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2 UNITED STATES DISTRICT COURT  
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
4 OAKLAND DIVISION  
5

6 BEI SENSORS & SYSTEMS COMPANY,  
7 INC.,

8 Plaintiff,

9 vs.

10 GREAT AMERICAN INSURANCE  
11 COMPANY,

12 Defendant.

Case No: C 09-5819 SBA

**ORDER DENYING DEFENDANT'S  
MOTION FOR SUMMARY  
ADJUDICATION; AND GRANTING  
IN PART AND DENYING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY ADJUDICATION**

Dkts. 62, 65

13 Plaintiff brings this insurance breach of contract action against Defendant. Federal  
14 jurisdiction is premised on diversity of the parties under 28 U.S.C. § 1332. The parties are  
15 presently before the Court on: (1) Defendant's Motion for Summary Adjudication, whereby  
16 Defendant seeks partial summary judgment in its favor as to Plaintiff's claim for losses  
17 sustained before Plaintiff became a subsidiary of the named insured Schneider Electric  
18 Holdings, Inc.; and (2) Plaintiff's Motion for Summary Adjudication of Certain Defenses,  
19 whereby Plaintiff seeks partial summary judgment as to Defendant's Fifth, Sixth, Seventh,  
20 Ninth, and Tenth Affirmative Defenses. Dkts. 62, 65. Having read and considered the papers  
21 filed in connection with these matters and being fully informed, the Court hereby DENIES  
22 Defendant's motion and GRANTS IN PART and DENIES IN PART Plaintiff's motion for the  
23 reasons set forth below. The Court, in its discretion, finds these matters suitable for resolution  
24 without oral argument. See Fed.R.Civ.P. 78(b).

25 **I. FACTUAL BACKGROUND**

26 **A. OWNERSHIP OF PLAINTIFF**

27 This matter involves the theft of gold by employees in Plaintiff's manufacturing  
28 divisions, Systron Donner Inertial and Systron Donner Automotive (collectively referred to

1 herein as “Systron Donner”). See Joint Statement of Undisputed Facts (“SUF”) ¶ 1, Dkt. 64.  
2 In 2005, Schneider Electric Holdings, Inc. (“SEHI”) purchased Plaintiff’s parent company, BEI  
3 Technologies, Inc. Id. ¶ 3. On October 2, 2005, the sale was completed and Plaintiff became  
4 the indirect subsidiary of SEHI, through SEHI’s ownership of BEI Technologies, Inc. Id. As  
5 of that date, Plaintiff was a subsidiary of BEI Technologies, Inc., which in turn was a  
6 subsidiary of SEHI. Id.

7 **B. THE POLICY**

8 Defendant issued Crime Protection Policy, No. SAA 517-77-45-03 (the “Policy”),  
9 identifying “Schneider Electric Holdings, Inc.” (previously defined herein as “SEHI”) as the  
10 Named Insured. Id. ¶ 5. The Policy was effective from May 1, 2007 to May 1, 2008. Id.  
11 Though Plaintiff is not directly identified as an insured under the Policy, it is insured by virtue  
12 of the fact it became an indirect subsidiary of SEHI on October 2, 2005. That is, pursuant to  
13 the “Joint Insured” endorsement of the Policy, the following are added as Named Insureds:

14 SCHNEIDER ELECTRIC HOLDINGS, INC. AND SUBSIDIARIES AND  
15 CROUZET CORP. / CROUZET MEXICANA S.A AND NUM  
16 CORPORATION AND JEUMONT-SCHNEIDER INDUSTRIE AND TAC  
AMERICAS, INC. AND ABACUS ENGINEERED SYSTEMS, INC.

17 ANY ENTITY WHICH IS SUBJECT TO CONTROL BY THE INSURED BY  
18 REASON OF (1) OWNERSHIP INTEREST IN SUCH ENTITY IN EXCESS  
19 OF 50% OR (2) OPERATION OF SUCH ENTITY THROUGH VOTING  
CONTROL OR BY WRITTEN CONTRACT ...

20 Id. ¶ 7.

21 The Policy states in pertinent part:

22 **CRIME PROTECTION POLICY**

23 Throughout this Policy the words “you” and “your” refer to the insured(s) shown  
24 in the Declarations.

25 ...

26 **A. CONSIDERATION CLAUSE**

27 In return for the payment of the premium, and subject to the Declarations,  
28 Insuring Agreements, Definitions, Exclusions, Conditions and other terms of this  
Policy, we will pay you for loss that you sustain resulting directly from acts  
committed or events occurring at any time and discovered by you during the

1            Policy Period shown in the Declarations or during the period of time provided in  
2            the Extended Period to Discover Loss ...

3            Id. ¶ 8 (underline added).

4            As amended by Endorsement No. 18, the Policy also provides as follows:

5            We will pay for loss of, and loss from damage to, money, securities and other  
6            property resulting directly from “Employee Dishonesty”:

7            A. With the exception of loss resulting from “trading:”

8                            “Employee Dishonesty” means only “theft” by an “employee,” whether  
9                            identified or not, acting alone or in collusion with other persons, except  
10                            you or a partner.

11                            ....

12            Id. ¶ 9. The Limit of Insurance for “Employee Dishonesty” is \$20 million dollars, with a  
13            \$250,000 per occurrence deductible. Id. ¶ 6.

14            Insuring Agreement No. 1 contains two definitions that are pertinent here – “theft” and  
15            “employee.” Endorsement No. 18 defines “theft” as the “unlawful taking of ‘money,’  
16            ‘securities,’ or ‘property other than money and securities’ to the deprivation of the Insured.”

17            Id. ¶ 10. The Policy defines “employee” as follows:

18                            4.            **Employee** means:

19    a. Any natural person:

20    (1) while in your service or for 30 days after termination of  
21    service; and

22    (2) whom you compensate directly by salary, wages or  
23    commissions; and

24    (3) whom you have the right to direct and control while  
25    performing services for you.

26            Id. ¶ 11 (emphasis in original).

27            The following Policy provisions are also pertinent to the instant motions (emphasis in  
28            original):

**[E. Conditions] 6. Discovery of Loss[:]** Discovery of loss occurs when you first  
                          become aware of facts which would cause a reasonable person to assume that a

1 loss covered by the insurance has been or will be incurred, even though the exact  
2 amount or details may not then be known. (SUF Ex. A at 13, ¶ 6.);

3 **[E. Conditions] 7. Duties in the Event of Loss[:]** [as modified by Endorsement  
4 No. 5]

5 AFTER ANY MEMBER OF THE RISK MANAGEMENT DEPARTMENT,  
6 AND/OR LEGAL DEPARTMENT, AND OR GENERAL COUNSEL AND/OR  
7 INTERNAL AUDIT DEPARTMENT AND/OR HUMAN RESOURCE  
8 DEPARTMENT DISCOVERS A LOSS OR A SITUATION THAT MAY  
9 RESULT IN LOSS FROM DAMAGE TO, COVERED PROPERTY THE RISK  
10 MANAGEMENT DEPARTMENT, AND/OR LEGAL DEPARTMENT,  
11 AND/OR GENERAL COUNSEL AND/OR INTERNAL AUDIT  
12 DEPARTMENT AND/OR HUMAN RESOURCE DEPARTMENT YOU  
13 MUST:

- 10 a. notify us as soon as possible;
- 11 b. submit to examination under oath at our request and give us a  
12 signed statement of your answers;
- 13 c. give us a detailed, sworn proof of loss within 120 days;
- 14 d. cooperate with us in the investigation and settlement of any claim.  
15 (Id. at GA 3982 and 4004.)

16 ....

17 **[E. Conditions] 17. Ownership of Property, Interests Covered[:]** The  
18 property covered under this insurance is limited to property: (a) that you own or  
19 hold; or (b) for which you are legally liable. However, this insurance is for your  
20 benefit only. It provides no rights or benefits to any other person or organization.  
(Id. at 15, 16.)

21 ....

22 **Endorsement No. 15: Applicable to Specific Insuring Agreements, 1.**  
23 **Cancellation as to Any Employee[:]** This insurance is canceled as to any  
24 **employee:** Loss caused by an employee if the insured possesses knowledge of  
25 any act or acts of fraud or dishonesty committed by such employee: (1) In the  
26 service of the Insured or otherwise during the terms of employment by the  
27 Insured, or (2) prior to the employment by the Insured provided that such  
28 conduct involved loss of money, securities or other property valued at \$25,000  
or more. (Id. at Endorsement 15.)

26 **C. USE OF GOLD IN PLAINTIFF'S MANUFACTURING PROCESS**

27 Systron Donner manufactured sensors used in inertial sensing systems, such as  
28 automotive stability control, at its facility in Concord, California. SUF ¶¶ 2-3; Knowles Decl.

1 ¶ 3, Dkt. 68. The sensors were coated with a uniform layer of gold. SUF ¶ 12; Knowles Decl.  
2 ¶ 6. The manufacturing process applied gold by heating and evaporating gold in a vacuum  
3 evaporation chamber, called an evaporator, to produce a uniform metallic coating. Knowles  
4 Decl. ¶ 8. Because the parts being coated comprised a small percentage of the total surface  
5 area inside of the chambers, the vast majority of the evaporated gold was deposited on the  
6 tooling and inside walls of the chamber. Id. Systron Donner employees scraped the gold  
7 deposited on the tooling and inside the chamber after it accumulated sufficiently. Id. Scraped  
8 gold was sent to refiners (also known as reclaimers), who melted and purified the gold  
9 recovered from the evaporators and tooling. Id. ¶ 9. At Systron Donner, gold was received by  
10 the shipping department, logged into an “ERP system” (presumably referring to an “Enterprise  
11 Resource Planning” system) and stored inside a purchasing safe. Id. ¶ 7. There was also a  
12 paper log for the purchasing safe. Id.

13 **D. CARLOS CORONADO**

14 One issue presented by Plaintiff’s motion is the application, if any, that Endorsement  
15 No. 15 of the Policy may have to losses caused by Carlos Coronado, a Systron Donner  
16 employee responsible for operating the evaporators. Endorsement No. 15 provides that  
17 coverage is cancelled as to an employee if Plaintiff “possesses knowledge of any act or acts of  
18 fraud or dishonesty” committed by such employee. SUF Ex. A, Endorsement No. 15.

19 Defendant asserts that Plaintiff had knowledge before 2008 sufficient to terminate  
20 coverage as to Coronado. Specifically, in or around 2003, Coronado had a meeting with two  
21 supervisors regarding inconsistencies between evaporator logs and logs from the drawers  
22 where gold was stored during the manufacturing process. Gladding Decl. ¶¶ 7-8, Dkt. 67;  
23 Hartmann Decl. Ex. 4, Almazan Dep. Tr. 184:15-185:3, Dkt. 66. Both supervisors testified  
24 that, after investigating the matter, they were unable to reach any conclusions whether  
25 Coronado had stolen gold. Gladding Decl. ¶ 9; Hartmann Decl. Ex. 4, Almazan Dep. Tr.  
26 184:15-185:3. Coronado’s immediate supervisor, Deborah Reeves Gladding, testified under  
27 oath as follows:  
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A: My concern is that [Carlos Coronado] was sloppy on his logs and not paying proper attention to detail. And he had documented two to three issues from the gold drawer to the machine that didn't match. In other words, there was no run performed.

....

Q: And did you confront him about it, or did you address your concerns with someone else?

A: I talked to my partner supervisor, who at the time was Dan Almazan, about my concern that there were there was something in the logs that didn't match and didn't make sense. So I asked if he would stay with me while I asked Carlos what happened.

Q: And did he do that?

A: Yes he did.

Q: And describe for me that conversation

....

A: I asked Carlos we asked Carlos into the office, and I explained to him that upon an audit of his process area logs we found some discrepancies we would like him to explain so we could understand why there were a couple runs issued to a machine where a run was not performed. He looked at the logs, and he said I must have made a mistake. I said I wanted him to think again about what could have happened, where he took the gold and went to this machine, what could have happened to it.

Q: And what did he say?

A: He said nothing. He didn't respond.

....

Q: Did you have any suspicion at all that he wasn't telling the truth at all?

A: I wasn't happy with his lack of explanation. I didn't have – I wasn't happy with his lack of explanation. I don't know if he was lying to me. I couldn't tell if he stole it. But he couldn't answer why his logs were discrepant and that bothered me.

....

Q: And after that conversation took place, did you have any other or later concerns about Carlos?

1 A: Given that we were so busy, and given that I was not comfortable with  
2 his reaction. So when I was a supervisor, when I was not confident in an  
3 operator's ability to execute the job in whatever fashion, I would move them out  
4 of the process area. It could be any other process area I felt they weren't taking  
5 seriously and providing the amount of focus required. So I moved him. Instead  
6 of trying to see if, in fact, he was stealing gold or if he's just sloppy with his  
7 process. I did not want to take that risk. I didn't have the background. I didn't  
8 have the time. I felt he would be better utilized elsewhere. That would solve the  
9 problem.

10 Hartmann Decl. Ex. 5, Gladding Exam. Tr. 19:14-24:17.

11 Gladding further explains in her declaration: "[a]fter investigating the matter, I was  
12 unable to reach any conclusions whether or not Mr. Coronado had simply failed to follow  
13 procedures, or whether he had done something improper, such as stealing the gold." Gladding  
14 Decl. ¶ 9. She further states: "[b]ecause I was not comfortable with Mr. Coronado's lack of  
15 explanation, but did not have the time or the background to determine whether he was stealing  
16 gold or was sloppy with his process, I felt Mr. Coronado would be better utilized elsewhere and  
17 recommended that he be transferred out of the first metal evaporator process." Id. ¶ 10. She  
18 further explains: "I did not report the incident, or my inability to reach any conclusions, to the  
19 human resources department or any of my supervisors." Id. ¶ 11.

20 Coronado's other supervisor, Dan Almazan, testified that, at the time, he had not formed  
21 the conclusion that Coronado had taken gold. Hartmann Decl. Ex. 4, Almazan Dep. Tr.  
22 139:17-23. Gladding offered Coronado a position elsewhere in the plant, took no further action  
23 against him, and subsequently gave Coronado positive performance reviews. Hartmann Decl.  
24 Ex. 6, Coronado Dep. Tr. 93:25-98:5.

25 With respect to Coronado, he testified that he met with Gladding about the  
26 discrepancies in his gold logs, but he told her he did not know anything about the missing gold.  
27 Hartmann Decl. Ex. 6, Coronado Dep. Tr. 93:25-98:5. Coronado also admitted that he had lied  
28 to Gladding, as he had, in fact, stolen gold pellets. Id. 95:13-20. Coronado later plead guilty to  
federal charges associated with the theft of gold from Systron Donner. Valeriano Decl. Ex. 1 at  
8 & Ex. 5 at 71, Dkt. 76.

1           **E.       INCIDENTS THAT PLAINTIFF ASSERTS GAVE IT KNOWLEDGE OF THE THEFT**

2           In contrast, Plaintiff posits that it did not have knowledge of any employee theft prior to  
3 2008. Specifically, in July 2007, a Systron Donner engineering manager, Stuart Knowles, was  
4 assigned to determine how to reduce the cost of so-called consumables, including gold, used in  
5 the manufacturing process. Knowles Decl. ¶ 11. He conducted an analysis of all gold used and  
6 consumed in the manufacturing process, as well as all gold recovered and shipped to refiners.  
7 Id. at ¶ 12. In November 2007, Knowles concluded that gold appeared to be missing, and that  
8 the losses extended back for a number of years. Id. at ¶ 13. He rechecked his calculations for  
9 several weeks, and eventually concluded that gold was, in fact, missing. Id. He initially  
10 suspected that the reclaiming companies had somehow been cheating Systron Donner in  
11 connection with the reclamation process. Id. at ¶ 14.

12           However, in January 2008, Knowles observed an employee named Jerry Kahue on  
13 security cameras engaging in suspicious activity in connection with an evaporator. Id. at ¶ 15.  
14 The Concord Police Department arrested Kahue, who confessed to stealing gold and agreed to  
15 cooperate. Id. ¶ 16. Ultimately police identified at least twelve current and former employees  
16 who had stolen gold. Id. Plaintiff immediately terminated employees when it discovered that  
17 they were involved with or had knowledge of the thefts. Id. at ¶ 17. Although Knowles and  
18 local management in Concord, California discovered the first employee thefts in January 2008,  
19 the loss was reported internally to SEHI's risk management department on May 21, 2008 by  
20 Lynn Lefebvre. Hartmann Decl. Ex. 1, Lefebvre Dep. Tr. 36:7-18 & Ex. 82. SEHI's insurance  
21 broker filed a notice of the claim with Defendant on May 23, 2008. Answer to First Amended  
22 Complaint ("FAC") ¶ 14, Dkt. 51. Plaintiff calculated the amount of the gold theft to be in  
23 excess of \$20 million dollars. FAC ¶ 16, Dkt. 47.

24           **F.       THE INSTANT ACTION**

25           Plaintiff filed its FAC on September 15, 2010, asserting a breach of contract claim  
26 against Defendant. Plaintiff contends that the losses it incurred as a result of its employees'  
27 theft of gold from February 2000 to May 2008 are covered under the Policy, and that  
28

1 Defendant breached the Policy by failing to pay the benefits owed under the Policy for those  
2 losses. FAC ¶¶ 24-27.

3 The parties are presently before the Court on cross-motions for partial summary  
4 judgment. Defendant seeks partial summary judgment in its favor as to Plaintiff's claim for  
5 losses sustained before October 2, 2005, i.e., before Plaintiff became a subsidiary of SEHI.  
6 Plaintiff seeks partial summary judgment as to Defendant's Fifth, Sixth, Seventh, Ninth, and  
7 Tenth Affirmative Defenses, which are as follows:

- 8 • Fifth Affirmative Defense:<sup>1</sup> As a separate and fifth affirmative defense to  
9 the First Amended Complaint, and to the purported causes of action set  
10 forth therein, Defendant alleges that the Policy was cancelled and/or non-  
11 renewed effective immediately as of the time of notice of the potential  
12 claim alleged in the First Amended Complaint and that any potential loss  
13 was covered by another insurance carrier as of such time.
- 14 • Sixth Affirmative Defense: As a separate and sixth affirmative defense to  
15 the First Amended Complaint, and to the purported causes of action set  
16 forth therein, Defendant alleges that, as one of the Conditions of the  
17 Policy, pursuant to Section (E) (6) and (7), Plaintiff was obligated to, but  
18 failed to, give timely notice of discovery of a loss and Defendant has been  
19 prejudiced.
- 20 • Seventh Affirmative Defense: As a separate and seventh affirmative  
21 defense to the First Amended Complaint, and to the purported causes of  
22 action set forth therein, Defendant alleges that the pre-acquisition  
23 (alleged) thefts were not a loss to the Insured but to the prior owner.  
24 Thus, the pre-acquisition (alleged) thefts were not a loss to the insured  
25 and not committed by their employees.
- 26 • Ninth Affirmative Defense: As a separate and seventh affirmative defense  
27 to the First Amended Complaint, and to the purported causes of action set  
28 forth therein, Defendant alleges that Plaintiff failed to comply with the  
Cancellation as to any Employee Condition (E)(1), as set forth at page 18  
of the Policy and endorsement No. 15, may apply such that the Policy  
was canceled upon notice of the alleged loss.
- Tenth Affirmative Defense: As a separate and tenth affirmative defense to  
the First Amended Complaint, and to the purported causes of action set

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<sup>1</sup> In response to Plaintiff's motion for summary judgment as to its Fifth Affirmative Defense, Defendant states that it "concedes the inapplicability of its Fifth Affirmative Defense," as this defense "creates only a right of action as to [Plaintiff's] other insurer." Def.'s Opp. at 5, Dkt. 75. Therefore, Plaintiff's motion for summary judgment as to Defendant's Fifth Affirmative Defense is GRANTED as unopposed.

1                   forth therein, Defendant alleges that Plaintiff failed to comply with  
2                   Condition (E)(17) as to the ownership of the claimed property.

3                   See Answer to FAC.

4                   **II.     LEGAL STANDARD**

5                   Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment if  
6                   there is no genuine issue as to any material fact and the moving party is entitled to judgment as  
7                   a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The  
8                   moving party bears the initial burden of demonstrating the basis for the motion and identifying  
9                   the portions of the pleadings, depositions, answers to interrogatories, affidavits, and admissions  
10                  on file that establish the absence of a triable issue of material fact. Celotex Corp. v. Catrett,  
11                  477 U.S. 317, 323 (1986). If the moving party meets this initial burden, the burden then shifts  
12                  to the non-moving party to present specific facts showing that there is a genuine issue for trial.  
13                  Fed.R.Civ.P. 56(e); Celotex, 477 U.S. at 324; Matsushita Elec. Indus. Co. v. Zenith Radio  
14                  Corp., 475 U.S. 574, 586-87 (1986).

15                  “On a motion for summary judgment, ‘facts must be viewed in the light most favorable  
16                  to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.’” Ricci v.  
17                  DeStefano, -- U.S. --, 129 S.Ct. 2658, 2677 (2009) (quoting Scott v. Harris, 550 U.S. 372, 380  
18                  (2007)). An issue of fact is “material” if, under the substantive law of the case, resolution of  
19                  the factual dispute might affect the outcome of the claim. See Anderson, 477 U.S. at 248.  
20                  Factual disputes are genuine if they “properly can be resolved in favor of either party.” Id. at  
21                  250. Accordingly, a genuine issue for trial exists if the non-movant presents evidence from  
22                  which a reasonable jury, viewing the evidence in the light most favorable to that party, could  
23                  resolve the material issue in his or her favor. Id. “If the evidence is merely colorable, or is not  
24                  significantly probative, summary judgment may be granted.” Id. at 249-50 (internal citations  
25                  omitted).

26                  The proper construction of an insurance policy is a question of law. Wausau  
27                  Underwriters Ins. Co. v. Unigard Sec. Ins. Co., 68 Cal.App.4th 1030 (1998). Under California  
28                  law, the first step in the resolution of the dispute between the parties regarding the Policy is the

1 determination of whether the terms at issue here are clear and unambiguous. Kilroy Industries  
2 v. United Pacific Ins. Co., 608 F.Supp. 847, 852 (C.D. Cal. 1985). “If, from the language  
3 employed, the Court can determine the plain meaning of the Policy, then the Court must hold  
4 the parties to their contract.” Id. On the other hand, if the Court finds that the language in the  
5 Policy is ambiguous, then “the meaning and construction most favorable to the insured must be  
6 applied.” Id.

7 **III. ANALYSIS - DEFENDANT’S MOTION**

8 The parties do not dispute that Plaintiff became SEHI’s indirect subsidiary on October  
9 2, 2005. The parties also do not dispute that, as an indirect subsidiary of SEHI, Plaintiff falls  
10 under the “Joint Insured” endorsement of the Policy, and that the Policy became effective on  
11 May 1, 2007. The parties, however, do dispute whether the Policy language precludes  
12 Plaintiff’s claim for losses it incurred prior to October 2, 2005, when it became SEHI’s indirect  
13 subsidiary.

14 According to Defendant, Plaintiff can only recover for loss it sustained after it became  
15 an indirect subsidiary of SEHI. In support of that argument, Defendant relies on the language  
16 of Insuring Agreement No. 1, which provides coverage for loss “you sustain” resulting directly  
17 from dishonest acts committed by an “employee” in “your service.” Defendant notes that the  
18 Policy defines the terms “you” and “your” to mean the insured shown in the Declarations.  
19 Plaintiff is not named on the Declarations. Also, Plaintiff is not specifically identified in the  
20 Joint Insured endorsement, unlike the SEHI. Rather, Plaintiff is a named insured only because  
21 it falls within the scope of “Schneider Electric Holdings, Inc. and subsidiaries” on the Joint  
22 Insured endorsement. Therefore, according to Defendant, prior to October 2, 2005, Plaintiff  
23 did not fall within the Policy’s meaning of “you” and “your” because it was not SEHI’s  
24 subsidiary (directly or indirectly) and not within the meaning of “Schneider Electric Holdings,  
25 Inc. and subsidiaries.” In other words, prior to October 2, 2005, an entity that was not SEHI’s  
26 subsidiary experienced gold theft. Accordingly, to follow Defendant’s logic, any loss that  
27 Plaintiff sustained before it became SEHI’s subsidiary is not covered by the Policy.

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1           However, Defendant’s interpretation of the Policy to exclude losses prior to SEHI’s  
2 acquisition of Plaintiff is inconsistent with the plain and unambiguous language of the Policy.  
3 See AIU Ins. Co. v. Superior Court, 51 Cal.3d 807, 814 (1990) (“we construe policy language  
4 according to the mutual intentions of the parties and its plain and ordinary meaning, resolving  
5 ambiguities in favor of coverage”). Specifically, the Policy expressly covers losses “that you  
6 sustain resulting directly from acts committed or events occurring at any time and discovered  
7 by you during the Policy Period shown in the Declarations or during the period of time  
8 provided in the Extended Period to Discover Loss ....” Id. ¶ 8 (emphasis added). At the time  
9 the Policy became effective, in 2007, Plaintiff was an indirect subsidiary of SEHI and thus fell  
10 within the definition of “you” and “your” under the Policy as an insured. Plaintiff discovered,  
11 during the Policy period, that it had incurred losses as the result of acts committed from 2000  
12 to 2008. Contrary to Defendant’s assertions, the Policy does not require that Plaintiff incur the  
13 losses while it is a named insured; rather, it only requires that the losses be discovered while it  
14 is a named insured. As noted by Plaintiff, if Defendant had intended to exclude losses that  
15 occurred before SEHI acquired Plaintiff, it could have made that clear in the Policy language  
16 by way of an exclusion. Its failure to do so is construed in favor of Plaintiff. See e.g., Kilroy  
17 Industries, 608 F.Supp. at 853 (finding that if the insurer had intended to include an exclusion,  
18 it could have done so); Pacific-Southern Mortgage Trust Co. v. Insurance Co. of North  
19 America, 166 Cal.App.3d 703, 711 (1985) (“[i]f [the insurer] had wanted the notice and the  
20 limitations period to start upon the discovery of the fraud, it could have so stated”).

21           On this issue, Defendant relies on three cases: Hoffman v. State Farm Fire & Cas. Co.,  
22 16 Cal.App.4th 184, 191 (1993); Fidelity Sav. and Loan Ass n. v. Republic Ins. Co., 513 F.2d  
23 954 (9th Cir. 1975); and Vons Companies v. Federal Ins. Co., 212 F.3d 489 (9th Cir. 2000).  
24 Each of those cases is inapposite. For instance, Hoffman held that a former homeowner could  
25 not recover losses under an insurance policy for damage that manifested after the homeowner  
26 sold the property and after the insurance policy had expired. Defendant asserts that Hoffman  
27 requires a finding that SEHI did not have an insurable interest in the property stolen by  
28 employees prior to October 2, 2005, just as the former homeowner did not have an insurable

1 interest in the property after its sale, which also caused the expiration of the policy. Defendant  
2 overlooks the fact that Plaintiff, a named insured, owned the gold at the time it was stolen, and  
3 discovered the loss during the Policy period. See Knowles Decl. ¶ 19. Therefore, Plaintiff had  
4 an insurable interest in the stolen gold throughout the claim period. Thus, Hoffman does not  
5 support Defendant’s position.

6 In Fidelity Savings, Republic Insurance Company (“Republic”) issued a fidelity bond to  
7 Fidelity Savings (“Fidelity”) for the period 1962 to 1968. The bond covered “losses sustained  
8 by the Insured at any time but discovered during the bond period.” 513 F.2d at 956. The bond  
9 also covered litigation costs incurred in defending suits brought as the result of employee  
10 dishonesty. Id. at 955. Fidelity Savings merged with Trans-Bay in 1966, four years after the  
11 bond had first been issued. Fidelity succeeded to all of the assets and liabilities of Trans-Bay  
12 as a result of the merger, including losses suffered by Trans-Bay prior to the merger arising  
13 from alleged employee fraud. After the merger, Fidelity incurred litigation costs resulting from  
14 the Tran-Bay s pre-merger employee fraud. After resolving the matters, Fidelity sued on bonds  
15 issued to both Fidelity and Trans-Bay, seeking to recover the litigation costs. The district court  
16 granted summary judgment in favor of Republic, holding that any loss was sustained by Trans-  
17 Bay, not by Fidelity. The Ninth Circuit affirmed, holding that the losses occurred before the  
18 merger, and therefore were sustained Trans-Bay, not Fidelity. Id. at 956. The Ninth Circuit  
19 rejected the argument that Fidelity sustained a loss by virtue of the succession of liabilities  
20 caused by the merger. Id. Thus, the bond issued to Fidelity would not provide coverage. Id.

21 Fidelity Savings is distinguishable on two grounds. First, as explained above, Plaintiff  
22 was a named insured under the Policy and, thus, was the insured entity that suffered the losses.  
23 Second, the insured in Fidelity Savings acquired the entity suffering losses several years after  
24 the policy had been issued, and the insured was aware of the losses at the time of the  
25 acquisition. Id. at 956. Extending coverage in that case would have held Republic liable for  
26 losses of an entity that was not part of the insured at the time the policy was issued. It would  
27 also have extended coverage for a loss that the insured was aware of before it acquired the  
28 other company. In contrast, here, SEHI acquired Plaintiff years before the losses were

1 discovered, and before Defendant issued the Policy. Extending coverage to Plaintiff's losses  
2 would not expand Defendant's coverage to losses suffered by an entity it did not insure.

3 Finally, Vons is also inapposite. In Vons, an employee of Vons was alleged to have  
4 defrauded third-party victims. The victims sued Vons and others. Vons eventually settled the  
5 litigation for \$10 million, the limit of its fidelity insurance policy with Federal Insurance  
6 Company ("Federal"). The Ninth Circuit, in upholding summary judgment in favor of Federal,  
7 concluded that "Federal provided Vons with coverage for 'direct losses' that were 'caused by'  
8 employee theft or forgery. Vons's policy did not provide coverage for third party claims. ...  
9 We hold that 'direct' means 'direct' and that in the absence of a third party claims clause,  
10 Vons's policy did not provide indemnity for vicarious liability for tortious acts of its  
11 employee." 212 F.3d at 492-493. Defendant argues that Vons stands for the proposition that  
12 the loss sustained by Plaintiff as a subsidiary of SEHI only occurred when it was acquired by  
13 SEHI and, thus, any pre-acquisition loss is not a "direct" loss to the insured. The argument is  
14 without merit. Here, the insured is defined by the Joint Insured endorsement, and it is  
15 undisputed the definition includes Plaintiff, which was a subsidiary of SEHI when the Policy  
16 was issued and throughout the Policy period. Put simply, Plaintiff was not a "third party" to  
17 the Policy, as was the case in Vons.

18 For these reasons, Defendant's motion for partial summary judgment is DENIED.

#### 19 **IV. ANALYSIS - PLAINTIFF'S MOTION**

20 Plaintiff moves for partial summary judgment with respect to Defendant's Sixth,  
21 Seventh, Ninth, and Tenth Affirmative Defenses on the grounds that the scope of the Policy's  
22 coverage is established as a matter of law, and there are no material facts in dispute as to these  
23 defenses.

##### 24 **A. DEFENDANT'S SIXTH AFFIRMATIVE DEFENSE**

25 The Sixth Affirmative Defense alleges that Plaintiff failed to give Defendant timely  
26 notice of discovery of the loss, and that Defendant was prejudiced by the delay. In particular,  
27 Endorsement No. 5 of the Policy states that "after any member of the ... human resource  
28 department discovers a loss or a situation that may result in loss from damage to [] covered

1 property ... the human resource department must ... notify us as soon as possible.” SUF Ex.  
2 A, Endorsement No. 5. Defendant argues that since Plaintiff’s human resources department  
3 knew of the loss in early January 2008, when Plaintiff’s employees were terminated, Plaintiff’s  
4 failure to give Defendant notice of the loss until May 23, 2008 resulted in prejudice.  
5 Specifically, the Proof of Loss submitted by Plaintiff indicates that between January of 2008  
6 and May of 2008, Plaintiff sustained losses ranging from \$175,834.73 to \$512,500.96.  
7 Valeriano Decl. Ex. 4 at 54. According to Defendant, it has been prejudiced in the amount of  
8 \$175,834.73 to \$512,500.96 because it was “only notified of the loss in May of 2008, after the  
9 thefts had abated,” and had it been given prompt notice, it could have “at least put itself on  
10 record as to the methodology required to put an immediate end to the thefts in question.”  
11 Def.’s Opp. at 7-8. Defendant further asserts that it was precluded from the “opportunity to  
12 work with [Plaintiff] to ensure that five further months of losses were avoided.” *Id.* at 9.

13 In order to demonstrate the requisite prejudice, Defendant must show that, due to delay  
14 in reporting the loss, Defendant “lost something that would have changed the handling of the  
15 underlying claim[.]” *Jones v. St. Paul Travelers*, 496 F.Supp.2d 1079, 1085 (N.D. Cal. 2007).  
16 An insurer must show that, but for the delay, there is a substantial likelihood that the insurer  
17 would have been able to garner a better result. *See Northwestern Title Security Co. v. Flack*, 6  
18 Cal. App. 3d 134, 143 (1970) (demonstrating possible prejudice does not satisfy the insurer’s  
19 burden; the insurer must show actual prejudice, which “does not arise merely because a  
20 delayed or late notice has denied the insurance company the ability to contemporaneously  
21 investigate the claim or interview witnesses”).

22 As indicated, Defendant argues that it was prejudiced by losses that occurred between  
23 January 2008, when the first employee was discovered stealing gold, and May 2008, when  
24 notice was given. However, Defendant has failed to proffer any evidence showing that the  
25 delay denied it the ability to effectively investigate the claim or interview witnesses. Nor has  
26 Defendant submitted any evidence creating a triable issue of fact that the losses would have  
27 been diminished if Plaintiff had reported the claim sooner. Instead, the undisputed evidence  
28 shows that Plaintiff immediately reported evidence of Kahue’s suspected thefts to the police,

1 that soon thereafter the Concord Police department questioned Kahue, that Kahue admitted his  
2 thefts, and Plaintiff terminated his employment. It is also undisputed that the police and FBI  
3 launched a multi-month investigation that resulted in the federal criminal prosecutions of  
4 former employees. Moreover, Defendant’s lead investigator on Plaintiff’s claim, Richard  
5 Searcy, stated during his deposition that “under the terms of the policy, it appears [Plaintiff]  
6 gave us prompt notice,” and Defendant “wouldn’t have stopped the theft . . . regardless of  
7 when notice was given.” Hartmann Decl. Ex. 2, Searcy Dep. Tr. 27:22-28:2; 77:4-78:3.  
8 Defendant has offered no evidence to the contrary.

9 Furthermore, Defendant’s alternative argument – that Plaintiff “allowed” thefts to  
10 continue from January to May 2008, and, thus, the losses occurred during that time are  
11 “voluntary payments” made to the thieving employees – is unpersuasive. Again, Defendant  
12 fails to submit any evidence that Plaintiff allowed thefts to continue. Moreover, the legal  
13 authorities Defendant relies on in support of this argument are distinguishable. Specifically,  
14 Faust v. The Travelers, 55 F.3d 471 (9th Cir. 1995), Jamestown Builders, Inc. v. General Star  
15 Indem. Co., 77 Cal. App. 4th 341 (1999), and Gribaldo, Jacobs, Jones & Assoc. v. Agrippina  
16 Versicherungen A.G., 3 Cal.3d 434, 446 (1970) each involved a third-party indemnity policy  
17 containing a clause expressly exempting “voluntary” payments made before notice was given  
18 to and consent received from the insurer. The continuing thefts of gold that occurred by  
19 Plaintiff’s employees between January and May of 2008 are not analogous to “voluntary  
20 payments,” as the thefts were not voluntary. Defendant’s reliance on this line of reasoning is  
21 therefore faulty.

22 At bottom, Defendant has failed to meet its burden in establishing that there is a genuine  
23 factual issue for trial regarding its Sixth Affirmative Defense. Therefore, Plaintiff’s motion for  
24 summary judgment as to Defendant’s Sixth Affirmative Defense is GRANTED.

25 **B. DEFENDANT’S SEVENTH AFFIRMATIVE DEFENSE**

26 Defendant’s Seventh Affirmative Defense presents the same issue as Defendant’s  
27 instant motion for partial summary judgment, addressed above. Specifically, with this defense,  
28 Defendant seeks to preclude Plaintiff’s claim for losses sustained before October 2, 2005, i.e.,

1 before Plaintiff became a subsidiary of SEHI. In its opposition to Plaintiff's motion, Defendant  
2 has presented the same arguments as in its own affirmative motion. As indicated above, the  
3 Court finds that the Policy language unambiguously covers Plaintiff's losses incurred prior to  
4 October 2, 2005. Given that Defendant has offered no new arguments in its opposition, and has  
5 not identified any factual disputes with respect to this defense, the Court GRANTS Plaintiff's  
6 motion for partial summary judgment as to Defendant's Seventh Affirmative Defense.

7 **C. DEFENDANT'S NINTH AFFIRMATIVE DEFENSE**

8 Defendant's Ninth Affirmative Defense alleges that Endorsement No. 15 of the Policy  
9 may apply such that coverage was cancelled as to Plaintiff's employee, Coronado, before 2008,  
10 because his supervisors suspected him of stealing gold in 2003. Endorsement No. 15 states that  
11 the Policy is cancelled as to any employee "if the insured possesses knowledge of any act or  
12 acts of fraud or dishonesty committed by such employee." SUF Ex. A, Endorsement No. 15  
13 (emphasis added). Plaintiff argues that summary judgment is appropriate as to this defense  
14 because the undisputed facts show that Plaintiff did not possess knowledge of Coronado's theft  
15 prior to 2008.

16 In response, Defendant argues that material issues of fact preclude summary judgment  
17 as to this defense. The Court agrees. While Coronado's supervisors, Gladding and Almazan,  
18 testified that they were unable to conclusively determine whether Coronado was stealing gold  
19 based on the log discrepancies, the evidence presented could lead a jury to reasonably conclude  
20 that Plaintiff nevertheless possessed knowledge of the theft to preclude coverage. Moreover,  
21 Defendant has presented evidence that varies from Plaintiff's version of events, in that this  
22 evidence indicates that it was expressly reported to Gladding by one of Coronado's co-workers,  
23 Rudy Artarp, that Coronado was taking gold from Plaintiff's facility. See Valeriano Decl. Ex.  
24 2, Almazan Dep. Tr. 129:1-130-21. Moreover, Almazan testified that Gladding told him that  
25 she believed that Coronado was taking gold. Id. 131:6-17. Almazan also testified that he and  
26 Gladding discussed the Coronado situation with Quezada, Plaintiff's human resources  
27 manager, for advice on how to handle the situation. Id. 175:20-176:18. Taken together, these  
28 facts could support the conclusion that Plaintiff possessed knowledge before 2008 sufficient to

1 terminate coverage for Coronado, regardless of whether Plaintiff ultimately took disciplinary or  
2 legal action against him. See Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d  
3 1110, 1140-1141 (9th Cir. 2003) (“Credibility determinations, the weighing of the evidence,  
4 and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,  
5 whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence  
6 of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”)  
7 (internal citation omitted).

8 Therefore, Plaintiff’s motion for summary judgment as to Defendant’s Ninth  
9 Affirmative Defense is DENIED.

10 **D. DEFENDANT’S TENTH AFFIRMATIVE DEFENSE**

11 Defendant’s Tenth Affirmative Defense asserts that Plaintiff failed to comply with  
12 Condition 17, which limits coverage to property “own[ed] or [held]” by the insured, or for  
13 which the insured is “legally liable.” SUF, Ex. A at 15, 16. Simply put, Defendant’s Tenth  
14 Affirmative Defense is that Plaintiff did not own the gold that was stolen.

15 Plaintiff has submitted the declaration of Stuart Knowles establishing that it owned all  
16 of the gold at the time it was stolen. See Knowles Decl. ¶ 19. Defendant concedes that it “does  
17 not dispute that [Plaintiff] owned the gold in question.” Def.’s Opp. at 21. Even so, Defendant  
18 argues that Plaintiff did not own the gold stolen prior to October 2, 2005 – for the purposes of  
19 the Policy – because SEHI had not yet acquired Plaintiff’s corporate parent. Defendant  
20 presents that same argument in support of its Tenth Affirmative Defense as it made in support  
21 of its own summary judgment motion; specifically, Defendant argues that the Policy only  
22 covers losses of property after SEHI acquired Plaintiff. For the reasons indicated above with  
23 respect to Defendant’s motion, the Court rejects that argument. Accordingly, the Court  
24 GRANTS Plaintiff’s motion for partial summary judgment as to Defendant’s Tenth  
25 Affirmative Defense.

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V. CONCLUSION

For the above stated reasons,

IT IS HEREBY ORDERED THAT:

1. Defendant's Motion for Summary Adjudication (Dkt. 62) is DENIED.
2. Plaintiff's Motion for Summary Adjudication (Dkt. 65) as to Defendant's Fifth, Sixth, Seventh, and Tenth Affirmative Defenses is GRANTED.
3. Plaintiff's Motion for Summary Adjudication (Dkt. 65) as to Defendant's Ninth Affirmative Defense is DENIED.
4. This Order terminates Dockets 62 and 65.

IT IS SO ORDERED.

Dated: 3/4/11

  
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SAUNDRA BROWN ARMSTRONG  
United States District Judge