UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SKY MEDIA AIRSHIPS, INC., a California corporation,

Plaintiff,

v.

GENERAL STAR INDEMNITY COMPANY, INC., a Connecticut corporation; GENERALCOLOGNE REINSURANCE COMPANY, INC., a Connecticut corporation,

Defendants.

Civil No. 03cv1355-L(BLM)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

[Docket No. 21]

This matter comes before the Court on Defendant General Star Indemnity Company, Inc.'s Motion for Summary Judgment. The Court finds the matter suitable for determination on the papers submitted and without oral argument in accordance with Civil Local Rule 7.1(d)(1).

Defendant requests the Court to hold that the Defendant's insurance policy does not cover the damage to Plaintiff Sky Media Airship, Inc.'s airship. The Court finds Defendant's policy is not ambiguous and the tear to Plaintiff's airship falls within the policy's exclusion governing tears. Therefore, Defendant's motion for summary judgment is **GRANTED**.

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FACTUAL BACKGROUND

I. The Damage to Plaintiff's Airship

Plaintiff's airship ("the Airship") is a hot air balloon approximately 144 feet long attached to a motorized gondola that can hold up to two pilots. (Nelson Decl. ¶ 2 and Ex. A at 6, 28; Rickerby Decl. ¶ 4 and Ex. C at 9-10.) According to Federal Aviation Administration ("FAA") documents, William Buel is the builder of record of the Airship and was Plaintiff's general manager in June, July, and August 2002. (Nelson Decl. ¶ 2 and Ex. A at 7, 9; Rickerby Decl. ¶ 4 and Ex. C at 11-12; Vitti Decl. ¶ 6 and Ex. 4 at 58, 61.)

During ground testing operations at Brown Field in San Diego on June 22, 2002, the Airship's envelope suddenly ripped open and the balloon deflated. (Rickerby Decl. ¶ 4 and Ex. C at 17; Vitti Decl. ¶¶ 2, 6 and Exs. 1, 4.) There was a noise that sounded like a loud "pop" or a "bang" when the balloon deflated. (Rickerby Decl. ¶ 4 and Ex. C at 17, 19; Nelson Decl. ¶ 3 and Ex. B at 29-30; Vitti Decl. ¶ 2 and Ex. 1 at 8.) The rip, approximately 48 feet long, traversed at least two panels of fabric and five load tapes, and showed signs of tremendous force in the separation. (Nelson Decl. ¶ 3 and Ex. B at 30; Rickerby Decl. ¶¶ 4, 6 and Exs. C at 17-19 and D at 28, 31.)

II. The Insurance Policy

Defendant issued Policy No. IMG 382414 ("the Policy") to Plaintiff effective December 21, 2001 to December 21, 2002. (Vitti Decl. ¶ 4 and Ex. 2.) The annual premium was $67,112.50. (Cohen Decl. ¶ 2 and Ex. A at 2.) The Policy provides coverage for physical injury to insured balloons, stating in pertinent part:

> **COVERAGE D PHYSICAL DAMAGE TO INSURED BALLOONS**
>
> **1. Insuring Agreement**
>
> We will pay for direct physical "loss" to a "covered property" caused by or resulting from a "covered cause of loss." The most we will pay for "loss" in any one occurrence is the applicable Limit of Insurance shown in the Schedule of Insurance — "Insured Balloon" Value in the Declarations.

(Vitti Decl. Ex. 2 at 29.)

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The policy also contains the following exclusion:

> (2) Wear, Tear, Gradual Deterioration
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> Tear unless caused directly by accidental and sudden physical contact with another object, wear gradual deterioration, freezing, mechanical or electrical failure, vermin, rot, mold, mildew, ultraviolet light, depreciation, dampness, cold or heat, insects and rodents, increased porosity, loss of fabric coating, rust, corrosion, decay, hidden or latent defects or any quality in the "covered property" that causes it to damage or destroy itself, or any combination of the forgoing causes, unless such "loss" is the result of other physical damage covered by the policy.

Id. at 32.

III. Plaintiff's Claim for Coverage

On Plaintiff's behalf, on July 2, 2002, Worldwide Facilities, Inc. sent a Property Loss Notice to Defendant. (Vitti Decl. ¶ 2 and Ex. 1.) The Property Loss Notice states: "Airship envelope (balloon) failed causing fabric to tear." (Vitti Decl. ¶ 2 and Ex. 1 at 6.) A letter dated June 24, 2002 from the Airship's pilot, Crispin Williams, to the FAA is attached to the Property Loss Notice. (Vitti Decl. ¶ 2 and Ex. 1 at 8-9.) Mr. Crispin's letter states, "[a]s part of our test program we were over-pressurizing the envelope when a seam opened up with a loud pop." (Vitti Decl. ¶ 2 and Ex. 1 at 8.) In a letter dated February 2, 2003, Mr. Williams clarified that he meant they "were taking the pressure of the envelope above the normal pressure that we expected during flight but not above the safe limit for the envelope." (Cohen Decl. Ex. B at 2.)

Defendant retained John Rickerby, an independent investigator and adjuster, to investigate Plaintiff's claim. (Vitti Decl. ¶ 3; Rickerby Decl. ¶¶ 1-2.) Mr. Rickerby sent correspondence to Plaintiff's owner, Paul Cohen, on July 9, 2002 acknowledging the claim on behalf of Defendant and reserving Defendant's right to decline coverage under the policy. (Rickerby Decl. ¶ 3 and Exs. A and B.) During a telephone conversation the same day, Mr. Cohen told Mr. Rickerby that Mr. Buel, Plaintiff's General Manager, was the person most knowledgeable at Sky Media regarding the damage to the envelope. (Rickerby Decl. ¶ 3.) Mr. Rickerby obtained a recorded statement from Mr. Buel on July 16, 2002. (Rickerby Decl. ¶ 4 and Ex. C.) Mr. Buel told Mr. Rickerby that he was in the Airship's gondola with Mr. Williams when the envelope popped, and described the event in part as, "It happened instantaneously. When the rip happened, it took less than maybe a second or two to go its whole length. It was

just a large pop and then the envelope started coming down." (Rickerby Decl. ¶ 4 and Ex. C at 17, 19.)

On August 13, 2002, Steven Peacock contacted Mr. Rickerby. (Rickerby Decl. ¶ 5.) Mr. Peacock indicated Plaintiff had hired him to assist in processing Plaintiff's claim. *Id.* He informed Mr. Rickerby that the information Mr. Rickerby had been given was not entirely accurate. *Id.* Mr. Peacock subsequently sent Mr. Rickerby a letter dated August 21, 2002 with several enclosures, including a "Statement of Facts" describing Plaintiff's version of the incident. (Rickerby Decl. ¶ 6 and Ex. D.) In relevant part, the statement asserts:

> The envelope was inflated within its normal operating range (.00 to 1.50 inches pressure). The actual gauge reading was .60 inch pressure and the airship was acting normally. The pressure control valve was installed and operating. The airship was tied down to two vehicles (nose and rear). During this process, the wind gusted substantially and changed directions.
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> The pilot signaled to the two drivers to turn the airship into the wind to avoid being tipped over. The two vehicles began moving in an uncoordinated manner in an attempt to turn the airship into the wind as directed.
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> In fact, what happened is that a tightening of the ropes occurred creating counterbalancing forces and a severe increase in the twisting effect on the balloon envelope itself.
>
> This severe twisting pressure caused a bursting along uneven, random sections of the airship envelope . . . . This sudden bursting caused the envelope to deflate immediately.
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> The envelope itself was in good condition with less than 100 hours of inflation time (estimated life cycle is 500-700 hours) and, as stated previously, the pressure control valve was in place and operating.

(Rickerby Decl. Ex. D at 27.)

On January 7, 2003, after reviewing Defendant's policy language and the information presented, Defendant declined coverage for the damage, finding the tear fell within the policy's exclusion for tears. (Vitti Decl. ¶ 5 and Ex. 3.) Plaintiff then filed this action in San Diego Superior Court on March 21, 2003. Defendant timely removed the case to this Court on July 9, 2003. Plaintiff filed a First Amended Complaint on August 29, 2003 alleging breach of contract and breach of the implied covenant of good faith and fair dealing.

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LEGAL STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 empowers the court to enter summary judgment on factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material when, under the substantive governing law, it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party does not have the burden of proof at trial, it may carry its initial burden by "produc[ing] evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). When the moving party bears the burden of proof on an issue — whether on a claim for relief or an affirmative defense — the party "must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in its favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986); *see S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003).

If the moving party fails to discharge its initial burden of production, summary judgment must be denied and the court need not consider the nonmoving party's evidence, even if the nonmoving party bears the burden of persuasion at trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970); *Nissan Fire*, 210 F.3d at 1102-03. When the moving party carries its initial burden of production, the nonmoving party cannot "rest on mere allegation or denials of his pleading." *Anderson*, 477 U.S. at 256. Rather, the non-movant must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on

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file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotations omitted); *Anderson*, 477 U.S. at 256; *Nissan Fire*, 210 F.3d at 1103.

A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). When ruling on a summary judgment motion, the court cannot engage in credibility determinations or weighing of the evidence; these are functions for the jury. *Anderson*, 477 U.S. at 255; *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002). The court must view the evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in favor of the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1180 (9th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003). The court is not required "to scour the record in search of a genuine issue of triable fact," *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), but rather "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

DISCUSSION

Plaintiff has alleged causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. Defendant moves for summary judgment as to both claims.

I. Breach of Contract

A. Applicable Law Regarding Insurance Contract Interpretation

"An insurance policy is, fundamentally, a contract between the insurer and the insured," *Stein v. Int'l Ins. Co.*, 217 Cal. App. 3d 609, 613 (1990), and is therefore governed by the same general principles of interpretation as any other contract. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821-22 (1990); *Truck Ins. Exch. v. County of Los Angeles*, 95 Cal. App. 4th 13, 23 (2002). The fundamental goal of contract interpretation is to give effect to the parties' mutual

intent. Cal. Civ. Code § 1636; *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992); *Truck Ins.*, 95 Cal. App. 4th at 23. Under California law, a court's analysis of insurance policies follows a three-step process. *AIU Ins.*, 51 Cal. 3d at 822.

The first step is the "plain meaning rule." *Waller v. Truck Inc. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). That is, when the policy's language is clear and explicit and does not lead to an absurd result, the court ascertains the parties' mutual intent from the language of the policy itself and goes no further. Cal. Civ. Code §§ 1638, 1639; *Waller*, 11 Cal. 4th at 18; *AIU Ins.*, 51 Cal. 3d at 822. When a policy is clear and unequivocal, the insured can only reasonably expect the coverage set forth by the policy. *See Van Ness v. Blue Cross*, 87 Cal. App. 4th 364, 375 (2001). The court must "consider the policy as a whole and construe the language in context, rather than interpret a provision in isolation." *Truck Ins.*, 95 Cal. App. 4th at 23. "The words of a contract are generally to be understood in their ordinary and popular sense unless the parties use them in a technical sense or 'a special meaning is given to them by usage.'" *Helfand v. Nat'l Union Fire Ins. Co.*, 10 Cal. App. 4th 869, 879 (1992) (*quoting* Cal. Civ. Code § 1644); *accord Van Ness*, 87 Cal. App. 4th at 372. When construing words in their "ordinary and popular sense," courts often refer to dictionary definitions. *Scott v. Continental Ins. Co.*, 44 Cal. App. 4th 24, 29 (1996).

A policy provision susceptible to two or more reasonable constructions is ambiguous. *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 470 (2004); *Waller*, 11 Cal. 4th at 18. When an ambiguity exists, the analysis proceeds to the second step. Thus, the policy is interpreted in the sense the insurer reasonably believed the insured understood the terms at the time the policy was issued; that is, in accordance with the insured's objectively reasonable expectations. *E.M.M.I.*, 32 Cal. 4th at 470; *Bank of the West*, 2 Cal. 4th at 1264-65. If an ambiguity persists, then the third analytical step applies, and the policy is construed against the insurer. *E.M.M.I.*, 32 Cal. 4th at 470; *Bank of the West*, 2 Cal. 4th at 1265.

The sequence of these steps is significant. If the plain meaning rule applies, then the court does not look to the "reasonable expectations of the insured." *Bank of the West*, 2 Cal. 4th

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at 1264. Similarly, the policy is interpreted against the insurer only when the policy cannot be resolved by looking to the insured's "objectively reasonable expectations." *Id.*

When interpreting a policy's exclusions, courts must be guided by the general rule that exclusions are strictly construed. *E.M.M.I.*, 32 Cal. 4th at 471; *Waller*, 11 Cal. 4th at 16. The California Supreme Court has repeatedly held that "an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. . . . [T]he burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language. . . . The exclusionary clause must be [c]onspicuous, plain and clear." *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 201-02 (1973) (internal quotations and citations omitted); *accord E.M.M.I.*, 32 Cal. 4th at 471. Further, exceptions to exclusions are broadly construed in the insured's favor. *E.M.M.I.*, 32 Cal. 4th at 471; *Aydin Corp. v. First State Ins. Co*, 18 Cal. 4th 1183, 1192 (1998).

B. Interpretation of the Policy's Tear Exclusion and Exception

Defendant's insurance policy covers physical damage to insured balloons, subject to certain exclusions. (Vitti Decl. Ex. 2 at 29-33.) The relevant exclusion to this case is one entitled, "Wear, Tear, Gradual Deterioration." *Id.* at 32. The gravamen of the parties' dispute is whether the policy's exclusion for tears is ambiguous and whether the damage caused to Plaintiff's Airship falls within the policy's exception to the exclusion for tears. The Court will address each argument in turn.

1. Whether the Exclusion for Tears is Ambiguous

Plaintiff contends the heading "Wear, Tear, Gradual Deterioration" creates an ambiguity as to what is excluded from coverage and therefore summary judgment is inappropriate. In so arguing, Plaintiff first asserts the phrase is commonly used to denote "wear and tear," and therefore the exclusion should be interpreted to apply only when "a loss is caused by gradual loss caused by use." (Plt's Oppo. to Def's Mtn. for Sum. Judg't at 4.) Plaintiff then raises the question of whether the comma between the words "wear" and "tear" in the policy drastically changes the meaning of the phrase. According to Plaintiff, Defendant had a duty to clear up any

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ambiguities related to benefits and coverage, and therefore the ambiguities must be construed against Defendant. This argument is unavailing.

As an initial matter, the parties' dispute over the interpretation of the exclusion does not preclude summary judgment. Contract interpretation is a question of law unless the interpretation turns upon the credibility of extrinsic evidence. *Waller*, 11 Cal. 4th at 18; *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 799 (1998). In this case, there are no factual issues in dispute affecting coverage. Accordingly, interpretation of the exclusion is a question of law.

Plaintiff does not cite any authority supporting its argument that the phrase "wear, tear, gradual deterioration" is commonly used to denote only "wear and tear." Plaintiff's proposed interpretation is based on a strained and grammatically incorrect construction of the exclusion title. The words "wear" and "tear" have different meanings. *See Webster's Unabridged Dictionary* 1949 (2d ed. 1998) (defining tear in part as: "to pull apart or in pieces by force, esp. so as to leave ragged or irregular edges;" "to pull or snatch violently; wrench away with force;" "to distress greatly;" "to divide or disrupt"); *id* at 2153 (defining wear in relevant part as "to cause . . . to deteriorate or change by wear;" "to impair, deteriorate, or consume gradually by use or any continued process;" "to waste or diminish gradually by rubbing, scraping, washing, etc."). That the phrase "wear and tear"[1] has a similar meaning as "wear" is irrelevant, as the exclusion heading does not use that phrase. Instead, there is a comma between the words "wear" and "tear." Defendant correctly notes the use of a comma between the two words is significant. The title of the exclusion, as it is grammatically structured, indicates the policy excludes losses caused by three different occurrences: (1) wear; (2) tear; or (3) gradual deterioration. *Cf. Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 807 (1982) ("Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.").

More significantly, Plaintiff's argument is myopic, focusing solely on the title of the exclusion rather than the language of the exclusion itself. This Court's interpretation of the policy must consider its language in context, rather than in isolation. *Truck Ins.*, 95 Cal. App.

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[1] "Wear and tear" is defined as "damage or deterioration resulting from ordinary use; normal depreciation." *Id.* at 2153.

4th at 23. The language of the exclusion buttresses the Court's conclusion the term "tear" in the heading of the exclusion should be defined in its ordinary sense and is not susceptible to Plaintiff's interpretation that the word is part of the phrase "wear and tear." The exclusion clearly, plainly, and conspicuously excludes tears "unless caused directly by accidental and sudden physical contact with another object." (Vitti Decl. Ex. 2 at 32.) Thus, tears resulting from other causes are excluded from coverage.

In brief, the Court finds the relevant exclusion is not susceptible to two or more reasonable constructions. Accordingly, the plain meaning of the policy governs.[2]

2. Whether the Exception to the Exclusion for Tears Applies

As noted above, the policy's exclusion for tears contains an exception. Tears are covered if they are "caused directly by accidental and sudden physical contact with another object." (Vitti Decl. Ex. 2 at 32.) Plaintiff maintains the damage to its Airship falls within this exception, and suggests the tear was caused by the Airship's sudden and accidental contact with either the tow trucks, the ropes, or the wind: "Clearly, tow trucks are not part of an airship. Either is the wind. The trucks, affixed to ropes that are attached to the airship created a situation where the envelope *accidentally and suddenly came into direct physical contact with another object, including the ropes, trucks and wind.*" (Plt's Oppo. to Def's Mtn. for Sum. Judg't at 7) (emphasis added). This argument is unpersuasive.

Plaintiff presents no evidence or authority supporting its contention the wind could be "another object" as the term is used in the policy. The Airship's contact with the wind also cannot be said to have been sudden or accidental. As Defendant cogently argues, "[c]ontact with wind is an obvious and natural consequence every time an airship takes flight." (Def's Reply to Mtn. for Sum. Judg't at 7.) Finally, there is no evidence the wind caused or contributed to the

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[2] Plaintiff contends it was Defendant's responsibility to clear up any ambiguities regarding coverage, and maintains Defendant improperly "issued a policy and collected premiums for what it claims now was non-existent coverage all along." (Plt's Oppo. to Def's Mtn. for Sum. Judg't at 7.) This argument is unavailing for two reasons. First, the language of the policy is unambiguous. Second, insofar as Plaintiff suggests Defendant failed to point out the relevant exclusion, Plaintiff has not presented any evidence or argument to support such a claim.

tear. On the contrary, Plaintiff's General Manager said the wind was at about 8 knots, and that ground operations are suspended only when the wind reaches 10 to 13 knots. (Vitti Decl. Ex. 4 at 61.)

Plaintiff's suggestion the tow trucks and/or the rope caused the tear is belied by the undisputed facts of how the tear occurred. The Airship was tethered to two tow trucks by ropes, nose and rear. When instructed by the pilot to turn into the wind, the vehicles "began moving in an uncoordinated manner in an attempt to turn the airship into the wind" and the ropes tightened, creating a "severe increase in the twisting effect on the balloon envelope itself." (Rickerby Decl. Ex. D at 27.) The parties do not dispute it was this "*severe twisting pressure* [that] *caused a bursting* along uneven, random sections of the airship envelope." *Id.* (emphasis added).

The ropes' contact with the envelope was intentional: they were tied to the front and back of the Airship as part of its tethered inflation. *Id.* There is no evidence the ropes had any other contact (and more specifically, sudden and accidental contact) with the Airship. Finally, there is no evidence to suggest the tow trucks came into sudden and accidental contact — or any other contact — with the envelope. Therefore, because the Airship's tear was not the result of "accidental and sudden physical contact with another object," the damage is not covered by Defendant's policy. Defendant's request for summary judgment on its breach of contract cause of action is **GRANTED**.

III. Covenant of Good Faith and Fair Dealing.

When there is no potential for coverage, a plaintiff cannot bring a claim for breach of the implied covenant of good faith and fair dealing. *Waller*, 11 Cal. 4th at 36. In light of the Court's finding that the damage to Plaintiff's Airship is not covered by Defendant's policy, Plaintiff's claim for breach of the covenant of good faith and fair dealing must also fail. Accordingly, Defendant's motion for summary judgment as to Plaintiff's claim for breach of the covenant of good faith and fair dealing is **GRANTED**.

CONCLUSION

Having reviewed the parties' briefs and supporting evidence, applicable law, and good cause appearing, **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment

is **GRANTED** (doc. no. 21). The Clerk of the Court is directed to enter judgment in accordance with this order.

IT IS SO ORDERED.

Dated: 7/23/04

M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE

COPY TO:

HON. BARBARA L. MAJOR
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL