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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRET STONE, DANIELLE STONE,) Case No. CV 06-03703 DDP (AJWx)
)
Plaintiff,) ORDER RE CROSS-MOTIONS FOR
) SUMMARY JUDGMENT
v.)
) [Motion filed on September 25,
HARTFORD CASUALTY COMPANY,) 2006]
)
Defendants.)

This matter comes before the Court on the plaintiffs' motion for summary judgment and the defendant's cross-motion for summary judgment or, in the alternative, partial summary judgment. After reviewing the papers submitted by the parties, the Court denies the plaintiffs' motion and grants the defendants' cross-motion. Specifically, the Court denies the plaintiffs' motion for summary judgment as to their first cause of action for declaratory relief as to Hartford's duty to defend; denies the plaintiffs' motion for summary judgment as to their second cause of action for breach of contract; grants the defendants' motion for summary judgment as to the plaintiffs' third cause of action for breach of the implied covenant of good faith and fair dealing; and denies the plaintiffs' motion for summary judgment as to their fourth cause of action.

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1 under Insurance Code Section 11580(b) (2) .

2 I. BACKGROUND

3 This is an unfortunate case of a draftsman insured only under
4 a general liability policy, performing the work of a contractor
5 that ultimately resulted in severe detriment to plaintiff
6 homeowners. The present matter arises out of Hartford Casualty
7 Insurance Company's ("Hartford") denial of coverage and refusal to
8 defend the draftsman, its insured, Peter Szucs in an underlying
9 action against Szucs entitled Stone v. Szucs, Case No. 1167045
10 (Santa Barbara Superior Court) ("Underlying Action"). Plaintiffs
11 Bret Stone and Danielle Stone ("the Stones") bring the present
12 action claiming that Hartford had an obligation under Szucs'
13 Hartford insurance policy, Hartford Spectrum Business Insurance
14 Policy No. 57 SBA AW2572 DX (the "Policy"), to defend him in the
15 Underlying Action and, therefore, is now liable for the stipulated
16 judgment entered against Szucs. This case turns on the
17 determination of whether or not there existed a "potential" for
18 coverage under the Policy based on the Stones' claims.

19 A. The Underlying Action: Stone v. Szucs

20 The Stones' May 2, 2005 complaint in the underlying suit
21 ("Underlying Complaint") included the following allegations:¹

- 22 • The Stones are homeowners who hired Szucs to design and
23 construct an addition to their home and to install a new
24 driveway (the "Project");
- 25 • In June 2003, the Stones gave Szucs \$14,750 for a "truss
26 system" for the Project;

27
28 ¹ The Underlying Complaint was served on Szucs and a courtesy
copy also provided to Hartford.

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- 1 • This truss system was never ordered and the funds were
- 2 misappropriated;
- 3 • In December 2003, the Stones paid Szucs \$4,250 to start the
- 4 Project;
- 5 • In June 2004, Szucs hired subcontractors and the Project
- 6 commenced with the tearing off of the roof and rough framing;
- 7 Around August 2004, construction stopped and soon after the
- 8 foreman quit due to problems with "cash flow";
- 9 • Around September 2004, Szucs hired a general contractor and
- 10 subcontractors to continue the Project;
- 11 • At this stage of the Project, there was no roof and no stucco
- 12 on the house, but drywall work was underway; Around October
- 13 2004, the drywall was complete, but the house was exposed to
- 14 the elements;
- 15 • Around the same time, the forecast called for heavy rains; The
- 16 Stones informed Szucs of the weather forecast;
- 17 • The Stones made their best effort to cover the house with
- 18 plastic; The Stones suffered severe property damage which was
- 19 so severe they were forced to move into a hotel and abandon
- 20 certain rooms of their house until the construction was
- 21 completed;
- 22 • The Stones then learned that Szucs had misappropriated the
- 23 funds they had given him and that Szucs was so in arrears that
- 24 he would not be able to complete the construction at all;
- 25 • The Stones then hired new subcontractors and paid for
- 26 materials to make the necessary repairs and complete the
- 27 construction at an expense \$90,000 in excess of the terms of
- 28 their original agreement with Szucs.

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1 • Szucs' conduct was willful, wanton, and oppressive. Szucs has
2 a duty of care to the Stones unrelated to his rendering of or
3 failing to render any services as a draftsman, as a builder,
4 or otherwise.

5 • Szucs is guilty of negligence proximately causing the Stones'
6 injuries. Szucs caused or contributed the moisture in the
7 ceiling, drywalls, insulation, and floors, and to the overall
8 unhealthful conditions of their home which rendered it
9 uninhabitable.

10 • The Stones suffered serious and genuine emotional distress,
11 including but not limited to a fear for their safety and the
12 safety of their young children and the loss of tens of
13 thousands of dollars.

14 On October 29, 2004, the Stones sent Szucs a letter, with
15 Hartford carbon copied, stating that the saturated drywall and
16 insulation had to be removed; mold spores were revealed requiring
17 treatment; portions of the hardwood floors would have to be
18 replaced and refinished; the exposed walls caused irritations to
19 Mrs. Stone's allergies causing her to become short of breath, and;
20 for the health and safety of the Stones and their children they had
21 to move out of the house and into a hotel.

22 On January 4, 2005, the Stones contacted Hartford directly to
23 follow up on the problems they suffered due to Szucs' neglect in
24 overseeing their construction project. They included copies of
25 their letters to Szucs, and claimed to have approximately \$95,000
26 in damages, but offered to settle the matter for \$65,000. On or
27 about January 31, 2005, Hartford denied coverage to Szucs for the
28

1 Stones' claims and he subsequently informed the Stones of the
 2 denial.

3 Thus, in March 2005, the Stones brought the underlying suit
 4 for damages; punitive damages; an order commanding Szucs to
 5 disgorge all ill-gotten gains from engaging in unlawful, unfair and
 6 fraudulent practices, and enjoining him from further such
 7 practices; and for costs, expenses, and attorneys' fees. The
 8 Underlying Complaint alleged breach of contract, breach of implied
 9 covenant of good faith and fair dealing, negligence, private
 10 nuisance, negligent infliction of emotional distress, fraud, and
 11 misappropriation of client funds in violation of the Unfair
 12 Competition Act, Bus. & Prof. Code Section 17200 *et seq.*

13 In response to the Stones' claim, Szucs requested Hartford to
 14 defend him. In a May 10, 2005 letter to Szucs analyzing his claim
 15 for coverage, Hartford stated that the Policy provides coverage for
 16 "bodily injury" and "property damage", caused by an "occurrence",
 17 or "personal and advertising injury" offenses, subject to multiple
 18 exclusions.² The letter recognizes that the Stones allege that
 19 Szucs did not complete the construction on their home, that damages
 20 occurred because Szucs abandoned the project, and that Szucs
 21 mishandled construction funds. The letter concludes that none of
 22 the allegations made by the Stones give rise to a "bodily injury"
 23 or an "advertising or personal injury", nor does mismanagement of
 24 construction funds or economic damages meet the definition of
 25

26 ² The Stones and Hartford stipulate that the Policy's
 27 coverage for "personal and advertising injury" liability is not
 28 applicable to the loss giving rise to the present lawsuit.
 (Stipulation Re Documents and Issues for Cross-Motions for Summary
 Judgment at 3 ¶ 17.)

1 "property damage". Specifically, the letter claims that exclusions
2 a, j, and k(5) apply in part because Szucs never completed the
3 project he designed. Hartford concluded that under the
4 circumstances there is no duty to defend and no potential for
5 indemnity coverage under the Policy. Thus, Hartford refused to
6 defend Szucs in the underlying suit by the Stones.³

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7 On or about November 1, 2005, Szucs and the Stones entered
8 into a Stipulation for Entry of Judgment ("Stipulated Judgment") in
9 the Underlying Action in the amount of \$540,000, which was approved
10 by Judge Thomas P. Anderle of the Santa Barbara Superior Court:
11 \$15,000 for loss of use of portions of the house due to property
12 damage caused by rains and failure to complete the project in a
13 timely manner; \$30,000 for damages caused by failure to protect the
14 house from water damage during rains, including repair and
15 replacement of drywall, insulation, and flooring; \$95,000 for the
16 increased cost of the construction due to abandonment of the
17 project, and; \$400,000 for emotional distress (\$200,000 per
18 plaintiff). The Stones and Szucs also entered into an Agreement
19 for Stipulated Judgment, Assignment of Rights, and Covenant Not to
20 Execute ("Stipulation Agreement"). The Stipulation Agreement
21 assigns to the Stones all of Szucs' legally assignable rights
22 against Hartford in exchange for the Stones' agreement not to
23 execute the Stipulated Judgment.

24 **B. The Hartford Insurance Policy**

25
26
27 ³ The letter also purported to reserve Hartford the right to
28 rely on additional policy provisions, conditions, terms, or
exclusions and amend its position.

1 Hartford issued the Policy, effective May 27, 2004 through May
2 27, 2005, identifying "Peter Szucs" as the named insured with a
3 premium of \$500. The Policy identifies the named insured's
4 occupation as "Draftsman". The application for the Policy
5 represents that the nature of the insured's business is to "create
6 drawings to client specifications" and that no "structural
7 alterations" or "demolitions" are contemplated. The section of the
8 Policy application for information on "contractors" is crossed out.
9 The Policy is a general business liability policy, as opposed to an
10 errors-and-omission policy.

11 The Insuring Agreement provision of the Policy in part
12 provides:

13 A(1)a. We [Hartford] will pay on behalf of the insured [Szucs]
14 those sums that the insured [Szucs] becomes legally
15 obligated to pay as damages because of "bodily injury",
16 "property damage" or "personal and advertising injury" to
17 which this insurance applies. We [Hartford] will have
18 the right and duty to defend the insured [Szucs] against
19 any "suit" seeking those damages. We will have the right
20 and duty to defend the insured against any "suit" seeking
21 those damages. However, we will have no duty to defend
22 the insured against any "suit" seeking damages for
23 "bodily injury", "property damage" or "personal and
24 advertising injury" to which this insurance does not
25 apply.

26 b. This insurance applies to:
27 (1) "Bodily injury" and "property damage" only if:
28 (a) The "bodily injury" or "property damage" is
caused by an "occurrence" that takes place in
the "coverage territory"; and
(b) The "bodily injury" or "property damage" occurs
during the policy period.

29 The Policy provides the following definitions of its terms:

30 G(4). "Bodily injury" means bodily injury, sickness or disease
31 sustained by a person, including mental anguish or death
32 resulting from any of these at any time.

33 G(14). "Occurrence" means an accident, including continuous or
34 repeated exposure to substantially the same general
35 harmful conditions.

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- 1 G(17). "Products-completed operations hazard";
- 2 a. Includes all "bodily injury" and "property damage"
- 3 arising out of "your product" or "your work" except:
- 4 (1) Products that are still in your physical
- 5 possession; or
- 6 (2) Work that has not yet been completed or
- 7 abandoned.
- 8 b. "Your work" will be deemed completed at the earliest
- 9 of the following times:
- 10 (1) When all of the work called for in your
- 11 contract has been completed.
- 12 (2) When all of the work to be done at the site has
- 13 been completed if your contract calls for work
- 14 at more than one site.
- 15 (3) When that part of the work done at a job site
- 16 has been put to its intended use by any person
- 17 or organization other than another contractor
- 18 or subcontractor working on the same project.
- 19 Work that needs service, maintenance, correction,
- 20 repair or replacement, but which is otherwise
- 21 complete, will be treated as completed.
- 22 c. This hazard does not include "bodily injury" or
- 23 "property damage" arising out of:
- 24 (1) The transportation of property, unless the
- 25 injury or damage arises out of a condition in
- 26 or on a vehicle created by the "loading or
- 27 unloading" of it; or
- 28 (2) The existence of tools, uninstalled equipment
- or abandoned or unused materials.
- G(18). "Property damage" means:
- a. Physical injury to tangible property, including all
- resulting loss of use of that property. All such
- loss of use shall be deemed to occur at the time of
- the physical injury that caused it; or
- b. Loss of use of tangible property that is not
- physically injured. All such loss of use shall be
- deemed to occur at the time of "occurrence" that
- cause it.
- G(23). "Your work":
- a. Means:
- (1) Work or operations performed by you or on your
- behalf; and
- (2) Materials, parts or equipment furnished in
- connection with such work or operations.
- b. Includes:
- (1) Warranties or representations made at any time
- with respect to the fitness, quality,
- durability, performance or use of "your work";
- and
- (2) The providing of or failure to provide warnings
- or instructions.

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C. The Insurance Policy Exclusions

The Insuring Agreement provision of the Policy also sets forth multiple exclusions to which the insurance does not apply, including:

- B(1) (a). Expected or Intended Injury
 - (1) "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.
- (j). Professional Services: "Bodily injury" or "property damage" or "personal and advertising injury" due to the rendering of or failure to render any professional service. This includes but is not limited to:
 - (1) Legal, accounting or advertising services;
 - (2) Preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, design or drawings and specifications;
 - (3) Supervisory, inspection, architectural or engineering activities;
- (k). Damage to Property: "Property damage" to:
 - (5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or
 - (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it. . . .

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

D. The Present Action

Pursuant to the Stipulation Agreement and the assignment of rights therein, the Stones have brought the present action to recover the Stipulated Judgment amount from Hartford.

The Stones moved for summary adjudication on the issues of Hartford's duty to defend and Hartford's liability for the Stipulated Judgment entered into by Szucs. The Stones argue that Szucs was entitled, as a matter of law, to have Hartford defend him in the Underlying Action because the allegations of the complaint,

1 along with the Stones' letters to Hartford and Szucs (which were
2 supplied to Hartford), created a potential for coverage, thereby
3 triggering a duty to defend. Hartford cross-motions for summary
4 judgment on the same issue and also for summary judgment on the
5 Stones' claim for breach of good faith and fair dealing. Hartford
6 claims that the circumstances did not present any potential for
7 recovery and so Hartford denies that they owed a duty to defend
8 Szucs. Hartford also denies that it breached the covenant of good
9 faith and fair dealing. Hartford asserts a number of affirmative
10 defenses, including, several based on exclusion-of-coverage
11 provisions contained in the Policy. Further, Hartford alleges that
12 the present action is the product of collusion between the Stones
13 and Szucs.

14

15 II. SUMMARY JUDGMENT STANDARD

16 Summary judgment is appropriate where the court is satisfied
17 "that there is no genuine issue as to any material fact and that
18 the moving party is entitled to a judgment as a matter of law."
19 Fed. R. Civ. P. 56[©]). This is equally true for summary
20 adjudication of individual claims, issues, or defenses. Fed. R.
21 Civ. P. 56(a).

22 A genuine issue exists if "the evidence is such that a
23 reasonable jury could return a verdict for the nonmoving party."
24 Id. at 248. Material facts are those "that might affect the
25 outcome of the suit under the governing law." Id. The burden of
26 establishing the nonexistence of a "genuine issue" of material fact
27 is on the party moving for summary judgment. Celotex Corp. v.
28 Catrett, 477 U.S. 317, 330 (1986). However, there is no genuine

1 issue of fact "[w]here the record taken as a whole could not lead a
2 rational trier of fact to find for the non-moving party."
3 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574
4 587 (1986). In deciding a motion for summary judgment, all
5 reasonable inferences from the evidence must be drawn in favor of
6 the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 242
7 (1986).

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9 **III. DISCUSSION**

10 **A. Plaintiffs' First Cause of Action for Declaratory Relief**
11 **as to Hartford's Duty to Defend and Second Cause of**
12 **Action for Breach of Contract**

13 The Stones move this Court for summary judgment as to their
14 claim for declaratory relief that Hartford had a duty to defend
15 Szucs in the underlying action that gave rise to the present
16 dispute. In particular, the Stones claim that Szucs was entitled
17 to a defense because the underlying complaint made allegations
18 against Szucs for conduct and activities potentially covered by
19 Hartford's Policy. In their underlying complaint, the Stones
20 alleged that Mr. Szucs abandoned the construction project on their
21 home, and as a result, the Stones suffered both property damage,
22 bodily injury, and severe emotional distress. The Stones contend
23 that these allegations, along with the terms of the Hartford
24 Policy, created a potential for coverage, thus triggering
25 Hartford's duty to defend.

26 Conversely, Hartford argues that there is no potential for
27 coverage under the Policy. It argues that several of the Policy's
28 exclusion-of-coverage provisions bar coverage: the "professional
services" exclusion, two of the "property damage" exclusions, and

1 the "products-completed operations hazard" exclusion. Hartford
2 argues that neither the underlying complaint nor the letters it
3 received allege an "occurrence" resulting in "property damage" or a
4 "personal injury" as those terms are defined in the Policy. SCANNED
5 Hartford also argues that any loss caused by Szucs' alleged
6 misrepresentations and failure to return money are not "property
7 damage" under the Policy. Further, Hartford alleges that it did
8 not breach its insurance contract with Szucs because Hartford
9 insured Szucs only as a "draftsman" and never assumed any risk
10 relating to Szucs' construction and/or construction supervision
11 activities. Therefore, Hartford contends it is entitled to summary
12 judgment because it had no duty to defend Szucs in the underlying
13 lawsuit.

14 1. Policy Coverage and the Duty to Defend

15 A liability insurer owes a broad duty to defend its insured
16 against claims that create a "potential" for indemnity. Montrose
17 Chem. Corp. of Cal. v. Superior Court, 6 Cal. 4th 287, 295 (1993).
18 The potential for coverage may arise from the underlying complaint,
19 the terms of the policy, possible amendments to the complaint, or
20 any other extrinsic evidence known to the insurer which would give
21 rise to liability under the policy, even if coverage is ultimately
22 found lacking. Id. at 295 & 299-300; Gray v. Zurich Insurance Co.,
23 65 Cal. 2d 263, 276 (1966) (reasoning that facts known to the
24 insurer and extrinsic to the third party complaint can generate a
25 duty to defend, even though the face of the complaint does not
26 reflect a potential for liability under the policy because pleading
27 rules liberally allow amendment and the third party plaintiff
28 cannot be the arbiter of coverage).

1 To prevail on the issue of the insurer's duty to defend, the
2 insured must prove the existence of a potential for coverage; it
3 need only show that the claim against it or some part of it may
4 fall within the insurer's policy coverage. Montrose, 6 Cal. 4th at
5 300. On the other hand, to be absolved of its duty to defend an
6 insurer must demonstrate that under no circumstance or conceivable
7 theory can any part of the claim fall under the policy coverage.
8 Id.; Gray, 65 Cal. 2d at 275-76, n. 15. Furthermore, any doubt as
9 to whether the facts give rise to a duty to defend is resolved in
10 the insured's favor. Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th
11 1076, 1081 (1993). The insurer's duty to defend arises on tender
12 of defense and lasts until it can conclusively show that there is
13 no potential for coverage. Montrose, 6 Cal. 4th at 295.

14 Any ambiguity or uncertainty in an insurance policy is to be
15 resolved against the insurer. Vann v. Travelers Cos., 39 Cal. App.
16 4th 1610, 1615 (1995); Montrose, 6 Cal. 4th at 299-300. If the
17 insurer uses language which is uncertain, any reasonable doubt will
18 be resolved against it. If the doubt relates to the extent or fact
19 of coverage, such as whether or not the peril is insured against,
20 the language will be understood in its most inclusive sense, for
21 the benefit of the insured. Continental Cas. Co. v. Phoenix
22 Constr. Co., 46 Cal. 2d 423, 437-38 (1956). An insurance policy
23 and specifically its exclusions are "strictly construed against the
24 insurer and liberally interpreted in favor of the insured." See
25 Delgado v. Heritage Life Ins. Co., 157 Cal. App. 3d 262, 271
26 (1984). In addition, exclusions "are to be interpreted by their
27 plain meaning and will not be stretched to cover areas not intended
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1 by the clause." See Oliver Mach. Co. v. United States Fidelity and
2 Guar. Co., 187 Cal. App. 3d 1510, 1514 (1986).

3 Conversely, where courts have found that no potential for
4 coverage existed it has generally been in instances where it was
5 evidently clear that the claims made fall outside of the policy
6 coverage. Montrose, 6 Cal. 4th at 298 (explaining that no
7 potential for coverage exists where the acts "occurred on a date
8 when the policy was not in effect or at a location concededly not
9 covered by the policy") (citations omitted); Insurance Co. of the
10 West v. Haralambos Beverage Co., 195 Cal. App. 3d 1308, 1317 (1987)
11 (finding no potential for coverage where claims were for breach of
12 contract and the policy clearly only covered tort liability for
13 bodily injury or property damage) (disapproved on other grounds);
14 Waller v. Truck Ins. Exch. Ins., 11 Cal. 4th 1, 26-27 (1995)
15 (finding no potential for coverage where the complaint sought
16 damages purely for economic loss and emotional distress stemming
17 from economic loss rather than bodily injury or property damage);
18 Tana v. Professionals Prototype I Ins. Co. Ltd., 47 Cal. App. 4th
19 1612, 1617, (1996) (finding no duty to defend where malpractice
20 insurance excluded legal fees from covered damages and the action
21 clearly did not complain of anything lawyer did or did not do, but
22 clearly sought only the return of attorney fees); The Hartford v.
23 State of Calif., 41 Cal. App. 4th 1564, 1569 (1996) (where
24 insurance covered only liability in connection with the renting of
25 booths, there was no duty to defend claim for personal injuries
26 occurring away from the rented booths); Fire Ins. Exch. v. Jiminez,
27 184 Cal. App. 3d 437, 442 (1986) (Insured injured victim while
28 engaged in a business pursuit specifically excluded under his

1 liability insurance policy. Victim sued, alleging negligence
2 generally, without mentioning the Insured's business pursuit.
3 Those allegations did not create a duty to defend because
4 undisputed facts established that the underlying occurrence was
5 clearly excluded).

6 2. The "Professional Services" Exclusion Bars Any
7 Potential for Coverage Under the Policy

8 The duty to defend, although broad, is not unlimited; it is
9 measured by the nature and kinds of risks covered by the policy.
10 Waller v. Truck Ins. Exch., 11 Cal. 4th 1, 19(1995). Policy
11 exclusions cannot be disregarded: "An insurance company has the
12 right to limit the coverage of its policy and when it has done so
13 the plain language of the limitation must be respected." National
14 Ins. Underwriters v. Carters, 17 Cal. 3d 380, 386 (1976). Even
15 when the loss alleged comes within the insuring clause, there is no
16 coverage if the exclusion applies. Westoil Terminals Co. V.
17 Industrial Indemnity Co., 110 Cal. App. 4th 139, 146 (2003).

18 The Stones argue in their motion that they suffered "bodily
19 injury" and "property damage" to their real property and personal
20 property, that these damages were caused by an "occurrence," and
21 that the existence of allegedly covered damages creates a duty to
22 defend. They argue that the various exclusions in the Policy are
23 inapplicable to the circumstances of this case. The Court finds
24 the Stones' analysis unpersuasive. As discussed below, the
25 "professional services" exclusion to the Policy eliminates the
26 potential for coverage of Szucs' activities.

27 The Policy's "professional services" exclusion (Policy
28 exclusion "j") states that the insurance does not apply to:

1 "Bodily injury" or "property damage" or "personal and
2 advertising injury" due to the rendering of or failure to
render any professional service. This includes but is not
limited to:

- 3 (1) Legal, accounting or advertising services;
- 4 (2) Preparing, approving, or failing to prepare or
approve maps, shop drawings, opinions, reports,
5 surveys, field orders, change orders, design or
drawings and specifications;
- 6 (3) Supervisory, inspection, architectural or
engineering activities;

7 On its face, the Policy's "professional services" exclusion
8 clearly applies to the Stones' claims based on Szucs' professional
9 undertaking to draft plans for room additions, construct and/or
10 supervise construction of the additions, and install a driveway.

11 The "professional services" exclusion excludes coverage for
12 injuries - including "bodily injury" and "property damage" - "due
13 to the rendering or failure to render any professional service."
14 Such "professional services" include, "but are not limited to,"
15 preparation, approval, or failure to prepare or approve "shop
16 drawings" and/or "designs or drawings and specifications, and
17 "supervisory" activities.

18 "Professional services" are defined as those arising out of a
19 vocation, calling, occupation, or employment involving
specialized knowledge, labor, or skill, and the labor or skill
20 involved is predominantly mental or intellectual rather than
physical or manual. It is a broader definition than
21 "profession" and encompasses services performed for
remuneration.

22 Tradewinds Escrow, Inc. v. Truck Ins. Exch., 97 Cal. App. 4th 704,
23 713 (2002).

24 In the Underlying Complaint, the Stones attempt to circumvent
25 the "professional services" exclusion by describing Szucs' services
26 as "non-professional services." They also claim that the duty to
27 defend is triggered because their injuries were "unrelated" to
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1 Szucs' "rendering or failure to render any professional service."
 2 Although the Underlying Complaint alleges that the Stones' damages
 3 were "unrelated" to Szucs' rendering of or failing to render any
 4 services as a draftsman, builder, or otherwise, the Court finds the
 5 Stones' characterization of Szucs' services to be pure semantics.

6 Szucs' services were clearly related to the rendering of
 7 professional services. Szucs contacted to draft plans and
 8 construct room additions and a driveway for the Stones. Such
 9 drafting and construction requires specialized intellectual
 10 knowledge, labor, and skill, and thus were non-covered
 11 "professional services." The mere allegation that Szucs' service
 12 were "non-professional" did not obligate Hartford to defend Szucs.
 13 The duty to defend is measured by the facts alleged in the third-
 14 party complaint rather than by the third party's characterization
 15 of the facts. Barnett v. Fireman's Fund Ins. Co., 39 Cal. App. 4th
 16 500, 510 (2001) (duty to defend measured by facts alleged rather
 17 than by cause of action pleaded by third party.)

18 The Stones' further attempt to avoid the "professional
 19 services" exclusion by arguing that some of Szucs' services -
 20 including measuring and handling windows and shear wall, removing
 21 drywall and insulation, and working with electricians and plumbers
 22 - are not among those described in the "professional services"
 23 exclusions' list of non-covered services. The Stones ignore the
 24 "professional services" exclusion's plain language stating that the
 25 scope of the exclusion "includes, but is not limited to" the
 26 various excluded services listed therein.

27 Additionally, California law recognizes the difference between
 28 the risks assumed by insurers under general liability policies and

1 those assumed under errors and omissions policies, and also
2 recognizes that general liability policies do not cover losses
3 resulting from the insured's professional errors and/or omissions.
4 Allstate Ins. Co. v. Interbank Financial Services, 215 Cal. App. 3d
5 825 (1990).

6 The Policy that Szucs purchased is unambiguously a business
7 package policy that includes general liability coverage. Hartford
8 assumed the risk of losses arising from factors *other than Szucs'*
9 rendering of "professional services." Examples of potentially
10 covered losses under Szucs' Policy would include a "bodily injury"
11 claim resulting from a "slip-and-fall" on Szucs' business premises
12 or "property damage" to a customer's car while it is parked in
13 Szucs' parking lot.

14 While Hartford assumed the risk of these kinds of losses,
15 Hartford did not assume the risk of insuring Szucs' errors and
16 omissions. The "professional services" exclusion, on its face,
17 intended to limit coverage to general liability. Having found that
18 the "professional services" exclusion removes any potential for
19 coverage under the Policy, the Court need not address the
20 applicability of the remaining policy exclusions. Thus, the Court
21 grants summary judgment on the duty to defend in Hartford's favor.

22 **B. Plaintiffs' Third Cause of Action for Breach of the**
23 **Implied Covenant of Good Faith and Fair Dealing**

24 The Stones contend that the issue of bad faith liability is
25 not before the Court on these cross-motions for summary judgment
26 and fail to substantively oppose summary judgment as to this cause
27 of action. However, Hartford's cross-motion for summary judgment
28 seeks summary adjudication on the Stones' claim that Hartford acted
in bad faith in investigating the claims and damages that were the

1 subject of the tender of defense, in denying coverage including the
2 duty to defend, and in rejecting opportunities to settle the
3 Underlying Complaint within the available policy limits. Hartford
4 argues that this claim fails because the absence of coverage
5 precludes a finding of bad faith, or, alternatively, the existence
6 of a genuine issue as to Hartford's obligation precludes a finding
7 of bad faith as a matter of law.

8 The covenant of good faith and fair dealing is implied in
9 every contract including insurance policies. Comunale v. Traders &
10 General Ins. Co., 50 Cal. 2d 654, (1958) (citations omitted);
11 Kransco v. Am. Empire Surplus Lines Ins. Co., 23 Cal. 4th 390
12 (2000). It takes on particular importance in insurance coverage
13 disputes because insurers are "invested with a discretionary power
14 affecting the rights of another." Amadeo v. Principal Mut. Life
15 Ins. Co., 290 F.3d 1152, 1161 (9th Circ. 2002) (applying California
16 law). An insurer's wrongful and unreasonable refusal to defend its
17 insured constitutes a violation of the covenant of good faith and
18 fair dealing. Campbell v. Superior Court, 44 Cal. App. 4th 1308,
19 1320 (1996); Amato v. Mercury Casualty Co., 53 Cal. App. 4th 825,
20 831 (1997).

21 "In order to establish a breach of the implied covenant of
22 good faith and fair dealing under California law, a plaintiff must
23 show: (1) benefits due under the policy were withheld; and (2) the
24 reason for withholding benefits was unreasonable or without proper
25 cause." Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Circ.
26 2001) (applying California law). Furthermore, where "there is no
27 potential for coverage, and hence, no duty to defend under the
28 terms of the policy, there can be no action for breach of the

1 implied covenant of good faith and fair dealing. . . ." Waller v.
2 Truck Ins. Exch., 11 Cal. 4th 1, 36 (1995). Additionally, when
3 there is a genuine issue, legal or factual, as to the insurer's
4 liability under the policy for the claim asserted by the insured,
5 there can be no bad faith liability imposed on the insurer.
6 Chateau Chamberay Homeowners Assn. v. Associated Int'l Ins. Co., 90
7 Cal. App. 4th 335, 347-48 (2001).

8 Having found that Hartford was not obligated to defend Szucs
9 under the Policy, the Court finds that no benefits due were
10 withheld, thus failing to meet the first prong of a breach of good
11 faith cause of action. Therefore, the Court need not reach the
12 second element of the Guebara test and finds that, as a matter of
13 law, Hartford did not breach the implied covenant of good faith and
14 fair dealing.

15 Even *assuming arguendo*, that Hartford wrongfully withheld a
16 benefit due Szucs under the Policy, the Court finds that the
17 existence of a genuine coverage dispute involving the proper
18 construction and applicability of the "professional services
19 exclusion" precludes a finding of bad faith on Hartford's part.
20 See Chamberay Homeowners Ass'n, 90 Cal. App. 4th at 348, n.7.
21 Furthermore, the Stones have not presented any evidence of bad
22 faith related to Hartford's decision to refuse to defend Szucs.
23 Thus, the Court finds that Hartford did not act unreasonably,
24 without proper cause, or in bad faith and grants Hartford's motion
25 for summary judgment as to the Stones' Third Cause of Action for
26 breach of the implied covenant of good faith and fair dealing.

27 **C. Plaintiffs' Fourth Cause of Action Under Insurance Code**
28 **Section 11580(b)(2)**

1 The Stones also move for summary adjudication on their claim
2 for declaration that they are entitled to recover the judgment
3 obtained against Szucs from Hartford pursuant to California
4 Insurance Code 11580(b)(2).

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5 Where an insurer refuses to provide a defense of its insured,
6 a stipulated judgment may be enforceable in a direct action against
7 the insurer under Section 11580(b)(2) of the California Insurance
8 Code. Sanchez v. Truck Ins. Exch., 21 Cal. App. 4th 1778, 1787
9 (1994). In order to recover on a judgment in an action brought
10 under Section 11580, plaintiffs have to plead and prove that:

- 11 1) [they] obtained a judgment for bodily injury, death, or
property damage,
- 12 2) the judgment was against a person insured under a policy
that insures against loss or damage resulting from liability
13 for personal injury or insures against loss of or damage to
property caused by a vehicle or draught animal,
- 14 3) the liability insurance policy was issued by the defendant
insurer,
- 15 4) the policy covers the relief awarded in the judgment, [and]
- 16 5) the policy either contains a clause that authorizes the
claimant to bring an action directly against the insurer or
17 the policy was issued or delivered in California and insures
against loss or damage resulting from liability for personal
injury or insures against loss of or damage to property caused
18 by a vehicle or draught animal.

19 Garamendi v. Golden Eagle Ins. Co., 116 Cal. App. 4th 694, 709-10
20 (2004) quoting, Wright v. Fireman's Fund Ins. Cos., 11 Cal. App.
21 4th 998, 1015 (1992).

22 Having found no potential for coverage triggered by the
23 Stones' allegations against Szucs, the Policy does not cover the
24 relief awarded in the Stipulated Judgment. Thus, an essential
25 element for a cause of action brought under Section 11580 has not
26 been met and therefore, the Stipulated Judgment is unenforceable
27 against Hartford. The Court grants Hartford's motion for summary
28

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1 judgment as to the Stones' Fourth Cause of Action under section
2 11580.

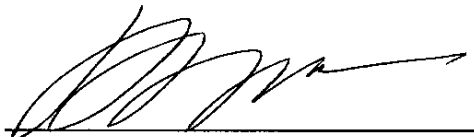
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V. CONCLUSION

For the reasons set forth herein, the Court denies the plaintiffs' motion and grant the defendants' cross-motion. The Court denies plaintiffs' motion for summary judgment as to their first cause of action for declaratory relief as to Hartford's duty to defend; denies plaintiffs' motion for summary judgment as to their second cause of action for breach of contract; grants defendant's motion for summary judgment as to plaintiffs' third cause of action for breach of the implied covenant of good faith and fair dealing; and denies plaintiffs' motion for summary judgment as to their fourth cause of action under Insurance Code Section 11580(b)(2). Thus, the Court finds it appropriate to enter judgment in favor of the defendant on all causes of action.

IT IS SO ORDERED.

Dated: 11-13-06



DEAN D. PREGERSON
United States District Judge

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