

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
 4 YANTING ZHANG,

No. C 12-1430 CW

5 Plaintiff,

ORDER GRANTING
 DEFENDANT'S MOTION
 FOR SUMMARY

6 v.

JUDGMENT (Docket
 No. 26); DENYING
 PLAINTIFF'S MOTION
 FOR ADMINISTRATIVE
 RELIEF (Docket No.
 35)

7 SAFECO INS. CO. OF AMERICA, INC.
 8 and LEONARD BAINES,

9 Defendants.
 _____/

10 Plaintiff brought this action against Defendant Safeco
 11 Insurance Company for breach of contract, breach of the covenant
 12 of good faith and fair dealing, and intentional
 13 misrepresentation.¹ Defendant moves for summary judgment on all
 14 claims. Plaintiff opposes the motion and moves for miscellaneous
 15 administrative relief. After considering the parties' submissions
 16 and oral argument, the Court grants Defendant's motion and denies
 17 Plaintiff's motion.
 18

19 BACKGROUND

20 The following facts are undisputed except where otherwise
 21 noted. In February 2009, Plaintiff purchased an insurance policy
 22 from Safeco for a residential property that she had recently
 23 acquired in Richmond, California. Declaration of Francis Doherty,
 24 Ex. A, Deposition of Yanting Zhang 14:2-:7; Declaration of Ronda
 25 Ives, Ex. 2, Safeco Policy No. OX5809698, at SAFE00798-99. The
 26

27 ¹ Plaintiff also initially asserted a claim against Leonard Baines
 28 for intentional infliction of emotional distress. The Court dismissed
 this claim in its May 23, 2013 order. Docket No. 15, at 9.

1 policy covered any "direct physical loss to [the] property,"
2 subject to certain conditions. Ives Decl., Ex. 2, at SAFE00821.

3 On June 16, 2009, Plaintiff contacted Safeco to report that
4 the property had been vandalized and file a claim under the
5 policy. Declaration of Leonard Baines ¶¶ 2-3. Three days later,
6 on June 19, Safeco sent a claims examiner, Leonard Baines, to
7 inspect the property and assess the damage from the vandalism.
8 Id. ¶ 4. Baines estimated that it would cost \$32,852 to repair
9 the property. Id., Ex. 1, June 2009 Repair Estimate, at
10 SAFE00619-30. On July 6, 2009, Safeco sent Plaintiff a copy of
11 Baines' report and a check for \$30,744 to cover the estimated cost
12 of repairs minus Plaintiff's deductible (\$1000) and the cost of
13 recoverable depreciation (\$1108). Declaration of Kevin G.
14 McCurdy, Ex. 1, Zhang Depo. 107:12-108:19; Ives Decl. ¶ 5.

15 Unbeknownst to Safeco, on the same day that Baines conducted
16 his inspection, Plaintiff finalized a sale of the property to
17 Jianqin Xie. Zhang Depo. 51:10-52:10; Doherty Decl., Ex. B, Grant
18 Deed, at SAFE00337. Although Plaintiff had initiated the sale on
19 June 11, four days before the vandalism, she did not record the
20 grant deed until the morning of June 19. Grant Deed at SAFE00337.
21 Plaintiff asserts that, when she first called to file a claim, she
22 notified Safeco that the property was in escrow at the time of the
23 vandalism. Zhang Depo. 51:10-52:10; Grant Deed at SAFE00765.

24 On July 10, 2009, Plaintiff called Safeco with questions
25 about Baines' repair estimate. Ives Decl. ¶ 6, Ex. 3.
26 Specifically, she wanted to know why Baines' estimate did not
27 account for the cost of cleanup and debris removal. Id. She also
28 complained that her contractors thought Baines' estimate was too

1 low. Id. The Safeco representative assigned to Plaintiff's
2 claim, Ronda Ives, told Plaintiff to contact Baines directly to
3 discuss her concerns. Id. Ives also told her that Safeco would
4 reimburse her for the cost of debris removal when she submitted
5 receipts for this service from a licensed contractor. Id.

6 On September 3, 2009, Plaintiff contacted Safeco again, this
7 time seeking compensation for lost rental income. Id. ¶ 7, Ex. 4.
8 She did not disclose during this conversation that she no longer
9 owned the property and had no authority to rent it to tenants.
10 Id. Safeco sent Plaintiff a check for \$5100 covering three months
11 of lost rental income beginning on June 15, 2009. Id.

12 Three months later, on December 3, 2009, Plaintiff contacted
13 Safeco to report that the property had been vandalized again. Id.
14 ¶ 8. Speaking with Ives, Plaintiff asserted that the contractor
15 she hired to inspect the property estimated that it would now cost
16 roughly \$60,000 to repair all of the damage. Id. Because
17 Plaintiff's contractor did not provide a written estimate of the
18 repair costs, Safeco -- still unaware that the property had been
19 sold -- sent Baines to conduct another inspection of the property
20 on December 6. Id.; Baines Decl. ¶ 7. His inspection revealed
21 that Plaintiff had not made any repairs to the property since the
22 first vandalism. Id., Ex. 2, December 2009 Repair Estimate, at
23 SAFE00597. He concluded that the new damage from the second
24 vandalism would cost an additional \$32,230 to repair. Id.

25 On December 17, 2009, shortly after Baines completed his
26 second repair estimate, a Safeco investigator interviewed
27 Plaintiff at her home about the vandalism. Declaration of Michael
28 Dunn ¶¶ 2-3. Plaintiff told the investigator that she owned the

1 property and conceded that she had not made any repairs to it
2 since the June 2009 vandalism occurred. Id. ¶¶ 4-5, Ex. 1.

3 Three weeks after the interview, on January 7, 2010,
4 Plaintiff contacted Safeco to report that the property had been
5 vandalized a third time. Ives Decl. ¶ 9, Ex. 6. Five days later,
6 on January 12, Plaintiff reported additional damage from a fourth
7 vandalism. Id. ¶ 10, Ex. 7. Plaintiff did not disclose during
8 either of these conversations that she had sold the property. Id.
9 ¶ 12.

10 On February 1, 2010, Ives wrote a letter to Plaintiff
11 informing her that Safeco would only cover her losses resulting
12 from the first occurrence of vandalism in June 2009. Id. ¶ 11,
13 Ex. 8. The letter explained that, under the terms of Plaintiff's
14 policy, Safeco was not required to cover losses resulting from
15 "vandalism and malicious mischief" when "the dwelling has been
16 vacant for more than 30 consecutive days immediately before the
17 loss." Id., Ex. 8, at 2. Because the property had been vacant
18 since June 2009, when the first vandalism occurred, Safeco
19 asserted that it was not required to cover the subsequent
20 incidents of vandalism. McCurdy Decl., Ex. 1, 83:12-:15; Ives
21 Decl., Ex. 8, at 2. In reaching this conclusion, Safeco
22 specifically rejected Plaintiff's view that her initial claim
23 should be expanded to cover the three subsequent vandalism
24 incidents, as well; rather, under Safeco's interpretation of the
25 policy, Plaintiff needed to file a separate claim for each
26 incident. Id.

27 On March 4, 2010, Plaintiff called Ives to discuss Safeco's
28 decision to deny her coverage for any property damage that

1 occurred after June 2009. Id. ¶ 12. During this conversation,
2 Plaintiff disclosed for the first time that she had sold the
3 property in June 2009. Id. ¶ 12, Ex. 9. Plaintiff also indicated
4 that she would speak with Xie, the new owner of the property, to
5 determine whether Xie's insurance policy would cover the losses
6 that occurred after June 2009. Id., Ex. 9.

7 More than five months later, in August 2010, Plaintiff sent
8 Safeco a repair estimate prepared by Har-Bro of Northern
9 California, a contractor that she hired to examine the property.
10 Id. ¶ 13; Zhang Depo. 90:12-:23. Har-Bro examined the property on
11 August 12, 2010 and estimated that it would cost \$155,790 to
12 repair all of the damage. Doherty Decl., Ex. F, Har-Bro Estimate,
13 at 27-29. According to Har-Bro's project manager, Keith Durden,
14 Har-Bro's repair estimate did not distinguish how much of the
15 property damage was attributable to the June 2009 vandalism and
16 how much was attributable to subsequent incidents. McCurdy Decl.,
17 Ex. 3, Deposition of William Keith Durden, Jr. 15:8-:17. Although
18 Plaintiff testified during her deposition that she believes she
19 gave Har-Bro pictures of the damage caused by the earlier
20 incidents of vandalism, Zhang Depo. 91:7-:16, Durden says that he
21 never received any such pictures, Durden Depo. 14:12-:17.
22 Plaintiff stated at her deposition that she no longer has these
23 pictures. Zhang Depo. 91:17-:24.

24 In March 2011, Safeco sent a letter to Plaintiff's then-
25 attorney, Gary Kwasniewski, stating that it was denying
26 Plaintiff's claim for additional repair damages based on the Har-
27 Bro estimate. Ives Decl. ¶ 13, Ex. 10. The letter explained that
28 Plaintiff had already received payment for the damage caused by

1 the initial vandalism in June 2009 even though Plaintiff had
2 violated several terms of her policy. Id., Ex. 10, at 4. One of
3 these terms required Plaintiff to "protect the property from
4 further damage, make reasonable and necessary repairs to protect
5 the property, and keep an accurate record of repair expenditures."
6 Id., at 2-3. Another term voided the policy if Plaintiff
7 "intentionally concealed or misrepresented any material fact or
8 circumstance relating to this insurance." Id.

9 The letter concluded by inviting Plaintiff to submit any
10 additional information that might provide a basis for
11 reconsideration. Id. at 4. Plaintiff, who does not appear to
12 have responded to this invitation, filed this lawsuit one year
13 later.

14 LEGAL STANDARD

15 Summary judgment is properly granted when no genuine and
16 disputed issues of material fact remain, and when, viewing the
17 evidence most favorably to the non-moving party, the movant is
18 clearly entitled to prevail as a matter of law. Fed. R. Civ.
19 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
20 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
21 1987).

22 The moving party bears the burden of showing that there is no
23 material factual dispute. Therefore, the court must regard as
24 true the opposing party's evidence, if supported by affidavits or
25 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
26 815 F.2d at 1289. The court must draw all reasonable inferences
27 in favor of the party against whom summary judgment is sought.
28 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,

1 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
2 F.2d 1551, 1558 (9th Cir. 1991).

3 Material facts which would preclude entry of summary judgment
4 are those which, under applicable substantive law, may affect the
5 outcome of the case. The substantive law will identify which
6 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
7 242, 248 (1986). Where the moving party does not bear the burden
8 of proof on an issue at trial, the moving party may discharge its
9 burden of production by either of two methods:

10 The moving party may produce evidence negating an
11 essential element of the nonmoving party's case, or,
12 after suitable discovery, the moving party may show that
13 the nonmoving party does not have enough evidence of an
14 essential element of its claim or defense to carry its
15 ultimate burden of persuasion at trial.

16 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
17 1099, 1106 (9th Cir. 2000).

18 If the moving party discharges its burden by showing an
19 absence of evidence to support an essential element of a claim or
20 defense, it is not required to produce evidence showing the
21 absence of a material fact on such issues, or to support its
22 motion with evidence negating the non-moving party's claim. Id.;
23 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);
24 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If
25 the moving party shows an absence of evidence to support the non-
26 moving party's case, the burden then shifts to the non-moving
27 party to produce "specific evidence, through affidavits or
28 admissible discovery material, to show that the dispute exists."
Bhan, 929 F.2d at 1409.

1 If the moving party discharges its burden by negating an
2 essential element of the non-moving party's claim or defense, it
3 must produce affirmative evidence of such negation. Nissan, 210
4 F.3d at 1105. If the moving party produces such evidence, the
5 burden then shifts to the non-moving party to produce specific
6 evidence to show that a dispute of material fact exists. Id.

7 If the moving party does not meet its initial burden of
8 production by either method, the non-moving party is under no
9 obligation to offer any evidence in support of its opposition.
10 Id. This is true even though the non-moving party bears the
11 ultimate burden of persuasion at trial. Id. at 1107.

12 DISCUSSION

13 I. Defendant's Motion for Summary Judgment

14 A. Breach of Contract

15 Plaintiff contends that Safeco breached its insurance
16 contract by failing to compensate her adequately for losses
17 resulting from the repeated incidents of vandalism that occurred
18 between June 2009 and January 2010. Because Plaintiff has failed
19 to produce evidence to support this allegation, Safeco is entitled
20 to summary judgment on this claim.

21 Plaintiff's insurance policy plainly states that Safeco will
22 not be liable to Plaintiff "for more than the amount of the
23 insured's interest [in the property] at the time of loss." Ives
24 Decl., Ex. 2, at SAFE00824. Plaintiff does not dispute that she
25 ceased to have an insurable interest in the property after June
26 19, 2009, when the grant deed transferring ownership of the
27 property was recorded. See Doherty Decl., Ex. B, at SAFE00337;
28 Warner v. Fire Ins. Exchange, 230 Cal. App. 3d 1029, 1033 (1991)

1 ("[A] seller does not have an insurable interest in property after
2 he or she sells it."). Thus, any losses that occurred after that
3 date -- including any resulting from the December 2009 and January
4 2010 vandalism incidents -- are not covered under the policy.

5 While Plaintiff has offered evidence that she had an
6 insurable interest in the property when it was first vandalized in
7 June 2009,² she has not offered evidence that Safeco failed to
8 compensate her for the damage resulting from that incident.
9 Indeed, Plaintiff admitted during her deposition that Safeco sent
10 her a check for roughly \$30,000 in July 2009 to cover the
11 estimated cost of repairs. Zhang Depo. 109:12-:16. She also
12 admitted that she never formally disputed Safeco's repair estimate
13 by submitting a conflicting estimate from a licensed contractor,
14 despite Safeco's invitation to do so. Id. 69:20-70:2.

15 Although Plaintiff contends that Har-Bro's August 2010 cost
16 estimate offers proof that Safeco's payment was inadequate, the
17 Har-Bro estimate is insufficient to satisfy Plaintiff's summary
18 judgment burden. Har-Bro issued its estimate more than a full
19 year after the initial vandalism and several months after the
20 subsequent vandalism incidents. Furthermore, Har-Bro's project
21 manager expressly stated during his deposition that Har-Bro did
22 not attempt to determine how much damage was caused by each
23 incident of vandalism. In fact, when Plaintiff asked him to
24 review Baines' June 2009 damage estimate, he made clear that Har-

25
26 ² Plaintiff cites several cases to argue that a property owner
27 maintains his or her insurable interest in a property, even when that
28 property is held in escrow. The Court does not discuss or rely on these
cases here because "Safeco does not seek summary judgment on the ground
that [P]laintiff had no insurable interest in the Property at the time
of the first vandalism in June 2009." Reply 1.

1 Bro's estimate differed from Safeco's because the property was in
2 a different condition than when Baines inspected it. Durden Depo.
3 16:19-17:3. Thus, the Har-Bro estimate does not create a genuine
4 dispute of fact concerning the accuracy of Safeco's June 2009 cost
5 estimate.³

6 Because Plaintiff has not offered any other evidence that
7 Safeco underpaid her for her June 2009 claim or otherwise violated
8 its insurance policy, Safeco is entitled to summary judgment on
9 Plaintiff's breach of contract claim.

10 B. Breach of the Covenant of Good Faith and Fair Dealing

11 Plaintiff asserts that Safeco breached the covenant of good
12 faith and fair dealing by unreasonably withholding payment for
13 damages caused by the series of vandalism incidents.

14 The Supreme Court of California has held that, if an insurer
15 does not breach its insurance contract, "there can be no action
16 for breach of the implied covenant of good faith and fair dealing
17 because the covenant is based on the contractual relationship
18 between the insured and the insurer." Waller v. Truck Ins.

19 Exchange, 11 Cal. 4th 1, 36 (1995); see also Love v. Fire Ins.
20 Exchange, 221 Cal. App. 3d 1136, 1151-52 (1990) (holding that the
21 "threshold requirement" for establishing that an insurer breached
22 the covenant of good faith and fair dealing is that "benefits due
23 under the policy must have been withheld"). Accordingly, because
24 Plaintiff has not provided evidence to support her breach of

25 _____
26 ³ In her opposition brief, Plaintiff refers to a "written estimate"
27 that she provided to Safeco in November 2009. Opp. 10. This appears to
28 be an error. The record does not contain any evidence of a November
2009 estimate and, at the hearing, Plaintiff failed to identify any
evidence that such an estimate exists, let alone that she provided a
copy of it to Safeco.

1 contract claim, she cannot maintain an action for breach of the
2 implied covenant of good faith and fair dealing. Safeco's motion
3 for summary judgment is therefore granted with respect to this
4 claim, as well.

5 C. Intentional Misrepresentation

6 Plaintiff's intentional misrepresentation claim is based on
7 the same allegations as her other claims. She alleges, in
8 essence, that Safeco misrepresented the nature of its insurance
9 coverage by withholding coverage for the property damage caused by
10 the various incidents of vandalism.

11 To establish liability for intentional misrepresentation, a
12 plaintiff must show "(1) a misrepresentation, (2) with knowledge
13 of its falsity, (3) with the intent to induce another's reliance
14 on the misrepresentation, (4) justifiable reliance, and
15 (5) resulting damage." Conroy v. Regents of Univ. of Cal., 45
16 Cal. 4th 1244, 1255 (2009). Plaintiff here has not provided any
17 evidence of a misrepresentation here, intentional or otherwise.
18 Indeed, Plaintiff does not even mention the intentional
19 misrepresentation claim in her opposition brief. What's more,
20 even if Plaintiff had offered evidence of misrepresentation, she
21 has not offered evidence that she suffered damages as a result:
22 Plaintiff received more than \$30,000 to repair a property that she
23 no longer owned and, ultimately, declined to use that money to
24 make any repairs. In short, she has not offered any evidence to
25 show that she was harmed by Safeco's conduct. Safeco is therefore
26 entitled to summary judgment on Plaintiff's intentional
27 misrepresentation claim.
28

1 II. Plaintiff's Motion for Administrative Relief

2 On April 25, 2013, Plaintiff filed an administrative motion
3 requesting a continuance of the trial date, leave to take several
4 depositions, and leave to file a supplemental declaration in
5 opposition to Defendant's summary judgment motion.

6 Plaintiff's request to continue the trial date is denied as
7 moot in light of Defendant's successful summary judgment motion.
8 Plaintiff's request for leave to take additional depositions is
9 denied because Plaintiff has not explained adequately why she was
10 unable to take these depositions during the designated fact
11 discovery period, which ended more than a month before she filed
12 this motion. Finally, Plaintiff's request for leave to file a
13 supplemental declaration in opposition to summary judgment is
14 denied because Plaintiff fails to identify the proposed content or
15 purpose of such a declaration.

16 CONCLUSION

17 For the reasons set forth above, Defendant's motion for
18 summary judgment (Docket No. 26) is GRANTED and Plaintiff's motion
19 for administrative relief (Docket No. 35) is DENIED. The clerk
20 shall enter judgment accordingly and close the file.

21 IT IS SO ORDERED.

22
23 Dated: 5/1/2013

24 
25 _____
26 CLAUDIA WILKEN
27 United States District Judge
28