UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CSX CORPORATION AND CSX INSURANCE COMPANY, Plaintiffs, vs. NORTH RIVER INSURANCE COMPANY, AMERICAN RE-INSURANCE COMPANY, N/K/A MUNICH REINSURANCE AMERICA, INC. WESTCHESTER SURPLUS LINES INSURANCE COMPANY, STEADFAST INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, LANDMARK AMERICAN INSURANCE COMPANY, FARADAY CAPITAL LIMITED AND ASPEN INSURANCE UK LIMITED, Defendants.	Case No. 3:08-CV-531-J-25 MCR THE HONORABLE HENRY LEE ADAMS, JR.

PLAINTIFFS CSX CORPORATION'S AND CSX INSURANCE COMPANY'S MOTION FOR SUMARY JUDGMENT, MEMORANDUM IN SUPPORT AND REQUEST FOR ORAL ARGUMENT

Plaintiffs CSX Corporation (on behalf of itself and its subsidiaries, collectively, "CSX") and CSX Insurance Company ("CSXIC") (collectively, "Plaintiffs"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby move the Court for summary judgment in favor of Plaintiffs on all counts of the Amended Complaint for Declaratory Judgment ("Amended Complaint") and Defendants' counterclaims. In support of this motion, Plaintiffs state as follows:

1. Plaintiffs filed an Amended Complaint for Declaratory Relief against Defendants North River Insurance Company ("North River"), American Re-Insurance Company, n/k/a Munich Reinsurance America, Inc. ("Am Re"), Westchester Surplus Lines Insurance Co. ("Westchester"), Steadfast Insurance Company ("Steadfast"), Hartford Fire Insurance Company ("Hartford"), Landmark American Insurance Company ("Landmark"), Faraday Capital Limited ("Faraday") and Aspen Insurance UK Limited ("Aspen") (collectively, "Insurer-Defendants") seeking declaratory relief regarding policies of insurance and reinsurance (the "Policies") issued by Insurer-Defendants.

2. Insurer-Defendants Faraday, Aspen and Steadfast filed counterclaims against Plaintiffs also seeking declaratory relief. The remaining Insurer-Defendants purport to have "adopt[ed] and incorporate[d] by reference any counterclaim asserted by each and every similarly situated defendant" in their affirmative defenses. (Am Re Answer ¶ 62.)

3. At issue are portions of CSX's insurance claim submitted to Insurer-Defendants regarding loss sustained by CSX as a result of Hurricane Katrina.

4. Specifically, the parties dispute the construction of three sections of the Policies as they relate to CSX's claim for loss sustained as a result of Hurricane Katrina..

5. First, the parties dispute the construction of the Time Element provision of the Policies as it relates to CSX's claim for business interruption losses. Certain Insurer-Defendants have filed counterclaims on this contract construction issue.

6. Second, the parties dispute the construction of the Property Damage provision of the Policies as it relates to a claim for diesel locomotive loss submitted by CSX.

7. Third, the parties dispute the construction of the Policies in respect of CSX's claim for reimbursement of amounts paid to PricewaterhouseCoopers ("PwC") in connection with the adjustment of CSX's claim.

8. For the reasons discussed in the attached Memorandum in Support, the law and undisputed material facts demonstrate that Plaintiffs are entitled to relief on all three of these contract construction issues and that judgment as a matter of law should be entered in their favor. Further, the law and undisputed material facts discussed below demonstrate that Insurer-Defendants are not entitled to any relief on their counterclaims.

9. The dispute before the Court does not extend to a determination of the amount of loss under the Policies, with respect to which any dispute must be arbitrated, and is limited to the three contract construction issues identified herein.

WHEREFORE, CSX Corporation and CSX Insurance Company respectfully request that the Court (i) enter summary judgment in favor of Plaintiffs on Counts I, II and III of the Amended Complaint, (ii) enter summary judgment in favor of Plaintiffs on

all counterclaims of Insurer-Defendants and (iii) award Plaintiffs such other and further relief as the Court may deem just and proper.

MEMORANDUM IN SUPPORT

I. Introduction and Undisputed Background Facts.

In late August 2005, Hurricane Katrina struck the Gulf Coast of the United States. (Fact Stip. ¶ 8.)[1] Hurricane Katrina caused damage to the property of two CSX subsidiaries – CSX Transportation, Inc. ("CSXT") and CSX Intermodal, Inc. ("CSXI"). (Id. at ¶ 9.) Hurricane Katrina damaged, among other items, CSXT's rail yard in New Orleans, Louisiana, CSXT equipment and CSXT track, including six major bridges, between New Orleans, Louisiana, and Mobile, Alabama. (Id. at ¶¶ 9, 15.) Hurricane Katrina also damaged CSXI's facilities, track and equipment in New Orleans, Louisiana, and Mobile, Alabama. (Id. at ¶ 9.) Hurricane Katrina also caused property damage to certain CSXT and CSXI customers. (Am. Compl. ¶ 17; Am Re Answer ¶ 17; Steadfast Answer ¶ 17; Faraday/Aspen Answer ¶ 17; Fact Stip. ¶¶ 29-85.)

CSX submitted an insurance claim to Insurer-Defendants for losses it asserts it sustained as a result of Hurricane Katrina. (Fact Stip. ¶ 11.) CSX's claim sought recovery under both the property damage and time element (business interruption) provisions of the Policies. (Id.) The issues before the Court fall into three categories: (i) a business interruption claim submitted under the Time Element provision of CSX-P2-

[1] The parties have filed a fact stipulation with the Court. This fact stipulation is attached hereto as Exhibit 1 and is incorporated herein.

05;[2] (ii) a diesel locomotive claim submitted under the Property Damage provision of CSX-P2-05; and (iii) PwC expenses submitted under the Property Damage provision of CSX-P2-05. (Id. at ¶ 14.)[3]

This contract construction dispute before the Court does not extend to a determination of the amount of loss suffered by CSX. Nor does the Court have jurisdiction to determine the amount of CSX's loss. Rather, pursuant to the arbitration provision of CSX-P2-05, if the parties "fail to agree on the amount of adjusted loss," such amount shall be determined in an arbitration proceeding involving appraisers and/or an umpire. (Id. at Ex. A to Fact Stip., Sec. 15.)

II. Legal Standard for Summary Judgment.

Summary judgment is required if the record reflects that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Med Imaging Ctr., Inc. v. Allstate Ins. Co., 818 F. Supp. 333, 334

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[2] All of the Policies of insurance and reinsurance at issue in this proceeding incorporate the terms of policy form CSX-P2-05, a copy of which is attached in redacted form as Exhibit A to the fact stipulation. (Ex. A to Fact Stip.) Insurers North River, Westchester and Landmark subscribed to excess first-party property insurance policies insuring CSX and its subsidiaries for the period February 1, 2005 through February 1, 2006. (Fact Stip. ¶ 4) These policies incorporate the terms of policy form CSX-P2-05. (Id.) Reinsurers Am Re, Hartford and Steadfast subscribed to excess first-party property reinsurance policies with CSXIC as the reinsured and CSX and its subsidiaries as the original assured for the period February 1, 2005 through February 1, 2006. (Id. at ¶ 5.) These policies also incorporate the terms of policy form CSX-P2-05. (Id.) Reinsurers Faraday and Aspen subscribed to an excess first-party property reinsurance policy with CSXIC as the reinsured and CSX and its subsidiaries as the original assured for the period February 1, 2005 through February 1, 2006. (Id. at ¶ 6.) For purposes of this proceeding, the Court may treat this policy as incorporating the terms of policy form CSX-P2-05. (Id.)

[3] Additional undisputed facts are discussed below as part of each of these three claims.

(M.D. Fla. 1993) (summary judgment should "be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all evidence is viewed in the light most favorable to the nonmoving party"). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant has met its burden, however, the non-moving party must come forward with specific factual evidence presenting more than mere allegations. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Moreover, only disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment. Id. at 248. Factual disputes that are irrelevant or unnecessary will not preclude the entry of summary judgment. Id.

III. The Time Element Claim.

A. Undisputed facts regarding CSX's Time Element claim.

The Time Element provision of CSX-P2-05 provides as follows in relevant part:

7(B) Time Element

> (1) This policy insures loss resulting from partial, complete, or potential suspension of business conducted by the Insured (including research and development) caused by loss, damage or destruction to:
>
> > (a) all property, except finished stock, as described in Section 7(A);
> >
> > . . .
> >
> > (d) real or personal property of others appurtenant to the premises of the Insured;
> >
> > . . .
> >
> > (j) real or personal property of others upon whom the Insured may be dependent for continued supply (or purchase) of services (including but not limited to

> electronic data processing services), raw materials component parts, merchandise, or finished products;
>
> (k) real or personal property of a receiver of goods or services from the Insured.

(Am. Compl. ¶¶ 20-21; Am Re Answer ¶¶ 20-21; Steadfast Answer ¶¶ 20-21, 53; Faraday/Aspen Answer ¶¶ 20-21; Ex. A to Fact Stip.) Section 7(A) of CSX-P2-05 provides, in turn, that the policy provides coverage for "the Insured's interest in all property owned, used, or intended for use by the Insured . . . ." (Am. Compl. ¶ 21; Am Re Answer ¶ 21; Steadfast Answer ¶¶ 21, 61; Faraday/Aspen Answer ¶ 21; Ex. A to Fact Stip.)

Further, Section 7(B)(4) of CSX-P2-05 provides as follows in relevant part:

> 7(B) Time Element
>
> (4) Loss, shall be computed:
>
> (a) from the time of the occurrence to the time when with due diligence and dispatch the property could be repaired and restored to normal operations not to be limited by the date of expiration named in the policy;
>
> . . .
>
> (e) for such additional time as may be required to restore revenue to the same level as would have existed had no loss occurred, not to be limited by the date of expiration named in the policy.

(Am. Compl. ¶ 23; Am Re Answer ¶ 23; Steadfast Answer ¶¶ 23, 53; Faraday/Aspen Answer ¶ 23; Ex. A to Fact Stip.)

The services that are the subject of CSX's Time Element claim are transportation services provided by CSXT or CSXI. (Fact Stip. ¶ 30.) Property of CSXT and CSXI used to provide services to certain of their customers was damaged as result of Hurricane

Katrina. (Fact Stip. ¶¶ 29-85.) In some cases, property of certain customers of CSXT and CSXI also was damaged as a result of Hurricane Katrina. (Id.) CSX seeks coverage for business interruption losses suffered as a result of Hurricane Katrina in the form of reduced revenues from transportation services provided to these customers. Paragraphs 29 through 85 of the attached fact stipulation lay out the stipulated facts regarding CSX's Time Element claim and are incorporated herein and discussed below. Additional facts also are discussed below.

B. Summary judgment should be granted as to Count I of the Amended Complaint concerning CSX's claim for business interruption losses.

Pursuant to the Time Element provision of CSX-P2-05, CSX's business interruption losses are to be computed from the time that the relevant property is damaged through the time that revenue with CSX's customers is restored to the level that would have existed had no loss from Hurricane Katrina occurred. The relevant facts are not in dispute; rather, the parties dispute the construction of the relevant policy language.

In construing insurance contracts, "[i]f the language in an insurance policy is not ambiguous, then the court's task is simply to apply the plain meaning of the words and phrases used to the facts before it." Med Imaging, 818 F. Supp. at 336; Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 33-34 (Fla. 2000) (same). A court may not rewrite an insurance policy or add meaning that is not present. Med Imaging, 818 F. Supp. at 336. Further, insurance policies should be read as a whole in order to give every provision its full meaning and operative effect. Auto-Owners, 756 So. 2d at 34. Such general insurance contract construction principles apply to business interruption insurance. Travelers Indem. Co. v. Kassner, 322 So. 2d 80, 82 (Fla. Dist. Ct. App. 1975).

Business interruption losses are to be determined "in a practical way, having regard for the nature of the business and the methods employed in its operation, in order to give practical effect to the intentions of the parties and the purpose of the insurances as evidenced by the terms, conditions, and provisions of the policy." Id. Business interruption insurance often provides coverage even after property damage has been repaired until business can be restored to the condition it would have been in had no property damage occurred. Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co., 949 F.2d 690, 692-93 (3d Cir. 1991) (obligation to indemnify under business interruption policy can arise while business continues, albeit at a less than normal level); WMS Indus., Inc. v. Federal Ins. Co., --- F. Supp. 2d ----, 2008 WL 4829638, at *4 (S.D. Miss. Oct. 28, 2008) (business interruption policy comprehended that although loss must be caused by property damage, loss may continue past the date on which the property itself is restored); Am. Guar. & Liab. Ins. Co. v. S. Minn. Beet Sugar Coop., 320 F. Supp. 2d 879, 882-83 (D. Minn. 2004) (denying declaratory judgment for insurer that business interruption policy only covered loss actually sustained during period of restoration where policy included coverage for loss sustained after property and operations were restored and until operations returned to the level that would have existed had no loss occurred); Lexington Ins. Co. v. Island Recreational Dev. Corp., 706 S.W.2d 754 (Tex. App. 1986) (business interruption policy provided coverage after a damaged restaurant reopened and while the restaurant was rebuilding its business to its pre-loss volume).

Here, the plain language of Section 7(B)(4) of CSX-P2-05 states that CSX's business interruption losses are to be computed *not only* through the time the relevant

damaged property could be repaired and restored to normal operation, *but also* "for such additional time as may be required to restore revenue to the same level as would have existed had no loss occurred, not to be limited by the date of expiration named in the policy." (Ex. A to Fact Stip.) Moreover, certain property insurance policies contain an express time limitation (for example, twelve months) that limits the period of additional time for which business interruption losses can be recovered after the relevant property is repaired or replaced. See, e.g., Duane Reade Inc. v. St. Paul Fire & Marine Ins. Co., 411 F.3d 384, 393 (2d Cir. 2005) (policy provided additional coverage commencing after damaged property had been repaired and lasting no more than twelve months). Here, Insurer-Defendants did not bargain for such an express time limitation and the period of "additional time" extends indefinitely, so long as revenue has not been restored "to the same level as would have existed had no loss occurred."

As stipulated by the parties, CSXT and CSXI had been conducting business with each of the customers at issue at the time that Hurricane Katrina struck. (Fact Stip. ¶¶ 29-85.) Those relationships were disrupted by the property damage caused by Hurricane Katrina. Property of CSXT and CSXI used to provide services to certain of their customers was damaged as result of Hurricane Katrina, and in some cases, property owned and/or used by certain customers of CSXT and CSXI also was damaged as a result of Hurricane Katrina. (Id.) Since Hurricane Katrina, CSXT and CSXI either have not resumed business with the customers at issue or have resumed business at an asserted reduced level. (Id.) The following chart represents certain facts as to each customer at issue:

Customer	Pre-Katrina Business Relationship?	Damage to CSXT/CSXI Property Used to Provide Services?	Damage to Property Owned and/or Used by Customer?	Current Status
Lone Star	Yes (Fact Stip. ¶ 33)[4]	Yes (¶ 35)	Yes (¶ 36; Exs. 2-5)	Resumption of certain business at an asserted reduced level (¶ 37)
Global Trading	Yes (¶ 45)	Yes (¶ 47)	Yes (¶¶ 44, 49)	Resumption of business at an asserted reduced level (¶51)
Calhoun Enterprises	Yes (¶ 45)	Yes (¶ 47)	Yes (¶¶ 44, 49)	No resumption of business (¶ 51)
Ona Foods	Yes (¶ 45)	Yes (¶ 47)	Yes (¶¶ 44, 49)	No resumption of business (¶ 51)
Intermodal Management Services (i.r.o. IKEA)	Yes (¶ 53)	Yes (¶ 55)	Yes (¶¶ 53, 56)	No resumption of business (¶ 57)
Hub City (i.r.o. Georgia Pacific)	Yes (¶ 53)	Yes (¶ 55)	--	No resumption of business (¶ 57)
Crowley Liner	Yes (¶ 59)	Yes (¶ 62)	No (¶ 63)	Resumption of business at an asserted reduced level (¶ 64)
Matson Intermodal	Yes (¶ 59)	Yes (¶ 62)	No (¶ 63)	Resumption of certain business at an asserted reduced level (¶ 65)
Birdsall Inc.	Yes (¶ 59)	Yes (¶ 62)	No (¶ 63)	Resumption of business at an asserted reduced level (¶ 66)
Gulf Atlantic Refining	Yes (¶¶ 69, 71)	Yes (¶ 69)	Yes (¶ 70)	No resumption of business (¶ 71)
Luxco Wax Co.	Yes (¶ 73)	Yes (¶ 76)	Yes (¶ 77)	No resumption of business (¶ 78)
Cargill Salt	Yes (¶ 80)	Yes (¶ 82)	--	Resumption of business at an asserted reduced level (¶ 83)

[4] All "¶" citations in this chart are to the Fact Stipulation attached as Exhibit 1.

As required by the language of the Policies and "in order to give practical effect to the intentions of the parties and the purpose of the insurances as evidenced by the terms, conditions, and provisions of the policy" (Kassner, 322 So. 2d at 82), the loss computation provision of the Time Element section of CSX-P2-05 should be construed as follows for these customers:

Lone Star (Fact Stip. ¶¶ 32-43) – The Hurricane-damaged property owned by CSXT and Lone Star has been repaired, and business has resumed between CSXT and Lone Star at an asserted reduced level. Importantly, part of the pre-Hurricane Katrina business relationship between CSXT and Lone Star involved Lone Star's transloading of product to and from vessels that traveled along the Mississippi River Gulf Outlet ("MRGO"), which connected to Lone Star's property. (Ex. 2 – Affidavit of Eric F. Johnson.) The MRGO was damaged as a result of Hurricane Katrina and since has been de-authorized for navigation.[5] The Policies provide coverage for loss of revenue from the

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[5] The MRGO is a navigation channel between the Port of New Orleans and the Gulf of Mexico. (Ex. 3 - Integrated Final Report to Congress and Legislative Environmental Impact Statement for the Mississippi River – Gulf Outlet Deep-Draft De-Authorization Study, Vol. 1 at iv-v.) The MRGO experienced severe shoaling as a result of Hurricane Katrina. (Id. at vii, xii-xiii.) Such severe shoaling caused by Hurricane Katrina limited the depth in the MRGO. (Id. at xiii.) This restricted deep-draft industry access and severely impacted many deep-draft industries. (Id. at xii-xiii.) In 2008, the U.S. Army Corps of Engineers de-authorized all navigation in a large portion of the MRGO and planned a physical closure of such portion of the MRGO. (Id. at xvi-xvii; Ex. 4 - U.S. Army Corps of Engineers, http://mrgo.usace.army.mil/default.aspx?p=MRGO_Study (last visited Jan. 21, 2009).) The U.S. Army Corps of Engineers did so despite stated concerns from the industry, including Lone Star, that such action could cause significant income and employment impacts to businesses relying on the MRGO and could present serious problems for the movement of vital commodities. (Ex. 3 at xxiii-xxiv; Ex. 5 - Appendix P to the Integrated Final Report to Congress and Legislative Environmental Impact Statement for the Mississippi River – Gulf Outlet Deep-Draft De-Authorization Study at P-18.)

date of initial property damage to the point at which CSXT's revenues are restored "to the same level as would have existed had no loss occurred."

Global Trading (Fact Stip. ¶¶ 44-51) – The Hurricane-damaged CSXT property and cold storage facilities in Mobile, Alabama used by Global Trading have been repaired, and business has resumed between CSXT and Global Trading at an asserted reduced level. The Policies provide coverage for loss of revenue from the date of initial property damage to the point at which CSXT's revenues are restored "to the same level as would have existed had no loss occurred."

Calhoun Enterprises and Ona Foods (Fact Stip. ¶¶ 44-51) – The Hurricane-damaged CSXT property has been repaired but the Hurricane-damaged cold storage facilities used by these customers prior to Hurricane Katrina have not been repaired. The Policies provide coverage for loss of revenue from the date of initial property damage to the point at which CSXT's revenues are restored "to the same level as would have existed had no loss occurred."

Intermodal Management Services (in respect of IKEA) and Hub City (in respect of Georgia Pacific) (Fact Stip. ¶¶ 52-57) – The Hurricane-damaged CSXI property has been repaired, but the warehouse used by IKEA has not. The Policies provide coverage for loss of revenue from the date of initial property damage to the point at which CSXI's revenues are restored "to the same level as would have existed had no loss occurred."

Crowley Liner, Matson Intermodal and Birdsall Inc. (Fact Stip. ¶¶ 58-67) – The Hurricane-damaged CSXI property has been repaired, and certain business has

resumed between CSXI and these customers at an asserted reduced level. The Policies provide coverage for loss of revenue from the date of initial property damage to the point at which CSXI's revenues are restored "to the same level as would have existed had no loss occurred."

Gulf Atlantic Refining ("Gulf Atlantic") (Fact Stip. ¶¶ 68-71) – The Hurricane-damaged CSXT property has been repaired, but the facility used by Gulf Atlantic was also damaged by Hurricane Katrina and Gulf Atlantic never resumed operations at that facility after Hurricane Katrina. The Policies provide coverage for loss of revenue from the date of initial property damage to the point at which CSXT's revenues are restored "to the same level as would have existed had no loss occurred."

Luxco Wax Co. ("Luxco") (Fact Stip. ¶¶ 72-78) – The Hurricane-damaged CSXT property has been repaired, but the Pass Christian, Louisiana facility used by Luxco was also damaged by Hurricane Katrina and Luxco never resumed operations at that facility after Hurricane Katrina. The Policies provide coverage for loss of revenue from the date of initial property damage to the point at which CSXT's revenues are restored "to the same level as would have existed had no loss occurred."

Cargill Salt ("Cargill") (Fact Stip. ¶¶ 79-84) – The Hurricane-damaged CSXT property has been repaired, and business has resumed between CSXT and Cargill at an asserted reduced level. The Policies provide coverage for loss of revenue from the date of initial property damage to the point at which CSXT's revenues are restored "to the same level as would have existed had no loss occurred."

Thus, summary judgment should be entered for Plaintiffs on this count, and Insurer-Defendants' counterclaims should be denied as a matter of law.

IV. The Diesel Locomotive Claim.

A. Undisputed facts regarding CSXT's Diesel Locomotive claim.

In relevant part, the Property Damage portion of CSX-P2-05 sets forth the valuation method for diesel locomotive loss as follows:

> 7(A)(3) Valuation – the basis of adjustment shall be as follows:
>
> . . .
>
> (f) Rolling Stock - All questions affecting value, depreciation and repairs in connection with losses to rolling stock shall be settled as follows:
>
> i. Owned Rolling Stock
>
> Loss or damage to owned rolling stock, including locomotives, shall be adjusted at the replacement cost at the time of loss if actually replaced. If the above mentioned rolling stock is not replaced, the loss shall be adjusted at the actual cash value.
>
> With respect to Section (f) replacement cost shall mean the Insured's cost of units of like kind and quality on the date of the loss. If units of like kind and quality are neither in production nor available for purchase as new equipment, the Insured's cost of current similar types of units will be replacement cost.
>
> It is understood and agreed that in respect of loss to or claim for Diesel Locomotive(s) of a type or model no longer in manufacture, the loss settlement(s) shall be based [on] the cost of a new unit in current manufacture equal to or the next higher capacity than the involved unit.
>
> With respect to this Section (f) actual cash value of locomotives shall mean the replacement cost as defined above depreciated by straight line depreciation of 2.5% per year subject to a maximum depreciation of 25%. Actual cash value shall in no event exceed what it would then cost

> to repair or replace the lost or damaged property with material of like kind and quality.
> . . .
> Loss or damage to units will be considered as total when the cost of repair and/or replacement exceeds 80% of the replacement cost of that unit.

(Am. Compl. ¶¶ 33-34; Am Re Answer ¶¶ 33-34; Steadfast Answer ¶¶ 33-34, 61; Faraday/Aspen Answer ¶ 33-34; Ex. A to Fact Stip.)

Two of CSXT's diesel locomotives were damaged when they were partially submerged in water as a result of Hurricane Katrina. (Am. Compl. ¶ 32; Am Re Answer ¶ 32; Steadfast Answer ¶ 32; Faraday/Aspen Answer ¶ 32; Fact Stip. ¶ 15.) As of August 2005, B30 diesel locomotives were no longer in manufacture. (Am. Compl. ¶ 36; Steadfast Answer ¶ 36; Faraday/Aspen Answer ¶ 36; Fact Stip. ¶ 16.)

CSXT elected to replace both of the damaged B30 diesel locomotives. (Fact Stip. ¶ 18.) As replacements for the two B30 diesel locomotives, CSXT purchased two new diesel locomotives in current manufacture of the next highest capacity. (Am. Compl. ¶ 36; Steadfast Answer ¶ 36; Faraday/Aspen Answer ¶ 36; Fact Stip. ¶ 19.) The cost of the new locomotives is approximately $3,400,000 ($1,700,000 each), and CSXT has submitted a claim under CSX-P2-05 for the cost of these two new locomotives. (Fact Stip. ¶ 19; Am. Compl. ¶ 35; Am Re Answer ¶ 35; Steadfast Answer ¶ 35; Faraday/Aspen Answer ¶ 35.)

B. Summary judgment should be granted as to Count II of the Amended Complaint concerning CSXT's Diesel Locomotive losses.

The undisputed evidence demonstrates that CSXT is entitled to coverage for the cost of two new diesel locomotives in current manufacture of the next higher capacity

than the two B30 diesel locomotives damaged during Hurricane Katrina. The relevant facts are not in dispute; rather, the parties dispute the construction of the relevant policy language. Insurer-Defendants contend that the repair cost should be used to determine CSXT's loss because the policy language purportedly does not permit CSXT to replace a damaged diesel locomotive with a new locomotive unless there is a "total" loss. (Am Re Answer ¶ 56; Steadfast Answer ¶¶ 61, 63-64; Faraday/Aspen Answer ¶ 39.) However, the relevant policy language plainly and unambiguously supports CSXT's claim for the cost of two new diesel locomotives.

A court is to apply the plain meaning of unambiguous policy language and not rewrite an insurance policy to add terms or meaning that are not present. Med Imaging, 818 F. Supp. at 336. Insurance policies also should be read as a whole in order to give every provision its full meaning and operative effect. Auto-Owners, 756 So. 2d at 34.

A plain reading of the unambiguous language in CSX-P2-05 as a whole supports CSX's position and entitles Plaintiffs to summary judgment for the following reasons:

1. CSX-P2-05 requires adjustment based on "replacement cost" when damaged property is actually replaced.

Section 7(A)(3)(f)(i) of CSX-P2-05 provides the basis for adjustment of loss or damage to Owned Rolling Stock, which includes the two diesel locomotives at issue. Section 7(A)(3)(f)(i) states that losses in respect of Owned Rolling Stock "shall be adjusted at the *replacement cost* at the time of loss *if actually replaced.*" (Emphasis added.) Section 7(A)(3)(f)(i) continues: "If the above mentioned rolling stock is not replaced, the loss shall be adjusted at the actual cash value." By the plain terms of CSX-P2-05, "replacement cost" must be used in adjusting loss when Owned Rolling Stock is

actually replaced, and "actual cash value" is used in adjusting loss when Owned Rolling Stock is not replaced. Unlike other property insurance policies, the language of the Policies does not give the insurer the option of deciding which valuation method to use. Compare Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Serv., Inc., 765 So. 2d 836, 837 (Fla. Dist. Ct. App. 2000) (policy stated that the insurer had the option of paying, inter alia, the cost to repair or replace). Here, CSXT replaced the two damaged B30 diesel locomotives (Fact Stip. ¶ 18), and thus replacement cost and not actual cash value should be used in adjusting the loss.

2. CSX-P2-05 requires loss settlement based on the cost of new locomotives in current manufacture of the next higher capacity.

Section 7(A)(3)(f)(i) of CSX-P2-05 states that "in respect of loss to or claim for Diesel Locomotive(s) of a type or model no longer in manufacture, the loss settlement(s) shall be based [on] the cost of a new unit in current manufacture equal to or the next higher capacity than the involved unit." It is undisputed that as of August 2005, B30 diesel locomotives were no longer in current manufacture (Am. Compl. ¶ 36; Steadfast Answer ¶ 36; Faraday/Aspen Answer ¶ 36; Fact Stip. ¶ 16), so the plain and unambiguous policy language requires "loss settlement(s)" to be based on the cost of a new unit in current manufacture equal to or the next higher capacity. The parties agree that CSXT replaced the damaged B30 diesel locomotives with two new diesel locomotives in current manufacture of the next higher capacity. (Am. Compl. ¶ 36; Steadfast Answer ¶ 36; Faraday/Aspen Answer ¶ 36; Fact Stip. ¶ 19.)

3. In contrast to Section 7(A)(3)(f), Sections 7(A)(3)(e) and (h), provide for an optional adjustment basis using repair cost.

Reading the Policies as a whole, Section 7(A)(3)(f) differs materially from Sections 7(A)(3)(e) and (h) of CSX-P2-05, thus evidencing the parties' intent to provide broader replacement cost coverage for loss settlement concerning damaged diesel locomotives. Section 7(A)(3)(e) provides in relevant part

> Loss or damage to buildings, structures or other property shall be adjusted at the replacement cost on the date of loss *if actually repaired or replaced.* If any building or structure or other property is not repaired or replaced, loss shall be adjusted based on the actual cash value.

(Emphasis added.) Section 7(A)(3)(h) provides

> In case of loss or damage to any part of a machine or unit consisting of two or more parts when complete either for sale or use, the liability of the Insurer shall be limited to the value of the part or parts lost or damaged, or, at the Insured's option, to the cost and expense of *replacing or duplicating* the lost or damaged part or parts, or of *repairing* the machine or unit.

(Emphasis added.) These sections, unlike Section 7(A)(3)(f) for diesel locomotives, specifically provide for an optional adjustment basis of repair cost.

4. "Repair" cost is referred to under Section 7(a)(3)(f)(i) only in the context of determining the "actual cash value" for diesel locomotives that are not replaced.

The statement in Section 7(a)(3)(f)(i) of CSX-P2-05 that "[l]oss or damage to units will be considered as total when the cost of repair and/or replacement exceeds 80% of the replacement cost of that unit" relates solely to the calculation of "actual cash value." This is supported by the following structure and language of CSX-P2-05: (i) the location of the "total" loss provision within Section 7(a)(3)(f)(i); (ii) the language differences between Section 7(a)(3)(f)(i) and Sections 7(a)(3)(e) and (h); (iii) Section

7(a)(3)(f)(i) does not by its terms require a "total" loss in order to adjust loss on the basis of "replacement cost," so the concepts of "total" loss and an 80% threshold are meaningless in that context; (iv) the "cost of . . . replacement" should always equal 100% of the "replacement cost," so the standard would be met in all instances in which loss is adjusted on the basis of "replacement cost"; and (v) the 80% threshold for "total" loss is more reasonably explicable in the context of determining the "actual cash value" of a unit that is not actually replaced.

5. The use of the "total" loss threshold of 80% of replacement cost in Section 7(a)(3)(f)(i) cannot be read to apply when the insured replaces a damaged diesel locomotive with a new unit of the next higher capacity.

Unlike for other rolling stock in Section 7(a)(3)(f)(i) of CSX-P2-05 – where the "the cost of current similar types of units" may be considered in determining replacement cost – for diesel locomotives, Section 7(a)(3)(f)(i) uses the term "loss settlement(s)" rather than "replacement cost" in referring to "the cost of a new unit in current manufacture equal to or the next higher capacity than the involved unit." Thus, the subsequent statement in Section 7(a)(3)(f)(i) that "[l]oss or damage to units will be considered as total when the cost of repair and/or replacement exceeds 80% of the replacement cost of that unit" does not apply when loss settlement is based on the cost of a new diesel locomotive in current manufacture of the next higher capacity. In such case, there is no proper "replacement" cost to which an 80% threshold can be applied. Instead, loss settlement is based on the full cost of a new diesel locomotive in current manufacture equal to or the next higher capacity. Indeed, if the 80% "total" loss threshold applied in such situation, this would lead to the absurd result of calculating a "total" loss based on

the higher cost of a new diesel locomotive of the next higher capacity, rather than the cost of a similar type of diesel locomotive. This would force CSXT to "repair" even extensively damaged diesel locomotives simply because the high cost of a new diesel locomotive of the next higher capacity prevented CSXT from surpassing the 80% "total" loss threshold that Insurer-Defendants seek to impose.

This unambiguous policy language thus permits CSXT to replace the two damaged B30 diesel locomotives rather than repair them. Once CSXT replaced the two damaged B30 diesel locomotives, that cost – rather than repair cost or actual cash value – became the proper measure of valuation under Section 7(A)(3)(f)(i). Because the parties agree that as of August 2005, B30 diesel locomotives were no longer in manufacture (Am. Compl. ¶ 36; Steadfast Answer ¶ 36; Faraday/Aspen Answer ¶ 36; Fact Stip. ¶ 16), under Section 7(A)(3)(f)(i), loss settlement is measured as the cost of the two new diesel locomotives in current manufacture equal to or the next higher capacity. The parties agree that CSXT has submitted a claim for the cost of the two new locomotives in current manufacture of the next higher capacity. (Am. Compl. ¶ 35; Am Re Answer ¶ 35; Steadfast Answer ¶ 35; Faraday/Aspen Answer ¶ 35.) This claim is covered in full by the clear policy language, and summary judgment should be entered for Plaintiffs on this count.

V. The PwC Expenses Claim.

A. Undisputed facts regarding the PwC expenses claim.

Section 7(A)(1)(b) of CSX-P2-05 sets forth coverage for certain categories of losses, including "claims adjustments expenses." (Am. Compl. ¶ 43; Am Re Answer ¶

43; Steadfast Answer ¶¶ 43, 65; Faraday/Aspen Answer ¶ 43; Ex. A to Fact Stip.) CSX retained the consulting firm PwC to assist in the collection and analysis of data to help prepare CSX's Hurricane Katrina claim. (Fact Stip. ¶ 21.) Insurer-Defendants retained Jim Ratcliff of Ratcliff Property Adjusting to adjust CSX's claim on Insurer-Defendants' behalf. (Fact Stip. ¶ 23.) CSX submitted certain information and materials produced for CSX by PwC to Insurer-Defendants. (Fact Stip. ¶ 24.) At CSX's direction, PwC also provided Insurer-Defendants or their agents, including Mr. Ratcliff, with certain information and materials that they requested. (Fact Stip. ¶ 25.) CSX incurred fees and expenses for the work performed by PwC and has submitted the fees and expenses it paid to PwC as part of its insurance claim. (Fact Stip. ¶¶ 26, 27.)

B. Summary judgment should be granted as to Count III of the Amended Complaint concerning CSX's PwC expenses.

The relevant facts are not in dispute; rather, the parties dispute the construction of the relevant policy language. Insurer-Defendants contend that CSX-P2-05 does not cover any of the PwC expenses. (Am Re Answer ¶¶ 47, 57; Steadfast Answer ¶¶ 44, 47, 66; Faraday/Aspen Answer ¶¶ 44, 47.) However, the relevant policy language plainly and unambiguously supports CSX's claim for the PwC expenses.

A court is to apply the plain meaning of unambiguous policy language and not rewrite an insurance policy to add terms or meaning that are not present. Med Imaging, 818 F. Supp. at 336. Insurance policies also should be read as a whole in order to give every provision its full meaning and operative effect. Auto-Owners, 756 So. 2d at 34.

A plain reading of the unambiguous language in CSX-P2-05 as a whole supports CSX's position and entitles Plaintiffs to summary judgment. Section 7(A)(1)(b) provides

coverage for "claims adjustments expenses." The plain meaning of that term encompasses expenses incurred as part of the adjustment of a covered insurance claim. The undisputed facts presented above establish that the PwC expenses were incurred in connection with the adjustment of CSX's claim. Adjusting the claim has involved both Insurer-Defendants, through Ratcliff Property Adjusting, and CSX, through PwC.

Insurer-Defendants' contrary position makes little sense. Insurer-Defendants assert that the PwC expenses are not covered because Insurer-Defendants did not retain PwC as a claims adjuster. (Am Re Answer ¶¶ 44, 47, 57; Steadfast Answer ¶¶ 44, 47, 66; Faraday/Aspen Answer ¶¶ 44, 47.) However, the policy language refers to "claims adjustments expenses" – not "claims *adjuster* expenses." Indeed, it would make little sense to construe CSX-P2-05 as being limited to the expenses of *Insurer-Defendants'* claims adjuster because CSX would never incur those expenses and, as a result, could never recover anything under the cited provision of CSX-P2-05. Rather, the plain meaning of "claims adjustments expenses" includes expenses incurred in connection with the adjustment of the claim. As discussed above, based on the undisputed facts, the PwC expenses are such "claims adjustments expenses." Thus, summary judgment for Plaintiffs is proper.

CONCLUSION

WHEREFORE, CSX Corporation and CSX Insurance Company respectfully request that the Court (i) enter summary judgment in favor of Plaintiffs on Counts I, II and III of the Amended Complaint, (ii) enter summary judgment in favor of Plaintiffs on

the counterclaims of Insurer-Defendants and (iii) award Plaintiffs such other and further relief as this Court may deem just and proper.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument concerning their summary judgment motion. Plaintiffs estimate that no more than two (2) hours total are needed for oral argument of Plaintiffs' summary judgment motion together with oral argument concerning any summary judgment motion(s) filed by Insurer-Defendants. All parties moving for summary judgment plan to file a joint request to this effect.

Dated: January 23, 2009

Respectfully submitted,

CSX CORPORATION

By: s/John A. DeVault, III

John A. DeVault, III
Florida Bar No. 103979
R.H. Farnell, II
Florida Bar No. 0019267
Amanda Eaton Ferrelle
Florida Bar No. 0913251
BEDELL, DITTMAR, DeVAULT,
PILLANS & COXE, PA
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211
(904) 353-9307 (fax)
JAD@bedellfirm.com
RHF@bedellfirm.com
AEF@bedellfirm.com

and

John H. Mathias Jr.
David M. Kroeger
Brian S. Scarbrough
JENNER & BLOCK LLP
330 N. Wabash Avenue
Chicago, Illinois 60611
(312) 222-9350
(312) 527-0484 (fax)
Of Counsel

CSX INSURANCE COMPANY

By: s/Eric L. Leach

Eric L. Leach
Florida Bar No. 745480
MILTON, LEACH, WHITMAN,
D'ANDREA & MILTON, P.A.
815 South Main Street #200
Jacksonville, Florida 32207
(904) 346-3800
(904) 346-3692 (fax)
ELeach@miltonleach.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Eric L. Leach
eleach@miltonleach.com

William Roderick Lewis
wlewis@butlerpappas.com

Ira S. Bergman
ibergman@moundcotton.com

John Vincent Garaffa
jgaraffa@butlerpappas.com

Richard Kyle Gavin
kgavin@lgcglaw.com

Rutledge Richardson Liles
rliles@lgcglaw.com

I FURTHER CERTIFY that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Gretchen Henninger
Philip C. Silverberg
Mound Cotton Wollan & Greengrass
One Battery Park Plaza
New York, NY 10004

Catherine Mondell
Ropes & Gray, LLP
One International Place
Boston, MA 02110

John H. Mathias, Jr.
David M. Kroeger
John P. Wolfsmith
Brian S. Scarbrough
Jenner & Block, LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603

s/John A. DeVault, III
John A. DeVault, III
Florida Bar No. 103979
E-Mail: jdevault@bedellfirm.com
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307