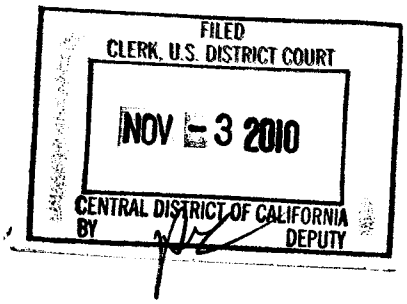

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, CENTRAL DIVISION

TORO-AIRE, INC., a California corporation, Plaintiff, v. FEDERAL INSURANCE COMPANY, an Indiana corporation; and DOES 1-100, inclusive, Defendants.	CASE NO. CV08-5784 SVW (JTLx) **~~[PROPOSED]~~ FINAL JUDGMENT** [F.R.Civ.P. 58 and L.R. 58] Honorable Stephen V. Wilson Complaint filed: July 18, 2008

Plaintiff Toro-Aire, Inc.'s ("Toro-Aire") Complaint against Defendant Federal Insurance Company ("Federal") contained causes of action for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing.

Based on this Court's Orders Granting Federal's Motion for Partial Summary Judgment on Toro-Aire's Breach of Contract Cause of Action (attached hereto as Exhibit A) and Federal's Motion for Partial Summary Judgment on Toro-Aire's Breach of the Implied Covenant of Good Faith and Fair Dealing Cause of Action

(attached hereto as Exhibit B), which together resolved all of the causes of action in Toro-Aire's Complaint:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Federal and against Toro-Aire, and that Toro-Aire is to take nothing by its Complaint against Federal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Toro-Aire's Complaint against Federal is dismissed in its entirety, with prejudice.

Dated: 11/2/10

The Honorable Stephen V. Wilson
Judge, United State District Court

Submitted by:

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OC#30433

EXHIBIT A

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TORO-AIRE, INC., a California corporation, Plaintiff, v. FEDERAL INSURANCE COMPANY, an Indiana corporation; and DOES 1-100, inclusive, Defendants.	CV 08-5784 SVW (JTLx) ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [13] AND GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [17]

The parties have brought cross-motions for summary judgment regarding the interpretation and application of a comprehensive general liability ("CGL") policy.

For the reasons stated below, Plaintiff's Motion is DENIED and Defendant's Motion is GRANTED.

I. FACTS[1]

Plaintiff Toro-Aire, Inc. brought this action to obtain indemnification from Defendant Federal Insurance Co. on a lawsuit that Plaintiff settled with the University of California Los Angeles ("UCLA" or "University"). The underlying lawsuit arose out of Plaintiff's installation of defective heating coils provided to the UCLA Westwood Replacement Hospital Project.

Plaintiff provided air-valve equipment and reheat coils for the Hospital.[2] Delivery began in July 2002. (Pl.'s SUF ¶ 3.) Within a year of Plaintiff's delivery and installation of the equipment, the Hospital informed Plaintiff that the reheat coils were failing at a higher rate than normal and that they were leaking water. (Pl.'s SUF ¶ 4.) Plaintiff learned from the Hospital that testing of the equipment revealed a latent defect in the air valves. (Pl.'s SUF ¶ 7.) The Hospital informed Plaintiff that it would "seek further reimbursement as necessary for the cost of replacement coils, the reports, old coil removal, new coil reinstallation, pipe and duct testing, as well as any repairs to ceiling or existing installation, until the water system is leak free." (Pl.'s SUF ¶ 8.) The Hospital proceeded to remove the defective coils and install replacement coils. The cost of replacing the heating coils was very high given that the walls had to be completely torn out, other piping and wiring impeded access to the

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[1] The factual summary is presented solely for reference, and should not be construed as constituting the Court's rulings on the admissibility of relevant evidence.

[2] Plaintiff obtained the equipment from third-party vendors. (See Pl.'s SUF ¶ 2.)

coils, and each individual coil had to be disconnected, drained, replaced, tested, and reinsulated. Following this process, the Hospital sought reimbursement from Plaintiff for these expenses as well as lost revenue from the delayed opening of the Hospital facilities. (Id. at ¶¶ 12, 14.)

Plaintiff tendered its claim for coverage to Defendant, which declined coverage. (Pl.'s SUF ¶¶ 23-26.) The University of California, as the owner and operator of the Hospital, filed suit on June 12, 2006, against Plaintiff seeking more than $2,500,000 in costs related to the removal and replacement of the coils provided by Plaintiff. (Id. at 27.) The complaint alleged claims for breach of contract, breach of warranty, negligence, and enforcement of a performance bond. In its contract and warranty claims against Plaintiff, the University alleged that Plaintiff delivered defective that failed to comply with the parties' contractual agreements, and that Plaintiff should be liable for the "direct and proximate result[s]" of this breach, including the costs of repair, correction, and replacement of the defective equipment, as well as delays to the completion and opening of the Hospital. (Ex. 2: Compl. ¶¶ 17, 20, 22, 25, 30, 31.) In the negligence claim, the University alleged that "[s]hortly after installation on the project the air vale equipment (specifically the reheat coils) began to leak and break. The leaking reheat coils caused damage to the property of the University." (Ex. 2: Compl. ¶ 34.)

On July 13, 2006, Defendant agreed to accept the defense of the lawsuit subject to a complete reservation of rights. Plaintiff required Defendant to provide Plaintiff with independent Cumis counsel

in light of Defendant's reservation of rights. Plaintiff filed a demurrer to the University's complaint, in which Plaintiff stated that the University's negligence claim did not state a valid cause of action because "as admitted by the complaint, the product in question caused no damage to person or property." (Def.'s Ex. 8: Demurrer Mem. P+A at 2.) In its Opposition to Plaintiff's Demurrer, the University did not respond to Plaintiff's discussion of property damage. (Def.'s Ex. 9.) In its Minute Order granting Plaintiff's Demurrer with respect to the negligence cause of action, the state court held that the University:

> did not respond to Toro-Aire's Demurrer to its third cause of action for negligence. Toro-Aire correctly argues that this claim is barred by the economic loss rule which precludes a negligence cause of action where damages do not rise above the level of mere economic loss. Plaintiff does not allege physical injury to property. Rather, it only alleges the cost of replacing defective equipment and installing replacement equipment. The Demurrer to the third cause of action is sustained without leave to amend.

(Def.'s Ex. 10.)

The University then filed an amended complaint that omitted the negligence cause of action and restated the contract and warranty claims. These remaining claims asserted that the University incurred "costs related to the removal and replacement of the defective coils supplied by Toro-Aire," as well as "delay costs associated with the replacement of the defective . . . [v]alves." (Def.'s Ex. 3, ¶ 21.)

Following these pre-trial developments, Plaintiff and the University entered into settlement discussions. (Def.'s SUF ¶ 30.) In December 2007, the parties reached an agreement whereby Plaintiff paid

the University $896,000. (Id. at 32.)

In this action, Plaintiff contends that because the heating coils leaked water, they caused physical property damage, which is covered under the standard CGL policy. Thus, Plaintiff argues that the cost of removing and replacing the heating coils was covered as a remedial response to the physical damage that the leaking coils caused.

In response, Defendant raises several arguments, including that the University's state court lawsuit, which eventually settled, was not for the physical damage to the University's facilities as a result of the water leakage, but simply for the replacement of the defective coils. Defendant argues that the defective coils alone are not covered by the CGL policy, and that the cost of replacing them should be borne by Plaintiff.

II. RELEVANT CONTRACTS

A. Insurance Policy Coverage

Plaintiff was insured under the General Liability part of an insurance policy (the "Policy") underwritten by Defendant. (Def.'s SUF ¶¶ 30, 32.) The Policy provided coverage for:

> damages that the insured becomes legally obligated to pay by reason of liability:
>
> -imposed by law; or
>
> -assumed in an insured contract;
>
> for bodily injury or property damage[3] caused by an occurrence[4] to

[3] The Policy defines "property damage" as:
-Physical injury to tangible property, including resulting loss of use of that property. . . .; or

which this coverage applies.

(Id. at ¶ 35.)

B. Insurance Policy Exclusions

The Policy excludes liability assumed by the insured in a contract, unless the contract covers such legal liability that the insured would have in the absence of the contract. (Id. at ¶ 38.) In other words, the Policy covers the Settlement Agreement between Plaintiff and the University to the extent that the Settlement Agreement takes the place of legal liability that Plaintiff would have in the absence of the Settlement Agreement.

The Policy also excludes:

property damage to:

-impaired property;[5] or

-Loss of use of tangible property that is not physically injured.

(Def.'s SUF, ¶ 36.)

[4] "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Def.'s SUF, ¶ 37.)

[5] "Impaired Property," is defined as:

> [T]angible property, other than your product or your work, that cannot be used or is less useful because:
>
> -it incorporates your product or your work that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> -you have failed to fulfill the terms or conditions of a contract or agreement;
>
> if such property can be restored to use by:
>
> -the repair, replacement, adjustment or removal of your product or your work; or
>
> -your fulfilling the terms or conditions of the contract or agreement.

(Id. at ¶ 41.)

-property that has not been physically injured;

arising out of any:

-defect, deficiency, inadequacy or dangerous condition in your product or your work; or

-delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms and conditions.

(Id. at ¶ 40.)

This exclusion does not apply, however, to "the loss of use of other tangible property resulting from sudden and accidental physical injury to your product or your work after it has been put to its intended use." (Id.)

The Policy further excludes "property damage to your product[6] arising out of it or any part of it." (Id. at ¶ 42.)

III. LEGAL STANDARDS

A. Summary Judgment

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263

[6] "Your product" is defined as: "any . . . goods or products . . . manufactured, sold, handled, distributed or disposed of by . . . you," as well as "representations or warranties made at any time with respect to the durability, fitness, performance, quality or use of your product." (Id. at 43.)

(9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex Corp v. Catrett, 477 U.S. 317, 323-24 (1986). When a party moves for summary judgment under Rule 56(c), that party bears the burden of affirmatively establishing all elements of its legal claim. See Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) (per curiam) (adopting District Court order as its own). See also Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) ("[I]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor.") (emphasis in original). On the other hand, if the moving party does not have an affirmative burden of proving all the elements of its case, its burden may be met by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325.

Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. See id. at 323-34; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes "where the evidence is such that a reasonable jury could return a verdict for the nonmoving party" over facts that might affect the

outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 248; see also Aprin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must identify specific evidence from which a reasonable jury could return a verdict in its favor).

B. Insurance Contract Interpretation

Under California law, basic principles of contract interpretation apply when interpreting an insurance contract. Unambiguous plain meaning controls. Ambiguous terms, on the other hand, "are resolved in the insureds' favor, consistent with the insureds' reasonable expectations." Kazi v. State Farm Fire & Cas. Co., 24 Cal. 4th 871, 879 (2001) (citation omitted). "An insurance contract is ambiguous if the court finds that the language is susceptible to different interpretations." Tzung v. State Farm Fire and Cas. Co., 873 F.2d 1338, 1340 (9th Cir. 1989) (citing State Farm Mut. Auto Ins. Co. v. Elkins, 52 Cal. App. 3d 534, 538 (1975)). However, "[a]mbiguity cannot be based on a strained instead of reasonable interpretation of a policy's terms." Highlands Ins. Co. v. Universal Underwriters Ins. Co., 92 Cal. App. 3d 171, 175 (1979) (citations omitted).

C. Burden-Shifting in Insurance Litigation

When construing the terms of an insurance policy, "[i]t is the burden of the insured 'to bring the claim within the basic scope of coverage,' and the burden of [the insurer] to prove exclusions to the coverage." Golden Eagle Ins. Corp. v. Cen-Fed, Ltd., 148 Cal. App. 4th 976, 984 (2007) (citing Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 16 (1995)).

Notably, the present case involves a duty to indemnify, not a duty

to defend. The duty to indemnify is narrower than the duty to defend. See Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal. 4th 945, 958 (2001). In a dispute involving an insurer's broad duty to defend, the insured may succeed by showing that any claim against the insured potentially falls within the scope of the insurance policy. In contrast, in a dispute over the insurer's duty to indemnify, the insured must show that the claim actually comes within the scope of the insurance policy. Palmer v. Truck Ins. Exchange, Inc., 21 Cal. 4th 1109, 1120 (1999) (citing Collin v. American Empire Ins. Co., 21 Cal. App. 4th 787, 803 (1994)). As is often said, "there can be no indemnity without liability." Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital, 8 Cal. 4th 100, 114 (1994) (internal quotations and citations omitted).

In determining whether an underlying cause of action falls within the scope of an insurance policy such that the insurer owes a duty to defend, the courts must examine "not . . . only the pleaded words but the potential liability created by the suit." Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 276 (1966). The courts are not limited by the specific causes of action pleaded, instead must look at the insured's liability "under the facts alleged, reasonably inferable, or otherwise known." Scottsdale Ins. Co. v. MV Transp., 36 Cal. 4th 643, 654 (2005). On the other hand,

These principles, articulated in the duty to defend context, can be extended to apply to the duty to indemnify context. The court must examine whether the underlying claims, as they existed at the time of the entry of judgment (or settlement of the claims), actually gave rise to the insured's liability. Ultimately, in determining whether an

insurer must indemnify an insured with respect to settled claims, the fundamental question is "whether the factual record and claims at the time of the Seagate settlement demonstrates coverage." Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 430 F. Supp. 2d 989, 995 (N.D. Cal. 2006).

Thus, in determining Policy coverage, the Court must determine whether the facts underlying Plaintiff's liability in the underlying state court action involved damage that was covered by the policy. Plaintiff bears the burden of making sufficient showings on these grounds.

In determining Policy exclusions, the Court must determine whether the facts underlying Plaintiff's liability claims in the underlying state court action involved damage that was specifically excluded from coverage under the Policy. Defendant bears the burden of making sufficient showing on these grounds.[7]

IV. ANALYSIS

A. Policy Coverage

Plaintiff bears the burden of establishing that the Policy covers the payments Plaintiff made to the University. To satisfy this burden,

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[7] The parties did not raise and address the applicability of the burden-shifting framework applied in other cases arising out of settled claims. See, e.g., Isaacson v. California Ins. Guar. Ass'n, 44 Cal. 3d 775, 791-92 (1988). The Court will refrain from addressing these unraised legal arguments.

In any event, the Court believes that the approach adopted in Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 430 F. Supp. 2d 989 (N.D. Cal. 2006), is the proper approach for the present procedural posture.

Plaintiff must establish that the relevant payments 1) resulted from "an occurrence" within the definition of the Policy, and 2) resulted from "property damage" caused by such an occurrence or occurrences.

1. Occurrence

In order to determine whether the policy covers the conduct at issue here, it first must be determined whether there was an "occurrence" within the meaning of the policy. The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The California Supreme Court has recently defined the term "accident" in a liability insurance contract as "'an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.'" Delgado v. Interinsurance Exchange of Automobile Club of Southern California, 97 Cal. Rptr. 3d 298, 302 (Cal. 2009) (quoting Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., 51 Cal. 2d 558, 563-564 (1959)) (citing Hogan v. Midland National Ins. Co., 3 Cal.3d 553, 559 (1970)). The Delgado court specified that the "unexpected, unforeseen, or undesigned" nature of the injury is determined by viewing the event from the insured party's perspective, rather than that of the injured party's perspective. As applied to the present case, Delgado requires this Court to determine whether or not Toro-Aire expected, foresaw, or designed to cause the injury alleged by the University.

The Delgado Court further clarified that "an injury-producing event is not an 'accident' within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor." Id. at 304. In Merced Mutual Ins. Co. v. Mendez, 213 Cal. App. 3d 41 (1989), the Court

of Appeal provides an oft-cited illustration of this principle: when an insured car driver intentionally drives fast intentionally crashes into another car, the resulting lawsuit against the driver does not arise from an "accident" because the driver intended the natural consequences of his or her actions. On the other hand, when a car driver intentionally drives fast but unintentionally crashes into another car, the car wreck is an "accident" under a CGL policy because the insured driver did not intend, foresee, or expect to cause the accident. Id. at 50.

It is important to remember also that "accidents need not crash or clatter; they need only be unexpected consequences." Anthem Electronics, Inc. v. Pacific Employers Ins. Co., 302 F.3d 1049, 1055 (9th Cir. 2002). In the present case, common sense dictates the conclusion that Plaintiff did not intend, foresee, or expect to install defective heating coils into the Hospital. Cf. Chu v. Canadian Indem. Co., 224 Cal. App. 3d 86, 97-99 (1990). Though Plaintiff does not offer much evidence or argument on this issue, it has satisfied its burden of establishing that "the defect in the coils was the result of a manufacturing defect." (Pl.'s Opp. at 13.) Since the coils were manufactured by a third party, Plaintiff cannot be deemed to have intended, foreseen, or expected these coils to fail. Defendant fails to identify any factual evidence to refute this conclusion.[8]

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[8] Defendant attempts to challenge this conclusion on the ground that coverage for an "accident" can only exist where the underlying cause of action sounds in tort rather than contract. This contract/tort distinction has been abolished. See Vandenberg v. Superior Court, 21 Cal.4th 815, 840-41 (1999). Indeed, in deciding that a particular contractual breach did not involve an accident, the court in Golden Eagle Ins. Corp. v. Cen-Fed, Ltd., 148 Cal. App. 4th 976, 989 (2007), specifically noted that it was deciding a case involving a "non-accidental act of breach of contract." This phrasing implicitly

2. Property Damage

Plaintiff also bears the burden of establishing that the "occurrence" caused "property damage." The Policy defines "property damage" as "physical injury to tangible property" or "loss of use of tangible property that is not physically injured." The dispute at issue in this Motion is whether the claim that the University brought against Plaintiff fell into either of these categories. If not, then then the policy would not cover the costs of replacing the reheat coils because it is well-established that damage limited solely to the insured's own product or work does not constitute "property damage" within the meaning of a standard CGL policy. See, e.g., St. Paul Fire & Marine Inc. Co. v. Coss, 80 Cal. App. 3d 888, 892-93 (1978); Hamilton Die Cast, Inc. v. United States F. & G. Co., 508 F.2d 417, 419-20 (7th Cir. 1975).

a. Physical Injury to Tangible Property

The basic definition of "physical injury to tangible property" has been nicely summarized by the California Court of Appeal:

> [S]tandard CGL policies such as those in this case define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured." Courts applying standard CGL policy language generally agree that the incorporation of a defective component or product into a larger structure or system does not constitute physical injury to tangible property, unless and until the defective component

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acknowledges the possibility of an accidental breach of contract. Such an accidental breach satisfies the CGL definition of "occurrence."

physically injures some other tangible part of the larger system or the system as a whole. In other words, the mere presence of a defective part causing no immediate harm does not produce physical injury.

Watts Industries, Inc. v. Zurich American Ins. Co., 121 Cal. App. 4th 1029, 1044 (2004) (quoting F & H Const. v. ITT Hartford Ins. Co. of Midwest, 118 Cal. App. 4th 364, 372 (2004) (emphasis added)).[9]

This rule applies even if some physical damage is required in order to remedy the defective component after it is installed. In New Hampshire Ins. Co. v. Vieira, 930 F.2d 696 (9th Cir. 1991), the Ninth Circuit interpreted California law involving the installation of defective equipment. The insurance company sought reimbursement from a

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[9] The Watts case is helpful mainly in its concise and accurate summary of the current state of the law in this area.

The facts of Watts are only helpful in establishing an unusual and limited "public health and safety" exception to the general rule preventing coverage for the incorporation of faulty components into a larger product. Watts involved a manufacturer that had provided lead-tainted piping for use in municipal water systems. Id. at 1035-37. The municipalities sued the manufacturer for the harm caused to their property (water). Id. at 1041. The court held that the insurer was obligated to defend the manufacturer in these suits even though the likely remedy was that the manufacturer would have to disassemble and reinstall its water systems. This disassembly and reinstallation was not merely prophylactic; it prevented ongoing harms to the property. Id. at 1042. Most notably, the court cited a pair of California cases that effectively established a narrow public health rule finding "immediate harm and physical injury to other property at the moment the incorporation [of the defective component] occurred." Id. at 1044-45.

These cases all involved unusual circumstances, such as the incorporation of asbestos into buildings, see Armstrong World Inds., Inc. v. Aetna Cas. & Surety Co., 45 Cal. App. 4th 1 (1996), and the incorporation of wood splinters into breakfast cereal, see Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., 78 Cal. App. 4th 847, 865-66 (2000). These cases should not be extended far beyond their unusual facts. See Walter Croskey, Rex Heeseman, Thomas W. Johnson, Jr., Insurance Litigation, § 7:1427 (2008 supp.)

subcontractor for payments related to the repair of the subcontractor's faulty drywall installation. Though the repairs involved the installation of additional drywall, which required holes to be cut in the roofs of the buildings, the court held that economic losses such as diminished value or costs of replacement did not constitute "property damage" under the CGL. Id. at 701-02. Notably, the costs of replacement involved the physical alteration of physical property (the roofs) other than the defective component itself.

Similarly, in Golden Eagle Ins. v. Travelers Cos., 103 F.3d 750 (9th Cir. 1996), overruled on other grounds by Government Employees, Inc. Co. v. Dizol, 133 F.3d 1220 (9th Cir. 1998), the court determined that a subcontractor's defective materials and poor workmanship did not constitute "property damage" within the meaning of the standard CGL. The insurer was not required to defend the insured subcontractor where the subcontractor's defective concrete-pouring had caused the floors to sink. Id. at 757. The court held that this was true even though the repair plans required that the "floor coverings would have to be removed and replaced in order to repair the concrete floors." Id. Since costs of repair and diminution of value are two sides of the same coin -- economic loss -- it is irrelevant that the repairs require the alteration of physical property. As the Ninth Circuit stated in both cases, "the nature of the repairs cannot create coverage where none exists." 103 F.3d at 757 (citing Vieira, 930 F.2d at 701).

There are various old cases to the contrary. See, e.g., St. Paul Fire & Marine Ins. Co. v. Sears, Roebuck & Co., 603 F.2d 780 (9th Cir. 1979); Geddes & Smith, Inc. v. Saint Paul-Mercury Indemnity Co., 51 Cal. 2d 558 (1959), and after remand at 63 Cal. 2d 602 (1965); cf.

Bundy Tubing Co. v. Royal Indemnity Co., 298 F.2d 151 (6th Cir. 1962). However, given that those cases interpret an old formulation of the CGL policy,[10] the rule applied in Vieira and Golden Eagle is the applicable standard.[11]

There are many counter-examples illustrating the type of covered property damage contemplated by the Watts court. For example, in

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[10] As the Insurance Litigation treatise notes, these cases were "decided under a pre-1973 CGL policy form that did not require 'physical injury to tangible property' and therefore may not be dispositive in interpreting the 'physical injury' requirement in more recent forms." Walter Croskey, Rex Heeseman, Thomas W. Johnson, Jr., Insurance Litigation, § 7:2309 (2008 supp.).

Though St. Paul Fire & Marine Ins Co. v. Sears, Roebuck & Co., 603 F.2d 780 (9th Cir. 1979), was decided under the old formulation of the CGL property clause, it arguably could satisfy the modern CGL clause. The case involved a summary judgment motion over the insurer's duty to defend an insured party who had installed a defective urethane foam on the roofs of certain houses. Id. at 781-82. A complaint was filed against the insured alleging that removal of the defective foam caused damage to the underlying surface of the roof: the removal and repair caused water damage from leaking roofs, debris was scattered around the property and not removed, and urethane was applied to personal property and landscaping where it did not belong. Id. at 785-86. Furthermore, in the summary judgment action, "the uncontested statements" of the insured's expert established that "the removal of the defectively installed roofing material will cause some damage to the existing roof structure." Id. at 786.

Even if there is a colorable argument that the modern CGL covers this property damage, it does not appear that Sears has survived Vieira and Golden Eagle. Vieira distinguished the facts of Sears and questioned the continuing applicability of Sears, 930 F.2d at 698-99 & n.3, 701; Golden Eagle did not even mention Sears.

To the extent the Sears holding remains good law, the case is distinguishable from the present dispute because the repair and reinstallation of the defective urethane in Sears caused actual damage to property other than the defective urethane itself. The Sears court did not hold that the mere act of tearing out and reinstalling the urethane constituted property damage under the CGL.

[11] Plaintiff cites to authorities from other jurisdictions, but those cases are not determinative of California law. The Court will not address these cases because there is adequate on-point authority construing California law.

Maryland Cas. Co. v. Reeder, 221 Cal. App. 3d 961 (1990), condominium buyers had sued the developers and builders of a condominium project on account of soil subsidence that caused damage to the condominium units. Id. at 965-66. The buyers' complaints alleged that the units suffered damage to their walls, floors, foundations, ceilings, patios, and walkways, and that rain water seeped into the units.[12] Id. The developers and builders sued their insurance company, asserting that the insurer owed a duty to defend the insured under the standard CGL "property damage" clause. The court determined that the condominium buyers' complaints had sufficiently alleged that their buildings and personal property had suffered physical injury as a result of the builders' and developers' mistakes, thus entitling the developers and builders to be defended by their insurer. Id. at 969-70. Notably, the claims had alleged property damage that occurred separate from the requested repair and replacement of the defective buildings. See id. at 970-71.

The conclusion from these cases is that Plaintiff is entitled to indemnity if it can establish the four links in the following chain of facts: (1) there was leakage of water or some other fluid at the University's Hospital; (2) Plaintiff's equipment leaked this fluid; (3) this leakage from Plaintiff's equipment caused physical damage to the Hospital property, and (4) some of the University's repair and reinstallation work was aimed at repairing this damaged property. If these requirements are satisfied, the reinstallation work would be considered "physical injury to tangible property" under the Policy.

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[12] Unlike in the present case, the allegations were relevant because the case involved the insurer's duty to defend, not the duty to indemnify.

In the present procedural posture, Plaintiff bears two separate burdens. In order to defeat Defendant's Motion, Plaintiff must introduce sufficient admissible evidence to raise a genuine issue as to whether or not the three above-mentioned sets of facts are true. In order to succeed on its own Motion, Plaintiff must introduce sufficient admissible evidence to establish the three above-mentioned sets of facts are true, such that no reasonable jury could find for Defendant.

The evidence before the Court does not meet either of these burdens. Plaintiff successfully introduces evidence suggesting that there was some water leakage at the Hospital.[13] However, Plaintiff fails to provide any admissible evidence regarding whether: (1) this water leakage was caused by Plaintiff's installation of defective equipment; (2) this water leakage caused actual property damage to the Hospital; or (3) the University's repair and reinstallation work sought to repair this water-damaged property.[14]

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[13] (See Pl.'s Ex. 5 (business record showing that water had leaked during construction of Hospital); Pl.'s Ex. 6 (same); Pl.'s Ex. 10, at 3 (adoptive admission by Defendant that there was leakage resulting from installation of heating coils); Ex. 13, at 2 (same). See Fed. R. Evid. 801(d)(2); Fed. R. Evid. 803(6).

Though Plaintiff fails to meet the technical requirements of admissibility for the business records (for example, by failing to lay a foundation as to whether these records are kept in the ordinary course of business), such technical defects are easily remedied at trial and do not affect the substantive contents of the asserted facts. The Court is more interested in examining whether the factual content of these records is admissible or inadmissible hearsay. The technical failure to provide evidence in an admissible form is less important than a substantive failure to provide evidence that contains admissible contents. See Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003). But cf. Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987).

[14] Plaintiff seeks to introduce an April 23, 2003 letter from the Hospital project's mechanical contractor sent to the project's lead contractor. (See Declaration of David McIntyre in Support of

In short, Plaintiff has introduced a mere "scintilla of evidence" in support of its claim, and this scintilla of evidence does not even establish all of the necessary facts upon which its legal claim is grounded. See Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000). Plaintiff's facts do not address the ultimate issue of whether the injuries at issue are covered under the Policy's "physical injury to tangible property" clause. As such, Plaintiff has failed to raise a genuine issue of material fact sufficient to defeat Defendant's motion for summary judgment, and Defendant is entitled to summary judgment on this question.

Plaintiff's Partial Summary Judgment ["McIntyre Decl."], ¶ 11(c); Pl.'s Ex. 3.) The letter includes a statement that "[t]he costs associated with drywall repair, painting and flooring damage caused by coils that break under water pressure after room finishes is undeterminable." (Pl.'s Ex. 3.)

This evidence does not satisfy Plaintiff's burden for two reasons. First, this letter does not include any facts establishing that coil-failure actually caused any damage to drywall, painting, or flooring. The letter simply mentions in passing that such damage may or may not have occurred, and that any costs potentially associated with such damage are speculative.

Second, and most importantly, this evidence is inadmissible hearsay to which no exception applies. The Court will not consider this evidence, as "[o]nly admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." Beyene v. Coleman Sec. Services, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988); see also Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). It is true that Plaintiff, in opposing Defendant's motion, "need not produce evidence in a form that would be admissible at trial." Curnow By and Through Curnow v. Ridgecrest Police, 952 F.2d 321, 323-324 (9th Cir. 1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). However, the factual contents of this evidence must be admissible at trial. See Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003). Inadmissible hearsay is always inadmissible when introduced to prove the truth of what is asserted, regardless of the form in which it is introduced.

b. Loss of use of tangible property that is not physically injured

Plaintiff also seeks coverage for property damage under the clause covering "loss of use of tangible property that is not physically injured." Since this clause is a coverage clause, Plaintiff bears the burden of showing that the clause actually applies to the settled state court action. Plaintiff asserts that "the need to remove and replace the coils delayed the opening of the hospital," and that "the University claimed to have suffered [damages] resulting from [these] delays." (Pl.'s Mot. at 21). In its Opposition to Defendant's Motion, Plaintiff reiterates that "the University incurred delays in opening its hospital as a result of the time it took to repair the coils." (Pl.'s Opp. at 21.)

On the question of "loss of use," it is helpful to examine a case where the clearly was no such loss of use. In F & H Const. v. ITT Hartford Ins. Co. of Midwest, 118 Cal. App. 4th 364, 372 (2004), a subcontractor provided defective products (pile cap extensions) to the contractor, who then incorporated the defective products part of a larger construction project. Id. at 368. Once the defects were discovered, the contractor modified its design so as to avoid the larger expense of removing and replacing the completed portions of the project. Id. at 368-69. Ultimately, the project suffered no delay and the completed structure met all of its specifications. Id. at 369. The contractor sued the subcontractor for damages arising from the costs of modification and the loss of an early-completion bonus which the contractor would have recovered but for the defective equipment. Id. at 377. In addition to holding that there was no "physical injury

to tangible property," the court also held that there was no "loss of use of tangible property" because the project was not delayed in any way. Id. at 377.

As a corollary to the F & H Construction holding, it appears that a litigant may succeed on a "loss of use" claim if a construction project is delayed and the proprietor suffers economic losses as a result of this delay. See Stein-Brief Group, Inc. v. Home Indem. Co., 65 Cal. App. 4th 364, 371 (1998) (dictum).

Despite this legal rule, in the present case Plaintiff has not met its burden of introducing evidence showing that the University suffered economic harm from loss of use due to a delayed Hospital opening. Plaintiff's declaration about this fact is a classic example of hearsay. (See McIntyre Decl., ¶ 5.) It is well-established that "hearsay evidence in Rule 56 affidavits is entitled to no weight" when deciding summary judgment. Scosche Inds., Inc. v. Visor Gear Inc., 121 F.3d 675, 681 (9th Cir. 1997).[15]

The only remaining argument regarding the delay in the Hospital's opening is the University's complaints against Plaintiff in the underlying state court action. (See Pl.'s Exs. 1, 14.) The complaints themselves are inadmissible hearsay to which no exception applies. Further, even if the complaints were admissible evidence, the University's statements in the complaints are nothing more than

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[15] As discussed supra, a court should not exclude evidence from summary judgment because it is contained in an inadmissible form – for example, a declaration or affidavit would not be admissible if the case proceeded to trial, and would have to be replicated by the live testimony of the declarant. However, the court must consider the admissibility of the statement's contents, as hearsay evidence is never admissible to prove the truth of what is asserted. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003).

allegations. Such allegations do not constitute factual support showing that the Hospital's opening was actually delayed and the University actually suffered economic loss. Cf. Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 430 F. Supp. 2d 989, 992, 994-95 (N.D. Cal. 2006) (discussing settlement of state court action in case where insured party had introduced evidence in federal court regarding factual basis of settled state court claims).

In short, Plaintiff has failed to establish the factual basis for its claim that the damage at issue constituted "loss of use" under the Policy. Accordingly, Plaintiff has failed to raise a genuine issue of material fact sufficient to defeat Defendant's motion for summary judgment, and Defendant is entitled to summary judgment on this question.

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B. Policy Exclusions

Having determined that the claims at issue are not covered by the Policy, the Court need not examine the parties' arguments regarding the applicability of the Policy's exclusions.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion and DENIES Plaintiff's Motion.

IT IS SO ORDERED.

DATED: October 1, 2009

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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EXHIBIT B

EXHIBIT B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TORO-AIRE, INC., Plaintiff, v. FEDERAL INSURANCE COMPANY, Defendant.	CV 08-5784 SVW (JTLx) ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [50] [JS-6]

On June 12, 2006, the University of California, Los Angeles ("UCLA") sued Plaintiff Toro-Aire, Inc. ("Toro-Aire") for the costs of ripping out and re-installing defective coils and air valves that Toro-Aire had supplied for a hospital building. Defendant Federal Insurance Company ("Federal") defended Toro-Aire in that lawsuit under a full reservation of rights and also permitted Toro-Aire to hire independent counsel. Throughout this process, Federal denied any duty to indemnify Toro-Aire under the insurance policy. UCLA and Toro-Aire subsequently settled, and this Court was left to decide whether any or all of the settlement was covered by the policy. On October 1, 2009, this Court issued an Order Granting Federal's Motion for Partial Summary Judgment

on Toro-Aire's breach of contract claim. [Docket no. 34]. Federal now moves for partial summary judgment on the remaining claim for alleged breach of the covenant of good faith and fair dealing ("the Motion").

Interestingly, the parties agree that the Motion should be granted. Both agree that under Waller v. Truck Insurance Exchange, 11 Cal.4th. 1, 36 (1995), there can be no finding of bad faith without an actual breach of contract. Because the Court has already ruled that there was no such breach, there can be no bad faith. As confirmed in Toro-Aire's brief, "There is no dispute that the District Court's Order on the motion for summary judgment of the breach of contraction action will necessarily adjudicate the entire action including the cause of action for breach of the implied covenant of good faith and fair dealing." (Plaintiff's Response at 2). On that ground, the Court GRANTS Federal's motion for partial summary judgment as to the claim for breach of the covenant of good faith and fair dealing.[1]

IT IS SO ORDERED.

DATED: October 5, 2010

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

[1] Federal requests that the Court also base its judgment on "the independent ground that even if Federal had breached its insurance contract, which Federal denies, Federal's actions were reasonable and did not constitute 'conscious and deliberate acts' that amounted to bad faith." (Federal Reply at 2). Having an adequate and undisputed basis for granting partial summary judgment on independent grounds, the Court declines to consider this additional argument.