

1 to Plaintiff, insurance policy number BOP8380952 covered “various hazards, including damage to
2 equipment used in Plaintiff’s business.” *Id.* at 9. Plaintiff alleged his “office and the equipment and
3 machines located therein was severely damaged due to a sprinkler malfunction that flooded the office
4 with water” on December 28, 2009. *Id.* Plaintiff asserts three of the damaged machines “were highly
5 sophisticated machines,” which were “rendered . . . useless for their intended purpose in that no person
6 would wish to have such intimate medical procedures performed upon him or her with the knowledge
7 that such machines had been severely damaged, even if such machines were repaired.” *Id.* at 9-10.

8 Plaintiff alleges: “Defendant, acting in good faith was required under the terms of the
9 Insurance Policy to treat the above-mentioned machines as being destroyed and to compensate
10 Plaintiff for such damages as would accrue.” (Doc. 2 at 10). However, Plaintiff asserts “Defendant
11 refused to do so, and only paid Plaintiff a small fraction of [his] actual damages.” *Id.* In addition,
12 Plaintiff asserts Defendant refuses to compensate him beyond the amount of \$50,000.00 “for the loss
13 of use of office equipment damaged or destroyed,” which Plaintiff alleges “exceeds the sum of
14 \$200,000.00.” *Id.* Plaintiff alleges, “Defendant acted in bad faith throughout the claim process” by
15 reassigning the claim to a different adjuster, “basing its analysis of the loss of use upon supposition
16 rather than the actual facts of [his] practice, and by using accounting methods not generally
17 recognized.” *Id.* Further, Plaintiff contends an accountant made deliberate errors in order to reduce
18 the amount of compensation. *Id.* According to Plaintiff, “Defendant was guilty of oppression in that
19 Defendant acted in utter disregard of Plaintiffs [sic] common-law and statutory rights to have his
20 claims settled in a reasonable manner.” *Id.* at 10-11. Therefore, Plaintiff included a prayer for
21 exemplary damages in addition to actual damages. *Id.* at 11.

22 On September 28, Golden Eagle filed the motion for partial summary judgment now pending
23 before the Court. (Doc. 14). Golden Eagle requests the Court find:

- 24 1. Golden Eagle did not breach its contract of insurance by failing to pay to
25 replace, rather than repair, the damaged equipment because the policy gave it
26 the right to elect to pay repair costs rather than to pay to replace the damaged
27 equipment.
- 28 2. Golden Eagle is entitled to summary judgment on Plaintiff’s claim of insurance
bad faith because the undisputed facts establish it acted reasonably and with
proper cause as a matter of law in adjusting the claim.

1 (Doc. 14 at 1-2). In the alternative, “because there is no evidence that could be deemed clear
2 and convincing evidence of malice or oppression,” Golden Eagle asserts it is entitled to
3 summary judgment on Plaintiff’s claim for putative damages. *Id.* at 2.

4 On October 29, 2012, the parties filed a Joint Statement of Undisputed Facts. (Doc. 19). In it,
5 the parties stipulated “that there is no clear and convincing evidence of malicious or oppressive
6 behavior sufficient to support Plaintiff’s request for punitive damages.” *Id.* at 2. Therefore,
7 “Plaintiff’s prayer for punitive damages [was] withdrawn.” *Id.* On November 14, 2012, Golden Eagle
8 reported: “Plaintiff’s counsel advised on November 13, 2012, the due date for plaintiff’s opposition,
9 that he had concluded he has insufficient basis for a meritorious opposition and therefore would not be
10 filing any opposition to this motion.” (Doc. 21 at 1). Thereafter, Plaintiff filed his Notice of Non-
11 Opposition to the motion. (Doc. 23).

12 **II. STANDARDS FOR SUMMARY JUDGMENT**

13 The “purpose of summary judgment is to pierce the pleadings and to assess the proof in order
14 to see whether there is a genuine need for trial.” *Matsuhita Elec. Indus. Co. Ltd. v. Zenith Radio*
15 *Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). Summary judgment is appropriate when there is
16 “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
17 Fed. R. Civ. P. 56(a). Summary judgment should be entered, “after adequate time for discovery and
18 upon motion, against a party who fails to make a showing sufficient to establish the existence of an
19 element essential to that party’s case, and on which that party will bear the burden of proof at trial.”
20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

21 In addition, Rule 56 allows a court to grant summary adjudication, or partial summary
22 judgment, when there is no genuine issue of material fact as to a particular claim or portion of that
23 claim. Fed. R. Civ. P. 56(a); *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981)
24 (“Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of
25 a single claim . . .”) (internal quotation marks and citation omitted). The standards that apply on a
26 motion for summary judgment and a motion for summary adjudication are the same. *See Fed. R. Civ.*
27 *P. 56 (a), (c); Mora v. Chem-Tronics*, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

28 A party seeking summary adjudication bears the “initial responsibility” of demonstrating the

1 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. An issue of fact is genuine only
2 if there is sufficient evidence for a reasonable fact finder to find for the non-moving party, while a fact
3 is material if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty*
4 *Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1422, 1436 (9th
5 Cir. 1987). The moving party demonstrates summary adjudication is appropriate by “informing the
6 district court of the basis of its motion, and identifying those portions of ‘the pleadings, depositions,
7 answers to interrogatories, and admissions on file, together with affidavits, if any,’ which it believes
8 demonstrates the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323 (quoting Fed.
9 R. Civ. P. 56(c)).

10 If the moving party meets its initial burden, the burden then shifts to the opposing party to
11 present specific facts that show there is a genuine issue of a material fact. Fed R. Civ. P. 56(e);
12 *Matsuhita*, 475 U.S. at 586. An opposing party “must do more than simply show that there is some
13 metaphysical doubt as to the material facts.” *Id.* at 587. The party is required to tender evidence
14 specific facts in the form of affidavits, and/or admissible discovery material, in support of its
15 contention that a factual dispute exists. *Id.* at 586 n.11; Fed. R. Civ. P. 56(c). In addition, the opposing
16 party is not required to establish a material issue of fact conclusively in its favor; it is sufficient that
17 “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
18 versions of the truth at trial.” *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d
19 626, 630 (9th Cir. 1987). However, “failure of proof concerning an essential element of the
20 nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322.

21 Even if a motion for summary adjudication is unopposed, a court cannot grant summary
22 adjudication solely because no opposition has been filed. *Cristobal v. Siegel*, 26 F.3d 1488, 1494-95
23 & n.4 (9th Cir. 1994). The Court must apply standards consistent with Rule 56 to determine whether
24 the moving party demonstrated there is no genuine issue of material fact and judgment is appropriate
25 as a matter of law. *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993). In resolving a motion
26 for summary judgment, the Court examines the evidence provided by the parties, including pleadings
27 depositions, answer to interrogatories, and admissions on file. *See* Fed. R. Civ. P. 56(c).

1 **III. UNDISPUTED MATERIAL FACTS¹**

2 According to the parties, Plaintiff entered into an insurance contract with Golden Eagle which
3 included an effective period from January 30, 2009 through January 30, 2010. (UMF 1). This policy
4 covered specified losses related to property damage at Plaintiff's place of business. *Id.* It also
5 included a "Loss Payment" section, which provided in part:

6 In the event of loss or damage covered by this policy:

7 a. At our option, we will either:

8 (1) Pay the value of lost or damaged property;

9 (2) Pay the cost of repairing or replacing the lost or damaged property;

10 (3) Take all or any part of the property at an agreed or appraised value; or

11 (4) Repair, rebuild or replace the property with other property of like kind and quality.

12 b. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.

13 c. We will not pay you more than your financial interest in the Covered Property.

14 (UMF 2). The policy provided coverage for the loss of business income sustained due to a necessary
15 suspension of operations during the "period of restoration," which was defined as beginning 72 hours
16 after the time of damage and ending on the date when the property is repaired, rebuilt or replaced with
17 reasonable speed and similar quality or the date when business is resumed at a new permanent
18 location, whichever is earliest. (UMF 3).

19 On January 4, 2010, Kia Insurance Associates submitted a claim on Plaintiff's behalf to
20 Golden Eagle, reporting his business had suffered "water damage sprinkler leakage" on December 28,
21 2009. (UMF 4). Golden Eagle employed LWG Consulting, a firm believed to specialize in equipment
22 loss investigations, to assist with Plaintiff's claim. (UMF 5). Within forty-five days after receiving
23 notice of the claim, Golden Eagle advanced payments for equipment repairs totaling \$40,000.00 on
24 January 27, 2010 (\$5,000.00), February 18, 2010 (\$25,000.00), and February 19, 2010 (\$10,000.00).
(UMF 6). In addition, Golden Eagle made payments "to cover the entire costs of the repair estimates
LGW [Consulting] obtained from the original manufacturers to have the equipment repaired and their
warranties remaining in tact [sic]." (UMF 11).

25 On June 2, 2010, Deborah Bok, an auditor with Liberty Mutual Group, Inc., was assigned to
26 evaluate Plaintiff's claim for business income loss. (UMF 12). Plaintiff informed Ms. Bok that his

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28 ¹ The facts are taken from the "Joint Statement of Undisputed Facts" filed by the parties on October 29, 2012.
(Doc. 19).

1 gynecology practice had not been affected, and “only his aesthetic practice was affected by the
2 claimed loss.” (UMF 13). Ms. Bok requested Plaintiff supply the following information and
3 documents related to his practice:

4 (1) days and hours of operations; (2) monthly revenue broken by operation for the
5 period 1/1/08 to the present; (3) weekly payroll for the period 11/1/09 to the present;
6 (4) monthly billings vs. receivables for the period 1/1/09 to the present; (5) monthly
profit and loss statements for the period 1/1/08 to the present; (6) 2008 and 2009
income tax returns; and (7) a copy of his commercial lease.

7 (UMF 14). Upon review of the information provided by Plaintiff, Ms. Bok reported on November 9,
8 2010 that Plaintiff “was entitled to \$34,783.00 in lost income” for the period of restoration, which
9 ended September 12, 2010, according to the claim adjuster. (UMF 22).

10 On September 23, 2011, Plaintiff’s counsel wrote a letter to Scott Elliot of Golden Eagle,
11 which identified “a \$15,990.00 arithmetic error [in] Ms. Bok’s audit report.” (UMF 23). Ms. Bok
12 corrected her report on or about October 6, 2011, Golden Eagle “promptly” issued a supplemental
13 payment to Plaintiff. *Id.* Therefore, Golden Eagle issued payments to Plaintiff totaling \$165,087.16
14 for equipment repair and business income loss. (UMF 24).

15 **IV. DISCUSSION AND ANALYSIS**

16 **A. Defendant did not breach the contract by paying to repair the equipment.**

17 A claim of breach of contract arises under California law, and a plaintiff must demonstrate (1)
18 the existence of a contract, (2) performance or excuse for nonperformance by the plaintiff, (3) breach
19 by the defendants, and (4) resulting damages. *Alcalde v. NAC Real Estate Invs. & Assignments, Inc.*,
20 316 Fed. App’x 661, 662 (9th Cir. 2009) (citing *First Comm. Mort. Co. v. Reece*, 108 Cal. Rptr. 2d 23,
21 33 (Ct. App. 2001)); *see also Haberbush v. Clark Oil Trading Co.*, 33 Fed. App’x 896, 898 (9th Cir.
22 2002) (identifying “agreement, consideration, performance by plaintiff, breach by defendant, and
23 damages” as elements to a breach of contract).

24 Here, the parties do not dispute that they entered into a contractual agreement for insurance
25 coverage. Rather, the parties disagree whether Golden Eagle breached the terms of the contract.
26 Plaintiff alleges Golden Eagle “was required under the terms of the Insurance Policy to treat the . . .
27 machines as being destroyed and to compensate Plaintiff for such damages as would accrue.” (Doc. 2
28 at 10). On the other hand, Golden Eagle argues the “repair or replace” provision gave it “the right

1 under the plain language of its policy to pay the costs of the manufacturer’s repairs rather than
2 purchase new or replacement equipment.” (Doc. 14 at 18).

3 As noted by Defendant, “California law requires that the mutual intention of the parties is to be
4 inferred, if possible, solely from the written provisions of the contract.” (Doc. 14 at 16) (citing *Stamas*
5 *v. County of Madera*, 795 F.Supp.2d 1047, 1081 (E.D. Cal. 2011); *AIU Ins. Co. v. Superior Court*, 51
6 Cal.3d 807, 822 (1990)). Here, the parties entered in an agreement that provided that, *at its option*,
7 Golden Eagle would pay the value of the damaged property, *or* pay the cost of repairing or replacing
8 the damaged property. (UMF 2; Doc. 14-6 at 37). Because Golden Eagle paid the estimated costs of
9 repair, it acted within the terms of the parties’ agreement. Accordingly, Plaintiff has failed to
10 demonstrate Golden Eagle breached its contract when it paid to repair, rather than replace, the
11 damaged equipment. Thus, Defendant is entitled to summary adjudication of this claim. *See Celotex*,
12 477 U.S. at 322 (a defendant is entitled to summary judgment where the plaintiff fails to prove “an
13 essential element” of a claim).

14 **B. Defendant did not act in bad faith.**

15 In every insurance policy, there is an implied covenant of good faith and fair dealing that
16 neither the insurer nor the insured “will do anything which will injure the right of the other to receive
17 the benefits of the agreement.” *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 658-59
18 (1958). Breach of the implied covenant by an insurer “sounds in both contract and tort,” and
19 “constitutes what is commonly called ‘bad faith.’” *Archdale v. American Int’l Specialty Lines Ins. Co.*,
20 154 Cal.App.4th 449, 466 (2007); *see also Jordan v. Allstate Ins. Co.*, 148 Cal.App.4th 1062, 1071
21 (2007) (“An insurer is said to act in ‘bad faith’ when it not only breaches its policy contract but also
22 breaches its implied covenant to deal fairly and in good faith with its insured”).

23 The covenant of good faith and fair dealing is of “peculiar importance in insurance law
24 because it may support the recovery of a tort measure of damages.” *Shade Foods, Inc. v. Innovative*
25 *Products Sales & Marketing, Inc.*, 78 Cal.App.4th 847, 879, (2000) (citing *Comunale*, 50 Cal.2d. at
26 658). To establish a claim for insurance bad faith, a plaintiff must show: “[T]he conduct of the
27 defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a
28 failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad

1 judgment, or negligence, but rather by a conscious and deliberate act, which unfairly frustrates the
2 agreed common purposes and disappoints the reasonable expectations of the other party thereby
3 depriving that party of the benefits of the agreement.” *Careau & Co. v. Security Pacific Business*
4 *Credit, Inc.*, 222 Cal.App.3d 1371, 1395, 272 Cal. Rptr. 387 (Ct. App. 1990); *see also Love v. Fire*
5 *Insurance Exchange*, 221 Cal.App.3d 1136, 1151 (1990) (to establish bad faith, an insured party must
6 show benefits due under the insurance policy were withheld and the reason for withholding benefits
7 was unreasonable or without proper cause). An insurer has not acted in bad faith where there is a
8 “genuine dispute” or “genuine issue” as to the insurer’s liability or amount of coverage. *McCoy v.*
9 *Progressive W. Ins. Co.*, 171 Cal. App. 4th 785, 793 (2009).

10 Significantly, Plaintiff agrees the delay of the \$15,990.00 payment was due to an “arithmetic
11 error [in] Ms. Bok’s audit report,” which was corrected “promptly” after notification of the error.
12 (UMF 23). Accordingly, this delay in payment cannot be the basis for a bad faith claim because it
13 appears not to be “a conscious and deliberate act,” but rather an honest mistake or mere negligence.
14 Although the parties may disagree about the amount of the payment due to Plaintiff, Golden Eagle
15 utilized experts to determine the amounts due to Plaintiff for equipment repairs and lost business
16 income, and the company paid the recommended amounts. (UMF 5, 11-12, 22-24). Therefore,
17 Defendant’s position “is maintained in good faith and on reasonable grounds,” and Plaintiff has failed
18 to demonstrate bad faith by Golden Eagle in paying the amount that it did. *See Wilson v. 21st Century*
19 *Ins. Co.*, 42 Cal. 4th 713, 724 (2007); *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1161-62
20 (9th Cir. 2002) (summary adjudication may be granted “when it is undisputed or indisputable that the
21 basis for the insurer’s denial of benefits was reasonable”). Consequently, Defendant is entitled to
22 summary adjudication of the claim that it did not act in bad faith in paying the sum it paid related to
23 the loss of use and lost business income due to the insured event.

24 Finally, Defendant produced evidence that, though the claim file was reassigned several times
25 to various adjusters before the claim was paid finally, this reassignment was due to various legitimate
26 reasons. (Doc. 14-2 at 2) For example, claims representative Heflin attested that initially, the claim
27 was assigned to a temporary employee and then to two other adjusters. *Id.* Apparently, each of these
28 employees left the company which required the file be assigned to another adjuster who also left

1 Golden Eagle for a job with an independent adjusting firm. Id. After this, Heflin was assigned the
2 matter and maintained the file until it was paid. Id. Though Defendant provides little explanation
3 about these circumstances, apparently, it suffers from an unusually high employee turnover rate.
4 However, this evidence is sufficient to demonstrate that the reassignment of the file was not done for
5 any bad motive but, indeed, was caused by a transient work force.

6 In response, Plaintiff admits that he did not oppose the motion for summary adjudication with
7 the understanding that the motion included the claim of bad faith related to the repeated reassignment
8 of claims adjusters to the file. (Doc. 27 at 3) Indeed, the reason that Plaintiff did not oppose this
9 motion was due to a lack of a sufficient, meritorious basis for doing so. (Doc. 23) Thus, the Court
10 determines that Plaintiff has failed to counter the minimal evidence proffered by Defendant and has
11 not demonstrated there exists a triable issue of genuine material fact. *Celotex*, 477 U.S. at 322.

12 **V. CONCLUSION AND ORDER**

13 Plaintiff failed to Defendant breached the insurance agreement by electing to pay for repairs
14 rather than replacement of the damaged equipment. In addition, Plaintiff failed to demonstrate
15 Defendant acted in bad faith when evaluating his claims. Accordingly, Defendant is entitled to
16 summary adjudication of these claims. *See Celotex*, 477 U.S. at 322; Fed. R. Civ. P. 56(c).

17 Based upon the foregoing, **IT IS HEREBY ORDERED:**

- 18 1. Plaintiff's prayer for punitive damages is **STRICKEN**;
- 19 2. As to the claim that Defendant acted in bad faith by repairing the damaged equipment,
20 rather than replacing it, the motion for partial summary judgment (Doc. 14) is **GRANTED**;
- 21 3. As to the claim that Defendant acted in bad faith when it paid Plaintiff for the loss of
22 use of the equipment and the lost business income caused by the insured event, the motion for partial
23 summary judgment (Doc. 14) is **GRANTED**;

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