1.) Mr. Ragsdale also stated that Plaintiff did not purchase the items on the invoices from Richdon Metals. (Ragsdale Dep. 25:13-26:16.)

B. Disputed Facts

The parties dispute whether Plaintiff was the sole owner of the Restaurant. Defendant contends Plaintiff never paid Swidan the balance of $75,000.00 he owed under the Sale Contract. (SUF ¶ 6; Bishara's April EOU 29:11-17.) Plaintiff contends, however, that he paid Swidan in full. (SGI ¶ 6; Swidan EOU 50:10-17, Bishara Decl. ¶ 3.)

The parties also dispute whether Plaintiff was a party to the Policy. Defendant contends that because Plaintiff is not listed explicitly on the Policy, he

---

[11] Plaintiff attempts to dispute this fact, contending "the documents were not 'invoices' but estimates re-created to show valuations of destroyed fixtures and equipment." Plaintiff offers no evidence supporting his contention. Accordingly, the Court deems the fact admitted without controversy. See L.R. 56-3.

is not a party to it. (See Ex. 10; SUF ¶ 29.) Defendant contends further that the "Policy is a contract between [Defendant] and Havana's Inc." (Mot. at 7.) According to Plaintiff, however, he is a party to the Policy because his name is listed as the applicant in the Insurance Application. (See Exs. 7-9; Opp'n at 7.) Alternatively, Plaintiff contends that if the entity insured under the Policy was a corporation, then Plaintiff qualifies as an insured. (Opp'n at 7.)

IV. DISCUSSION

A. Parties to the Insurance Contract

On a motion for summary judgment, the Court construes the evidence and all justifiable inferences in the non-moving party's favor. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992); T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). Here, there exists a genuine dispute as to whether Plaintiff is a party to the Policy.

Defendant contends that because the Policy lists the named insured as "Havana's Sports Bar & Restaurant," and describes the business as an "Organization (Other than Partnership, LLC or Joint Venture)," Plaintiff is not a Party to the Policy.

(Ex. 10; SUF ¶ 29; SGI ¶ 29). Defendant contends further that Plaintiff lacks standing to bring his claim because the Policy is a contract between Defendant and Havana's Inc. (Mot. at 7.)

Plaintiff asserts, however, that he is a party to the Policy because he is referred to as the applicant in the Insurance Application documents. (Opp'n at 7.) Plaintiff contends further that even if the Policy is between Defendant and Havana's Inc., Plaintiff still has standing because he is an "insured" under the Policy. (Id.)

Defendant first contends that because the Policy lists the named insured as "Havana's Sports Bar & Restaurant," and not Plaintiff, he has no standing to bring a claim under the Policy. Here, it is unclear which person or entity is insured under the Policy.

The Policy identifies the insured entity as "Havana's **Sports** Bar & Restaurant." (Policy at 280.) Although several of the parties' exhibits reference "Havana's Bar & Restaurant," there are no documents before the Court other than the Policy that provide any evidence of "Havana's Sports Bar & Restaurant's" corporate existence or its relationship to any of the entities or parties in this action. Referring to

Plaintiff's Insurance Application does not clarify which person or entity is the insured party, as:

- The ACORD Form lists "Shadi N Bishara dba Havanas Bar" as the applicant;
- The LLA lists "Shadi N Bishara / Havana Bar & Restaurant" as the applicant; and
- The Supplemental Questionnaire lists the "insured" as "Shadi N Bishara / Havana Bar & Restaurant."

(See Exs. 7-9.) Notably, none of the Insurance Application documents identify the purportedly-insured entity, "Havana's **Sports** Bar & Restaurant," as the applicant to be insured. (See id.) Thus, as there is no evidence indicating the involvement of, or existence of an entity called "Havana's Sports Bar & Restaurant," the insured party under the Policy is unclear.

Defendant contends further the insured is "Havana's Inc.," and because Plaintiff is not the named insured, he has no standing to bring a claim under the Policy. (Mot. at 7; Reply at 3.) Here, the evidence does not indicate clearly whether "Havana's Inc." is the named insured. There is evidence supporting Defendant's contention that the named insured was intended as "Havana's Inc." Specifically,

- The Policy states that the named insured is an "Organization (Other than Partnership, LLC or Joint Venture)";
- The ACORD Form lists the applicant as "Havanas"; and
- The LLA lists the applicant as a Corporation.

(See Exs. 7-9.)

There is, however, also evidence supporting Plaintiff's contention that he was an insured under the Policy. Specifically, as stated above, the ACORD Form and LLA include Plaintiff as the applicant, and the Supplemental Questionnaire indicates Plaintiff is the insured. (See Exs. 7-9.) Indeed, the applicant name on the ACORD Form is nearly identical to the literal name of the Plaintiff here. (Compare ACORD Form at 270 (listing applicant as "Shadi N Bishara dba Havanas Bar") with Compl. at 1 (listing the named Plaintiff as "Shadi Bishara, an individual dba Havana Sport Bar and Grill").) Moreover, in the signature block for the LLA and Supplemental Questionnaire, the only applicant listed is "Shadi N. Bishara."[12] (See LLA at 274; Supp. Questionnaire at 277.) There is no

[12] The signature block in the ACORD Form does not contain an entry for the name of the applicant, but only the applicant's signature. (See ACORD Form at 266.) Accordingly, the Court cannot discern who signed the ACORD Form.

indication he signed the documents on behalf of a corporate entity.

Drawing all justifiable inferences in Plaintiff's favor, the Court finds that as the Insurance Application includes numerous references to Plaintiff, and as the Insurance Application documents make no reference to "Havana's Sports Bar & Restaurant," Plaintiff demonstrates sufficiently the name on the Policy may be the result of a scrivener's error, and therefore disputes sufficiently whether he was a party to the Policy.

Finally, even if Defendant demonstrated sufficiently that Plaintiff was not a named party to the Policy, such a demonstration would not necessarily bar Plaintiff from bringing a suit under the Policy. See Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co., 420 F.2d 1211, 1214-15 (5th Cir. 1969) ("[W]e believe that when an insurer and its customer agree that the insurer is to insure the owner of specified property against fire loss, it would be no less unconscionable to allow the insurer to avoid its obligation under their contract because the owner, whose particular identity is of no particular concern to the insurer, is incorrectly named in that contract than to allow such avoidance

because the insurer in preparing the policy acted unmindful of facts it either knew or should have known."); Gills v. Sun Ins. Office, Ltd., 238 Cal. App. 2d 408, 413-14 (1965) (affirming trial court's reformation and interpretation of insurance contract where the trial court concluded the policy covered a parcel of property, but specified the insured as an entity that did not exist at the time the policy was issued); Capital Glenn Min. Co. v. Indus. Acc. Comm'n, 124 Cal. App. 79, 86 (1932) ("When an insurance company, through its own fault, issues a policy to an assured under a wrong name, and accepts and retains premiums in payment therefor, it will be estopped from denying that the real [party] was insured by the terms of the policy . . . .").

Accordingly, as Plaintiff offers evidence sufficient to dispute whether he was a party to the Policy, the Court finds Defendant's contention that Plaintiff does not have standing because he was not a Party to the Policy lacks merit.

B. Plaintiff's Declaratory Relief and Breach of Contract Claims

Defendant contends that Plaintiff cannot recover on his declaratory relief and breach of contract claims because Swidan's possible involvement in the

October 5, 2008, Fire barred coverage under the Policy, thus making proper Defendant's decision to deny Plaintiff's Coverage Claim. (Mot. at 10.) Under "Causes of Loss - Special Form," the Policy excludes

> loss or damage caused by or resulting from . . . [a] [d]ishonest or criminal act by you, any of your partners, members, officers, managers, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose: (1) Acting alone or in collusion with others; or (2) Whether or not during the hours of employment.

(Policy at 351-52.)[13]

The uncontroverted evidence demonstrates the Policy did not provide coverage for the October 5, 2008, Fire. Here, Swidan was an employee of Plaintiff, and thus any "dishonest or criminal act" he committed that caused a loss or damage to the Restaurant was not covered under the Policy. (SUF ¶ 14; SGI ¶ 14; Policy at 351.)

---

[13] The Policy continues, stating "[t]his exclusion does not apply to acts of destruction by your employees (including leased employees); but theft by employees (including leased employees) is not covered." (Policy at 352.) Neither party addresses whether this provision is applicable here. Nevertheless, it appears the provision is inapplicable here, as the alleged acts would, if true, constitute a "criminal act," specifically arson. See Cal. Penal Code § 451 ("[a] person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned . . . any structure . . . ."); People v. Morse, 116 Cal. App. 4th 1160 (2004) ("The statute . . . requires only an intent to do the act that causes the harm.").

The uncontroverted facts further establish that on the night of the October 5, 2008, Fire, Plaintiff left the restaurant at about 2:15 a.m. (SUF ¶ 15; SGI ¶ 15.) After Plaintiff left the Restaurant, at approximately 2:44 a.m., Swidan set the alarm to the Restaurant and left the building. (Swidan EUO 79:24-81:16; SUF ¶ 15; SGI ¶ 15.) At the time Plaintiff left the building, all of the Restaurant's windows and doors were closed and locked. (Bishara's April EUO 100:11-23; SUF ¶ 15; SGI ¶ 15.) At 2:50 a.m., six minutes after Swidan left the Restaurant, a motion detector inside the Restaurant went off; a second motion detector went off four minutes later, at 2:54 a.m. (SUF ¶ 17; SGI ¶ 17; FIR at 15.)[14] The Rialto Fire Department responded to the fire, and found all the doors and windows locked and secured when they arrived. (SUF ¶ 19; SGI ¶ 19; FIR at 37-38.)

The Rialto Fire Department investigated the fire, and concluded that Swidan intentionally set fire to the inside of the Restaurant. (SUF ¶ 21; SGI ¶ 21; FIR at 41.) The Rialto Fire Department based its conclusion on, inter alia, the following facts:

---

[14] The FIR does not contain independent page numbers. Accordingly, for ease of reference, the Court cites to the continuous page number on the bottom right-hand corner of Defendant's exhibits.

1. Swidan was the last person seen leaving the building on October 5, 2008; ten minutes after he leaves, smoke is seen coming from inside the building;
2. No one was seen entering the building on video surveillance cameras after Swidan left the building, and the Rialto Fire Department found no indications that someone tried to force open the doors or windows; and
3. All accidental and natural ignition sources were ruled out.

(FIR at 41.) Advanced Analysis, Inc., a private investigation company Defendant hired, also concluded "that . . . Joe Swidan . . . intentionally set fire to the [Restaurant]." (SUF ¶ 20; Ex. 6 at 31; Kaufman Decl. ¶ 8.)

Thus, because the uncontroverted evidence indicates Swidan intentionally set fire to the Restaurant, Defendant has satisfied its burden of establishing an absence of evidence that Defendant denied Plaintiff's Coverage Claim improperly.

To be clear, the Court does not opine or make any findings as to whether Swidan actually set fire to the Restaurant. Rather, the Court finds only that the uncontroverted evidence satisfies Defendant's

burden of demonstrating there is an absence of evidence establishing Defendant breached the Policy by refusing to approve Plaintiff's Coverage Claim. As Defendant has satisfied its initial burden of demonstrating an absence of evidence, the burden shifts to Plaintiff to demonstrate that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256.

Here, Plaintiff offers no testimonial or documentary evidence demonstrating Swidan was not involved in the October 5, 2008, fire. Although Plaintiff submits a declaration from Bishara denying any involvement, Plaintiff offers no evidence rebutting Defendant's evidence of Swidan's involvement in the fire. Accordingly, Plaintiff has not satisfied his burden of demonstrating there is a genuine issue of material fact as to whether Defendant denied his Coverage Claim properly. The Court therefore GRANTS Defendant's Motion as to Plaintiff's Declaratory Relief and Breach of Contract claims.

C. Plaintiff's Bad Faith Denial of Coverage Claim

"California law is clear, that without a breach of the insurance contract, there can be no breach of

the implied covenant of good faith and fair dealing." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1034 (9th Cir. 2008); see also Waller v. Truck Ins. Exch., 11 Cal. 4th 1, 36 (1995) ("a bad faith claim cannot be maintained unless policy benefits are due is in accord with the policy in which the duty of good faith is [firmly] rooted." (citing Love v. Fire Ins. Exch., 221 Cal. App. 3d 1136, 1153 (1990)). Here, as discussed above, Plaintiff was not entitled to coverage under the Policy; Defendant therefore did not breach the Policy when it denied Plaintiff's Coverage Claim. Accordingly, as there were no contractual benefits owed under the Policy, Plaintiff cannot recover under his Second Claim for relief, bad faith denial of coverage.

Moreover, even if Defendant owed Plaintiff contractual benefits under the Policy, Plaintiff's Second Claim for relief would still fail.

> [U]nder California law, a plaintiff must show (1) benefits due under the policy were withheld, and (2) the reason for withholding benefits was unreasonable or without proper cause. [citation] Because the key to a bad faith claim is whether denial of a claim was reasonable, a bad faith claim should be dismissed on summary judgment if the defendant demonstrates that there was 'a genuine dispute as to coverage.'

Feldman v. Allstate Ins. Co., 322 F.3d 660, 669 (9th Cir. 2003) (citing Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001) (citing Love, 221 Cal.

App. 3d at 1151)). Assuming Plaintiff could demonstrate the benefits due under the policy were withheld improperly, Plaintiff's Second Claim for relief would still fail as there is a genuine dispute as to the coverage for the October 5, 2008, Fire.

Here, Defendant's reliance on the Rialto Fire Department and Advanced Analysis Reports was reasonable. Both reports examined thoroughly the potential cause of the October 5, 2008, fire, and reached detailed conclusions based on the extensive investigations. Additionally, both of the investigations reached the same conclusion: Swidan intentionally caused the October 5, 2008, fire. (SUF ¶ 20-21; SGI ¶ 21; FIR at 41; Ex. 6 at 31; Kaufman Decl. ¶ 8.) Moreover, although Defendant hired Advanced Analysis, there is no evidence that it was not independent; and, furthermore, there is no evidence indicating that the Rialto Fire Department's report, which echoed Advanced Analysis's report, is biased. (See Kaufman Decl. ¶ 8 (indicating Defendant retained Advanced Analysis, Inc., to investigate the October 5, 2008, fire).)

"[U]nder existing case law, a single, thorough report by an independent expert is sufficient, all other things being equal, to support application of

the 'genuine dispute' doctrine." Adams v. Allstate Ins. Co., 187 F. Supp. 2d 1207, 1215 (C.D. Cal. 2002) (citing Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co., 90 Cal. App. 4th 335, 346 (2001)). Accordingly, as Defendant's reliance on the Rialto Fire Department's report is sufficient to support application of the genuine dispute doctrine here, Defendant's denial of Plaintiff's Coverage Claim was reasonable as a matter of law.[15]

As Plaintiff cannot demonstrate that Defendant withheld benefits due under the Policy or that the reason for withholding benefits was unreasonable or without proper cause, the Court GRANTS Defendant's Motion as to Plaintiff's Bad Faith Denial of Coverage Claim.

[15] Despite the exhaustive investigations and detailed conclusions of both the Rialto Fire Department and Advanced Analysis, Plaintiff nevertheless contends it was unreasonable for Defendant to deny Plaintiff's claim "when no charges or indictments [of Plaintiff or Swidan] have been made by ay [sic] authority." (Opp'n. at 14.) Whether or not the District Attorney decided to file criminal charges against Plaintiff or Swidan is of no consequence in this civil suit filed by Plaintiff. See Arneson v. Fox, 28 Cal. 3d. 440, 455 (1980) ("Of course, if acquitted, because of the difference in the burdens of proof in a civil and criminal case, the acquittal would be of no evidentiary benefit to him."). Accordingly, Plaintiff's argument lacks merit.

D. Plaintiff's Punitive Damages Request

To prevail on a request for punitive damages, a plaintiff must establish: (1) that the insurer breached the policy, warranting contract damages; (2) that the insurer breached the implied covenant of good faith and fair dealing; and (3) that the breach constituted fraud, oppression, or malice warranting punitive damages under California Civil Code section 3294(a). Griffin v. Northern Ins. Co., 176 Cal. App. 4th 172, 194-95 (2009). Here, as discussed above, Plaintiff can not establish that Defendant breached the Policy, nor that he is entitled to damages for Defendant's purported bad faith denial of his Coverage Claim. Accordingly, Plaintiff cannot demonstrate he is entitled to punitive damages under Civil Code section 3294(a). The Court therefore GRANTS Defendant's Motion as to Plaintiff's Punitive Damages Claim.

E. Federal Rule of Civil Procedure 4(m)

Defendant removed this action on September 14, 2009. Plaintiff has not, however, filed proofs of service for Defendants Century Insurance Group or Procentury Corp. Accordingly, the Court dismisses Plaintiff's Complaint against Defendants Century Insurance Group and Procentury Corp. for failure to prosecute.

V. CONCLUSION

For the foregoing reasons, the Court:

1. GRANTS Defendant's Motion;
2. DISMISSES Plaintiff's Complaint against Defendant Century Surety Corp. WITH PREJUDICE; and
3. DISMISSES Plaintiff's Complaint against Defendants Century Insurance Group and Procentury Corp WITHOUT PREJUDICE.

Dated: April 6, 2011

VIRGINIA A. PHILLIPS
United States District Judge