UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CSX CORPORATION and
CSX INSURANCE COMPANY,

Plaintiffs,

v. CASE NO. 3:08-CV-00531-J-25MCR

NORTH RIVER INSURANCE COMPANY, AMERICAN RE-INSURANCE COMPANY, n/k/a MUNICH REINSURANCE AMERICA, INC., WESTCHESTER SURPLUS LINES INSURANCE COMPANY, STEADFAST INSURANCE COMPANY,[1] HARTFORD FIRE INSURANCE COMPANY, LANDMARK AMERICAN INSURANCE COMPANY, FARADAY CAPITAL LIMITED, and ASPEN INSURANCE UK LIMITED,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Plaintiffs CSX Corporation's and CSX Insurance Company's Motion for Summary Judgment, Memorandum in

[1] Plaintiffs' claims against Defendant Steadfast Insurance Company and Steadfast's Counterclaim against Plaintiffs were dismissed pursuant to the Court's April 8, 2009 Order (Dkt. 74).

Support and Request for Oral Argument[2] (Dkt. 60), Defendant-Insurers' Memorandum of Law in Opposition thereto (Dkt. 65), and Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment (Dkt. 71); Defendant-Insurers' Motion for Summary Judgment and Memorandum of Law in Support as to All Counts of Plaintiffs' Amended Complaint[3] (Dkt. 62), Plaintiffs' Memorandum in Opposition to Insurer-Defendants' Motions for Summary Judgment and Request for Oral Argument (Dkt. 67), and Defendant-Insurers' Reply Memorandum (Dkt. 70); and the parties' Joint Request for Oral Argument on Motions for Summary Judgment (Dkt. 64).

I. Background

Plaintiffs, CSX Corporation ("CSX") and CSX Insurance Company ("CSXIC") (collectively, "Plaintiffs"), bring this declaratory judgment action against Defendants, North River Insurance Company ("North River"),

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[2] Plaintiffs' Motion for Summary Judgment (Dkt. 60) is incorporated in Plaintiffs' Memorandum in Opposition to Insurer-Defendants' Motions for Summary Judgment and Request for Oral Argument (Dkt. 67). Therefore, the Court will consider the arguments made in Plaintiffs' Motion and Reply when it addresses Defendant-Insurers' Motion for Summary Judgment (Dkt. 62).

[3] Defendant-Reinsurers Faraday and Aspen's Motion for Summary Judgment as to their Counterclaim for Declaratory Judgment (Dkt. 63) incorporates Defendant-Insurers' Motion for Summary Judgment and Memorandum of Law (Dkt. 62) and, specifically, those portions that deal with the Time Element issue. Therefore, the Court will not separately address Defendant-Reinsurers Faraday and Aspen's Motion (Dkt. 63).

American Re-Insurance Company ("Am Re"), Westchester Surplus Lines Insurance Company ("Westchester"), Hartford Fire Insurance Company ("Hartford"), Landmark American Insurance Company ("Landmark"), Faraday Capital Limited ("Faraday"), and Aspen Insurance UK Limited ("Aspen") (collectively, "Insurer-Defendants" or "Defendants"), who provided property or reinsurance coverage to Plaintiffs from February 1, 2005 to February 1, 2006. (Dkts. 24 and 27.)

Plaintiffs' losses were caused by Hurricane Katrina in August 2005, which damaged the property of two CSX subsidiaries — CSX Transportation, Inc. ("CSXT") and CSX Intermodal, Inc. ("CSXI"). (Dkts. 24, 27, and 59.) By February 2006, major repairs to the property of CSXT and CSXI have been completed and, as of April 1, 2006, CSXT and CSXI have resumed unrestricted operations on all relevant lines. (Dkt. 59.) CSX submitted an insurance claim to Insurer-Defendants for both property damage and time element (business interruption). (*Id.*)

Plaintiffs' damaged property that is the subject of this action includes two B30 diesel locomotives owned by CSXT, which were partially submerged in water. (*Id.*) The total cost of repairing these locomotives was $1,600,000. (*Id.*) As of August 2005, they were no longer in manufacture. (*Id.*) CSXT

elected to replace them with two new diesel locomotives in current manufacture of the next highest capacity for a total cost of $3.4 million. (*Id.*) The parties dispute the construction of the policy form CSX-P2-05. (*Id.*)

Plaintiffs also seek declaratory relief concerning the expenses that were incurred in retaining the consulting firm PriceWaterhouseCoopers ("PwC") to assist in the collection and analysis of data to help prepare CSX's Hurricane Katrina claim. (*Id.*) Insurer-Defendants retained Jim Ratcliff of Ratcliff Property Adjusting to adjust CSX's claim on Insurer-Defendants' behalf. (*Id.*) CSX provided and directed PwC to provide Insurer-Defendants or their agents, including Mr. Ratcliff, with certain information and materials produced by PwC. (*Id.*) CSX submitted the fees and expenses it paid to PwC as part of its insurance claim, but the parties dispute whether these expenses constitute "claims adjustments expenses" under policy form CSX-P2-05. (*Id.*)

In addition, a portion of CSX's claim is presented under the Time Element provision (Section (7)(B)) of policy form CSX-P2-05 on a customer-by-customer basis and includes over one hundred customers. (*Id.*) The services that are subject of the Time Element claim are transportation services provided by CSXT or CSXI. (*Id.*)

II. Relevant Contractual Provisions

The insurance policy in this case, CSX-P2-05, provides in relevant part:

(1) INSURED CSX Corporation and all subsidiary or affiliated companies as now exist or are hereafter constituted, ATIMA.

(2) TERM This policy attaches at 12:01 a.m., Local Standard Time, February 1, 2005 and expires 12:01 a.m., Local Standard Time February 1, 2006.

. . .

(7) COVERAGE

(A) Property Damage

(1) This policy insures:

(a) the Insured's interest in all property owned, used, or intended for use by the Insured . . . . This policy also covers the Insured's interest in property of others . . . .

(b) the expense of debris removal, rerail, salvage, defense, claims adjustments expenses and rerouting of insured property damaged by an insured peril;

. . .

(3) Valuation - the basis of adjustment shall be as follows:

. . .

(e) 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. . . .

For the purposes of this section, replacement cost shall mean the full cost to repair or replace with like kind and quality on the date of loss. However, this Insurer's liability for loss on a replacement cost basis shall not exceed the smallest of the following amounts:

i. the amount of this policy applicable to the damaged or destroyed property; or

ii. the replacement cost of the property or any part thereof identical with such property and intended for the same occupancy and functional use; or

iii. the amount actually and necessarily expended in repairing or replacing said property or any part thereof.

For the purpose of this section, actual cash value shall mean full cost to repair or replace with like kind and quality with proper deduction for physical depreciation on the date of loss. . . .

(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 this Section (f) replacement cost shall mean the Insured's cost of units of like kind and quality on the date of 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 the [sic] 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.

The above notwithstanding, when values and expenses cannot be reasonably determined, all questions affecting values, depreciation, repairs, salvage, and dismantling costs shall be settled in accordance with the factors published by the Association of American Railroads in effect at the time of loss, or factors later put into effect retroactive to the time of loss.

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.

The basis of loss settlement for Leased or Rented rolling stock shall be the same as that for Owned Rolling Stock except to the extent of the Insured's liability therefor.

. . .

(h) 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.

. . .

(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.

. . .

(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 this policy;

. . .

(d) for a period of time equivalent to the time in which, with due diligence and dispatch, property in the course of construction, erection, installation or assembly could be repaired or replaced.

(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.

. . .

(9) PERILS EXCLUDED

This policy does not insure:

. . .

(H) Delay, loss of market, bankruptcy, foreclosure.

. . .

(15) ARBITRATION

> If the Insured and Insurers fail to agree on the amount of adjusted loss, each, upon the written demand either of the Insured or of Insurers made within thirty (30) days after receipt of proof of loss by the Insurer, shall select a competent and disinterested appraiser. The appraisers will then select a competent and disinterested umpire.

(Dkt. 59-2 (emphasis added).)

III. Summary Judgment Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show 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). Issues are genuine if a reasonable jury could find for the non-movant and facts are material if they can affect the outcome. *Scottsdale Ins. Co. v. Cutz, LLC*, 543 F. Supp. 2d 1310, 1313 (S.D. Fla. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

> The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. . . . Once the moving party has discharged its burden, the nonmoving party must designate specific facts showing that there is a genuine issue of material fact. . . . All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. The court may not weigh the credibility of the parties on summary judgment.

Id. (internal citations omitted). The movant need not negate the other party's

claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the nonmoving party fails to prove an essential element of its case, the movant is entitled to summary judgment. *Id.*

Where cross motions for summary judgment are filed, the "court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Scottsdale Ins. Co.*, 543 F. Supp. 2d at 1313-14 (internal quotations omitted). Cross-motions may be probative of the lack of a factual dispute if the parties generally agree on the material facts and controlling legal theories. *Id.* at 1314.

IV. Discussion

A. Time Element or Business Interruption Losses (Count I of the Amended Complaint)[4]

Defendants, North River, Am Re, Westchester, Hartford, Landmark, Faraday, and Aspen, argue that CSX's claim for "continuing" loss does not meet the plain requirements of the business interruption provision. (Dkt. 62.) Defendants assert that CSX must establish that (1) the property damage that

[4] Those parts of Defendant-Insurers' Motion for Summary Judgment (Dkt. 62) that deal with the Time Element issue are incorporated in Defendant-Reinsurers Faraday and Aspen's Motion for Summary Judgment as to their Counterclaim for Declaratory Judgment (Dkt. 63).

is alleged to have interrupted its business falls within one of the categories specified in the business interruption provision, (2) the property damage caused the suspension of business, (3) the suspension was a complete cessation of part of CSX's operations that prevented CSX from earning revenue, and (4) the claim extends no longer than the time hypothetically required to repair any covered property damage and restore the suspended operations plus such additional time as may be required to restore revenue. (Dkt. 70.)

Plaintiffs respond that the undisputed facts show: (i) Hurricane Katrina caused damage to covered property; (ii) CSXT and CSXI had business relationships with each of the fifteen customers at issue prior to Hurricane Katrina; (iii) business conducted by CSXT and CSXI with each of these fifteen customers was partially, completely, or potentially suspended as a result of the above property damage; (iv) since Hurricane Katrina, CSXT and CSXI have either not resumed business with the customers at issue or have resumed business at levels asserted to be lower than what would have existed had Hurricane Katrina not occurred; and (v) CSX suffered resulting loss. (Dkt. 71.) Plaintiffs explain that at issue here is that small number of their pre-Katrina business relationships that they were not able to resume to

the point required to restore revenue to the same level as would have existed had no loss occurred. (*Id.*) Plaintiffs also assert that the policies cover business interruption losses resulting not only from damage to the property of CSX, but also from damage to the property of third parties that are not directly related to CSX. (*Id.*)

Insurance contracts are interpreted as a whole and in context, and the plain language of the policy is followed unless the language is ambiguous, in which case it is construed in favor of the insured. *Swire Pac. Holdings, Inc. v. Zurich Ins.*, 845 So.2d 161, 165 (Fla. 2003). Whether a term is ambiguous is a question of law. *Escobar v. United Auto. Ins. Co.*, 898 So.2d 952, 954-55 (Fla. Dist. Ct. App. 2005). Language is not ambiguous for being complex or requiring analysis, but it is ambiguous for being "susceptible to more than one reasonable interpretation." *Swire*, 845 So.2d at 165. The absence of a definition does not make a term ambiguous, *Id.* at 166, but rather requires construction under its ordinary meaning, *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1188 (11th Cir. 2002). "Where a critical term is not defined in an exclusionary clause of the policy, it will be liberally construed in favor of an insured." *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 180 (Fla. Dist. Ct. App. 1997). Exclusionary clauses are

construed strictly, while coverage clauses are interpreted broadly to achieve the greatest possible coverage. *Id.* at 179. If a clause can be reasonably interpreted as both extending and excluding coverage, it will be construed as extending coverage. *Id.*

As a preliminary matter, Defendants correctly point out that some of the properties that were damaged by Hurricane Katrina are not covered under the Time Element provision because they do not fall under Section (7)(B)(1)(a), (d), (j), or (k). First, the cold storage facilities in Gulfport, Mississippi that were used by Global Trading, Calhoun Enterprises, and Ona Foods, were not owned, used, or intended for use by the Insured, were not appurtenant to the premises of the Insured, and were not the property of Global Trading, Calhoun Enterprises, or Ona Foods. (*See* Dkt. 59.) Therefore, these facilities are not property covered under Section (7)(B)(1).

Similarly, the warehouse facility located in Pearlington, Mississippi is not a covered property under the Time Element provision as it was used, but not owned, by IKEA, whose products were transported by Intermodal Management Services ("IMS"), a customer of CSXI.[5] (*Id.*) The MRGO is also

[5] Plaintiffs' Memorandum in Opposition to Insurer-Defendants' Motions for Summary Judgment indicates that the facility in Pearlington, Mississippi was used by "IMS i.r.o. IKEA." (Dkt. 67.)

not covered under the Time Element provision because it was used, but not owned, by Lone Star. (*See* Dkts. 60-3, 62, and 67.) Further, since "[n]o property of Crowley, Matson or Birdsall experienced loss, damage or destruction as a result of Hurricane Katrina" (Dkt. 59), Plaintiffs also cannot recover for the effect of Hurricane Katrina on the business relationships between these three entities and CSXI. In addition, the Pass Christian, Mississippi facility used by Luxco Wax Co. ("Luxco") does not qualify as covered property under the Time Element provision because it was not owned by Luxco. (*See id.*)

In contrast, the Gulf Atlantic facility in Mobile, Alabama that was damaged as a result of Hurricane Katrina was owned by Gulf Atlantic Refining ("Gulf Atlantic"). (*See id.*) The Stipulated Facts demonstrate, however, that the Gulf Atlantic facility went out of business in September 2005 and Gulf Atlantic filed for bankruptcy in November 2006. (*Id.*) Importantly, Plaintiffs have not demonstrated that the suspension of business was "caused by loss, damage, or destruction to [Gulf Atlantic's property]" due to Hurricane Katrina as required by Section (7)(B).

The exhibits filed in this case show that Gulf Atlantic's "performance was prevented or delayed by two events that . . . are force majeure

events—hurricane Emily and hurricane Katrina." (Dkt. 69-2.) Moreover, the complaint filed by CSX Transportation, Inc. against Gulf Atlantic indicates that Gulf Atlantic breached their contract for the twelve-month period ending on December 31, 2005. (Dkt. 61-2.) In sum, Plaintiffs have not demonstrated that Hurricane Katrina was the sole, or even predominant, cause for the suspension of business. *See Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co.*, 127 F. Supp. 2d 1239, 1242-43 (S.D. Fla. 1999) ("Dictiomatic failed to prove that but/for the 20 day suspension of operations, it sustained an actual loss of business income which was caused solely by the hurricane and not by other factors.").

With respect to Cargill Salt ("Cargill"), the property that was damaged belonged to CSXT and, thus, it seems to qualify as covered property under Section (7)(B)(1)(a). The Stipulated Facts demonstrate that by December 2005 the "damage to CSXT property that was used to provide services to Cargill" was repaired, but that "Cargill's demand for CSXT's services has not returned to the level that CSXT believes would have existed in the absence of Hurricane Katrina." (Dkt. 59 (emphasis added).)

The Court notes that to the extent Plaintiffs seek to recover for the lessened demand for CSXT's services, there could be no recovery under the

Time Element provision because the lessened demand does not constitute a suspension of business. *See Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 813 (11th Cir. 1988) (affirming the district court's judgment that "the hotel's decrease in room occupancy due to the loss of its restaurant by fire is not a covered loss under the defendant insurance company's business interruption policy"); *see also Apt. Movers of Am., Inc. v. Onebeacon Lloyd's of Tex.*, 2005 U.S. Dist. LEXIS 695, at *9 (N.D. Tex. Jan. 19, 2005) (stating that suspension of operations "must come, not from a lack of customer demand, but of an inability to meet customer demand"); *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 991 (D. Kan. 1995) (explaining that suspension means "a temporary, but complete, cessation of activity" and concluding the insured is not entitled to coverage on its claim for loss of business income because the policy requires "necessary suspension" rather than "a slowdown or reduction in operations").

On the other hand, to the extent CSX seeks to recover for interruption to the business of CSXT and CSXI based on the damage to their property,[6]

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[6] The Stipulated Facts demonstrate that Hurricane Katrina caused damage to "certain CSXT property that was used to provide services to Lone Star, which was repaired by February 2006" (¶ 35), "CSXT property that was used to provide services to Global Trading, which was repaired by September 2005" (¶ 47), "CSXT property that was used to provide services to Calhoun Enterprises and Ona Foods, which was repaired by February 2006" (¶ 47), "CSXI property that was used to provide shipping

Defendant-Insurers state they have paid that portion of CSX's claim. (Dkt. 70.) Plaintiffs counter that "Insurer-Defendants' contention that CSX has been 'fully compensated' by CSX's insurers and CSXIC's reinsurers for its business interruption loss 'linked to CSX's property damage through March 2006' finds no support in the stipulated facts." (Dkt. 71.) Plaintiffs point out that paragraph 13 of the Fact Stipulation, which does not include Defendants Faraday and Aspen, shows only that portions of CSX's time element claim have been paid. (*Id.*) Defendant-Insurers respond that "[t]o the extent there is any dispute as to the details of the measurement linked to damage to property of CSX and its subsidiaries, the parties have agreed those matters are to be submitted to appraisal." (Dkt. 65.)

Paragraph 13 of the Stipulated Facts provides that "[t]o date, the Insurer-Defendants participating on the third layer of insurance and/or reinsurance have paid portions of the Hurricane Katrina claim submitted by CSX, involving both property damage and portions of CSX's time element

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services to IMS . . . and Hub City . . ., which was repaired by February 2006" (¶ 55), "CSXI property that was used to provide shipping services to Crowley, Matson and Birdsall, which was repaired by February 2006" (¶ 62), "CSXT property that was used to provide shipping services to Gulf Atlantic, which was repaired by September 2005" (¶ 69), "CSXT property that was used to provide shipping services to Luxco, which was repaired by February 2006" (¶ 76), and "CSXT property that was used to provide services to Cargill, which was repaired by December 2005" (¶ 82). (Dkt. 59.)

claim." (Dkt. 59.) Section 15 of the policy provides that in the event "the Insured and Insurers fail to agree on the amount of adjusted loss, each . . . shall select a competent and disinterested appraiser." (Dkt. 59-2.) Although the Stipulated Facts show that CSX has been paid for *portions* of its Time Element claim (Dkt. 59), it is unclear whether those portions include, in whole or in part, the business interruption losses incurred as a result of damage to the property of CSXT and CSXI. Therefore, a genuine issue of a material fact exists and summary judgment will not be entered in favor of either party on this particular question.

In sum, as to Count I, Defendants' Motions for Summary Judgment (Dkts. 62 and 63) are due to be denied with respect to the issue of recovery for interruption to the business of CSXT and CSXI based on damage to their property, and the Motions are due to be granted with respect to the remaining issues. Plaintiffs CSX Corporation's and CSX Insurance Company's Motion for Summary Judgment (Dkt. 60) is due to be denied as to Count I.

B. Diesel Locomotive Losses (Count II of the Amended Complaint)

Defendants claim that as to a damaged locomotive, the policy contemplates either repair, replacement, or payment of actual cash value. (Dkt. 62.) Defendants argue that as a threshold matter it must be determined

whether the locomotive is a "total" loss. (Dkt. 65.) If the damage does not exceed 80% of a unit of like kind and quality, the locomotive is not a "total" loss and, therefore, the Insured is entitled to the cost of repair. (Dkts. 62 and 65.) Because the damage here did not exceed 80%, Defendants argue CSX is entitled to the cost of repair. (*Id.*)

Plaintiffs respond that Section (7)(A)(3)(f)(i) allows only two possible outcomes — replacement or actual cash value. (Dkts. 67 and 71.) Since CSXT replaced the two locomotives, Plaintiffs assert they are entitled to replacement costs. (Dkt. 60.) Unlike Sections (7)(A)(3)(e) and (7)(A)(3)(h), Plaintiffs argue Section (7)(A)(3)(f) does not provide for adjustment based on repair. (Dkts. 67 and 71.) Plaintiffs also claim that the reference to total loss in Section (7)(A)(3)(f)(i) does not bar recovery because, *inter alia*, the reference appears in that part of the section that shows how to calculate the actual cash value of diesel locomotives that are not replaced. (Dkt. 67.)

The plain language of Section (7)(A)(3)(f)(i) provides that "[l]oss or damage to owned rolling stock, including locomotives, shall be adjusted at the replacement cost at the time of loss if actually replaced." (Dkt. 59-2 (emphasis added).) This language does not require the loss or damage to be

total.[7] *Cf. Compagnie Des Bauxites De Guinee v. Three Rivers Ins. Co.*, 2:04-CV-393, at *15 (W.D. Penn. June 7, 2007) ("The parties likewise carefully segmented those forms of property loss that would be valued at replacement cost new, regardless of whether such property could be repaired."). Therefore, when CSXT elected to replace the two diesel locomotives that were damaged, it was entitled to the replacement cost at the time of loss.

The replacement cost is defined as "the Insured's cost of units of like kind and quality on the date of loss," but where, as here, there is a "loss to or claim for Diesel Locomotive(s) of a type or model no longer in manufacture, the loss settlement(s) shall be based the [sic] cost of a new unit in current manufacture equal to or the next higher capacity than the involved unit." (Dkt. 59-2.) Because CSXT was entitled to receive the cost of a new unit in current manufacture equal to or the next higher capacity than the involved unit and CSXT purchased two new diesel locomotives in current manufacture of the

[7] Section (7)(A)(3)(f)(i) contains only one reference to "total" loss or damage. The sentence that contains the reference states as follows: "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." (Dkt. 59-2 (emphasis added).) It is unclear how the cost of replacement can exceed 80% of the replacement cost. In light of this ambiguity, which must be construed in favor of the Insured, the lack of any other reference to total loss or damage in Section 7(A)(3)(f)(i), and the plain language of Section 7(A)(3)(f)(i), the Court finds Defendants' argument that CSX is entitled only to the cost of repair because the damage did not rise above the 80% threshold, to be unpersuasive.

next highest[8] capacity, the plain language of Section (7)(A)(3)(f)(i) requires that CSXT be reimbursed for the replacement costs.

In sum, as to Count II of Plaintiffs' Amended Complaint, Defendant-Insurers' Motion for Summary Judgment (Dkt. 62) is due to be denied and Plaintiffs CSX Corporation's and CSX Insurance Company's Motion for Summary Judgment (Dkt. 60) is due to be granted.

C. PwC Expenses (Count III of the Amended Complaint)

Defendants argue CSX should not be allowed to recover for its claim preparation expenses because the term "adjustment" is an activity undertaken on behalf of the Insurers in response to a claim prepared and submitted by the Insured. (Dkt. 65.) Defendants also point out there has been no contention that PwC was acting as a public adjuster or was qualified and licensed to do so. (Dkt. 70.)

Plaintiffs respond the plain meaning of the term "adjustments" is not restricted to activity undertaken on behalf of the Insurers in response to a claim submitted by the Insured, but rather includes the preparation of a claim

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[8] Although the Stipulated Facts include the phrase "next highest capacity," rather than "next higher capacity" as required by Section (7)(A)(3)(f)(i), the Court believes the parties actually intended to use the word "higher" due to their use of the word "next" and also because neither party argues the two new locomotives were not of the "next higher capacity."

on behalf of a policyholder. (Dkts. 67 and 71.) Plaintiffs also argue that it would make little sense to construe the policy as being limited to the expenses of Insurer-Defendants' claims adjuster because CSX would never incur those expenses. (Dkt. 60.)

Section (7)(A)(1)(b) provides that "claims adjustments expenses" are insured under the policy. (Dkt. 59-2.) The term "adjustments" is not defined in the policy; therefore, it will be construed under its ordinary meaning. *See Hyman*, 304 F.3d at 1188. "In the insurance industry, the phrase 'loss adjustment expenses' generally means the expense incurred by the insurer to investigate and settle a claim." *Woodliff v. Cal. Ins. Guar. Ass'n*, 3 Cal. Rptr. 3d 1, 3 (Cal. Ct. App. 2003). "Simply stated, an insured does not incur loss adjustment expenses because the insured does not initiate or control the loss adjustment process." *Id.*

Under Florida law, a qualified person can be either a public adjuster, an independent adjuster, or a company employee adjuster. Fla. Stat. § 626.864 (1990). "A 'public adjuster' is any person . . . who . . . prepares, completes, or files an insurance claim form for an insured . . . ." Fla. Stat. § 626.854 (2009). The "public adjuster is the only one who is limited by definition to act on behalf of an insured. The [other types of adjusters], by definition,

represent insurers." *Larson v. Lesser*, 106 So.2d 188, 190 (Fla. 1958).

In the present case, the Stipulated Facts show that PwC is a consulting firm, not an adjuster, and that it was retained by CSX. (*See* Dkt. 59.) In order to recover its expenses, CSX needs to show PwC is a public adjuster. Since CSX has failed to demonstrate that, it is not entitled to recover its expenses.

In sum, as to Count III of Plaintiffs' Amended Complaint, Defendant-Insurers' Motion for Summary Judgment (Dkt. 62) is due to be granted and Plaintiffs CSX Corporation's and CSX Insurance Company's Motion for Summary Judgment (Dkt. 60) is due to be denied.

Accordingly, it is **ORDERED**:

1. Plaintiffs CSX Corporation's and CSX Insurance Company's Motion for Summary Judgment (**Dkt. 60**) is **GRANTED in part and DENIED in part**. The Motion is granted as to Count II and denied as to Counts I and III.

2. Defendant-Insurers' Motion for Summary Judgment (**Dkt. 62**) is **GRANTED in part and DENIED in part**. As to Count I, the Motion is denied with respect to the issue of recovery for interruption to the business of CSXT and CSXI based on damage to their property, and granted with respect to the remaining issues in Count I. The Motion is denied as to Count II and granted

as to Count III.

3. Defendant-Reinsurers Faraday and Aspen's Motion for Summary Judgment as to their Counterclaim for Declaratory Judgment (**Dkt. 63**) is **GRANTED in part and DENIED in part.** The Motion is denied with respect to the issue of recovery for interruption to the business of CSXT and CSXI based on damage to their property, and granted with respect to the remaining issues.

4. The Joint Request for Oral Argument on Motions for Summary Judgment (**Dkt. 64**) is **DENIED**.

DONE AND ORDERED this 25 day of September, 2009.

HENRY LEE ADAMS, JR.
United States District Judge

Copies to: Counsel of Record