IN THE 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. Magistrate Judge Monte C. Richardson **ORAL ARGUMENT REQUESTED**

DEFENDANT-INSURERS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT
AS TO ALL COUNTS OF PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

In late August 2005, the property of two of CSX Corporation subsidiaries, CSX Transportation, Inc. ("CSXT") and CSX Intermodal, Inc. ("CSXI") sustained physical damage during Hurricane Katrina. These CSX entities ("CSX") submitted claims under their property insurance policies, and CSX's insurers and reinsurers of CSX's captive insurer, CSX Insurance Company, have paid nearly $400 million for covered property damage and business interruption. Nevertheless, CSX submits three additional claim components (for many millions of dollars more) that are not insured under its property insurance policies and on which summary judgment is appropriate:

First, CSX argues that it should be entitled to recover tens of millions of dollars for what it alleges are "continuing" (and unbounded) losses of revenue associated with fifteen current or former CSX customers. The CSX Policy Form[1] provides for business interruption

[1] The CSX Policy Form, CSX-P2-05, is attached to the Stipulated Facts [Doc. No. 59] as Exhibit A. Plaintiff CSX Corporation negotiated this property insurance policy form with its own captive insurer, CSX Insurance Company (also a Plaintiff here), to cover the period from Feb. 1, 2005 to Feb. 1, 2006. The insurer and reinsurer defendants each issued separate policies for participation on excess layers of CSX's property insurance program either as direct insurers of CSX Corporation or as reinsurers of CSX Insurance Company. Although certain points vary among the separate policies issued, the parties have stipulated for purposes of this motion that the policies of insurance at issue incorporate all relevant terms of the CSX Policy Form.

insurance when "loss, damage or destruction" to certain specifically identified categories of property cause a "partial, complete or potential *suspension*" of CSX's business and "*prevent*" it from earning revenue. *See infra*, pp. 5-6. The purpose of business interruption insurance (as recognized in the Eleventh Circuit and elsewhere) and the language of the policy provision read as a whole serve to underscore and reinforce these straightforward requirements, and dictate that a mere lessening in demand for an insured's services is not covered. *See infra*, pp. 6-17. Despite this unambiguous wording, and against the great weight of authority, CSX argues that it should be permitted to recover for an alleged lessening in demand from these fifteen entities, even though (i) the undisputed facts demonstrate that these fifteen entities were able to conduct business with CSX at pre-Katrina levels, but elected not to do so for business reasons of their own; and (ii) the theory CSX relies upon would create unbounded – and therefore impermissibly speculative – claims. *See infra*, pp. 17-20. Such a claim is not covered under CSX's property insurance policies.

Second, CSX seeks to recover from its insurers the costs it incurred when it hired PriceWaterhouseCoopers ("PWC") to assist with its insurance claim *preparation*, arguing that such amounts constitute "claims *adjustments* expenses" and are therefore recoverable under the CSX Policy Form. However, claim adjustment (by insurers and their representatives) is a process that occurs in response to, and separate from, claim preparation (by an insured and their representatives). CSX's property insurance policies do not provide coverage for the claim preparation fees CSX's consultants charged CSX to assemble – and maximize – CSX's insurance claim. *See infra*, pp. 21-22.

Third, CSX argues that it should be entitled to recover the *entire* cost of *new* diesel locomotives whenever any locomotive sustains any degree of damage, no matter how minor. CSX's property insurance policies provide for recovery of replacement costs in certain circumstances, namely when there is a "total loss," defined as occurring when the "cost of repair and/or replacement exceeds 80% of the replacement cost of that unit." CSX continues to press its facially flawed claim despite conceding that this definition of "total loss" is not met. On the undisputed facts, CSX's property insurance policies provide coverage for the estimated cost of repair – not the entire cost of two new locomotives. *See infra*, pp. 23-25.

As to each of these three claim components, summary judgment is appropriate to confirm that they are not insured under a plain reading of the policy provisions at issue.

STATEMENT OF FACTS

The material facts necessary to the resolution of this motion are undisputed and contained in the Stipulation filed with the Court on December 24, 2008 [Doc. No. 59] ("Stip. Facts"). For the Court's convenience, a brief summary of the relevant policy provisions and facts of CSX's claim appears at the outset of each of the three argument sections below.

ARGUMENT

Summary judgment will be granted when "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 a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P.

56(c)).[2] It is well-settled that the interpretation of insurance policy provisions is a matter of law for the Court to decide. *Jones v. Utica Mut. Ins. Co.*, 463 So. 2d 1153, 1157 (Fla. 1985); *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. Dist. Ct. App. 2002). Equally well-settled precedent establishes that insurance policy provisions must be read plainly, in a manner that gives force and effect to all provisions, and avoids strained, forced, or unrealistic constructions and unreasonable results. *See, e.g.*,[3] *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165-66 (Fla. 2003); *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 739 (Fla. 2002); *Gen. Star Indem. Co. v. W. Fla. Village Inn, Inc.*, 874 So. 2d 26, 29-30 (Fla. Dist. Ct. App. 2004). Under these well-recognized standards, summary judgment is appropriate on each of the three components of CSX's claim at issue.

I. CSX'S CLAIM FOR "CONTINUING" LOSS DOES NOT MEET THE PLAIN REQUIREMENTS OF THE BUSINESS INTERRUPTION PROVISION

CSX asserts that it has certain "continuing" losses associated with fifteen entities that had used CSX's services prior to Hurricane Katrina[4], and seeks to recover from its property insurers the entire difference between each entity's actual demand for CSX's services post-Katrina and the revenue CSX hoped to generate from them. This assertion is made, however, without regard to whether the alleged lessening in demand was due to insured property

[2] More specifically, Federal Rule of Civil Procedure 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and *on which that party will bear the burden of proof at trial*." *Chapman v. Am. Cyanamid Co.*, 861 F.2d 1515, 1518 (11th Cir. 1988) (citations omitted) (emphasis added). As the insured, CSX bears the burden of proof to show that its claims fall under the ambit of the provisions in its insurance policies. *Citizens Prop. Ins. Corp. v. Manning*, 966 So. 2d 486, 488 (Fla. Dist. Ct. App. 2007).

[3] Although Florida choice of law principles would direct the Court to consider the place of contracting if a conflict of laws existed, no such conflict has been identified with respect to the basic principles of contract interpretation cited herein.

[4] The one exception is CSX's assertion of "continuing" losses associated with Air Products. CSX does not assert that it would have provided services to Air Products in the future, but *assumes* that Lone Star *would have* picked up Air Products' business once it went out of business for reasons unrelated to Hurricane Katrina. *See* Stip. Facts ¶ 38.

damage and without recognition of any outer bound in the policies on the time such a claim might extend. CSX's claims related to these fifteen entities do not meet the plain requirements of the business interruption provision.

A. Undisputed Facts Regarding The "Continuing" Loss Claim Component

1. *The Requirements Of The Business Interruption Provision*

The CSX Policy Form incorporated in CSX's property insurance policies includes provisions that provide coverage for damage to CSX property, as well as for Time Element (aka: business interruption) losses from a suspension of business that directly results from specified property damage. Stip. Facts, Ex. A ("CSX Policy Form") ¶¶7.A & 7.B.

The business interruption provision states:

> (1) This policy insures loss resulting from partial, complete, or potential *suspension of business conducted by the Insured* . . . caused by loss, damage, or destruction to [an enumerated list of the Insured's real and personal property interests].

Id. ¶¶7.B.1(a)-(k) (emphasis added). This provision further states that it does not insure against, "any increase in loss which may be occasioned by:"

> (a) the suspension, lapse or cancellation of any lease, license, contract or order *unless* such suspension, lapse or cancellation results *directly from the interruption of business*.

Id. ¶7.B.2(a) (emphasis added). Additionally, any loss must be adjusted based on:

> (a) the *ACTUAL LOSS SUSTAINED* by the Insurer, consisting of the *net profit which is thereby prevented from being earned* . . . only to the extent that they must necessarily continue during the partial, complete, or potential suspension of business, and *only to the extent to which they would have been earned had no loss occurred*.

Id. ¶7.B.3(a) (emphasis added).

If the business interruption provision is determined to apply, it shall be measured based on a period:

> (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. . . .;
>
> . . .
>
> (e) for such additional time as may *be required* to restore revenue to the same level as would have existed had no loss occurred. . . .

Id. ¶¶7.B.4(a) & (e) (emphasis added).

2. *CSX's "Continuing" Loss Claim Is One For Lessened Demand*

CSX has already recovered its business interruption claim for the period of time from August 2005 to April 2006 when its two subsidiaries, CSXT and CSXI, were repairing their property and ramping up to unrestricted operations on all relevant lines. Stip. Facts ¶¶ 9-13. Certain of CSX's customers experienced property damage that took slightly longer to repair, and where that was the case, CSX has also recovered its contingent business interruption claim for those time periods.

CSX's "continuing loss" claim is specific to fifteen customers that – for a variety of reasons[5] – *elected* not to do business with CSX at the same levels after Hurricane Katrina that they had elected to do business with CSX before the storm. *Id.* ¶¶ 29-85. CSX concedes that as of June 2006[6], there was no unrepaired property of CSX[7] and no unrepaired property of

[5] *See, e.g.*, Stip. Facts ¶ 41 ("Air Products ceased operations in December 2005 *for reasons unrelated to Hurricane Katrina*"); ¶ 50 (Calhoun Enterprises, Ona Foods and Global Trading elected to use third-party cold storage facilities "located in different geographic areas" to ship their frozen chicken products); ¶ 56 (relocation of a third-party warehouse facility); ¶ 70 (bankruptcy filing).

[6] Claim amounts have been paid for business interruption during the period when either CSX or the entity in question was in the process of repairing property or resuming operations at levels that would have generated revenue at pre-Katrina levels.

[7] CSX concedes that all property of CSXT and CSXI was repaired no later than February 2006, Stip. Facts ¶ 10, and that it has resumed unrestricted operations on all relevant lines shortly thereafter. *Id.*

these fifteen entities that prevented them from conducting business at pre-Katrina levels.[8] Indeed, the facts further establish that CSX resumed serving many of these entities shortly after any relevant property damage had been repaired.[9] Nevertheless, CSX seeks to recover for what it asserts is the continuing "impact" of Hurricane Katrina on the "demand for [its subsidiaries'] services" – even after all relevant property damage was repaired and CSX was fully capable of generating revenue from these customers at pre-Katrina levels.[10] CSX takes the position that the policies insure for whatever period of time it wishes – in many instances submitting calculations stretching for more than a decade after Hurricane Katrina, *see* Answer & Counterclaim of Faraday & Aspen [Doc. No. 28] ¶ 11 at p. 15 – even when the potential customers in question are still shipping products and have simply chosen to use a CSX competitor for their shipping needs. Stip. Facts ¶¶ 50, 57, 61.

CSX has never yet explained its position in writing, but has indicated it relies on a clause within the business interruption provision, stating that – if a covered claim is established – the loss shall be computed for the hypothetical period from the time of the

[8] *See* Stip. Facts ¶¶ 36-37 (Lone Star property repaired by May 2006, and CSXT providing services to LoneStar as of June 2006); ¶¶ 42-43 (no damage to property of Air Products); ¶ 48 (no damage to property of Global Trading, Calhoun Enterprises or Ona Foods); ¶¶ 55-56 (no damage to property of IMS or Hub City; the only damage identified by CSX is to a third-party warehouse used by a customer of IMS); ¶ 63 (no damage to property of Crowley, Matson or Bridsall); ¶ 73 (no damage to property of Luxco; the only damage identified by CSX is to a third-party facility); ¶ 84 (no damage to property of Cargill).

[9] *See* Stip. Facts ¶ 37 (providing services to: Lone Star's "emerging markets" as of March 2006); ¶ 37 (providing services to Lone Star's phosphates operations at Michoud as of June 2006); ¶ 51 (providing services to Global Trading as of September 2005); ¶¶ 64-66 (providing services to Crowley as of March 2006, to Matson as of April 2006, and to Birdsall as of March 2006); ¶ 83 (providing services to Cargill as of December 2005).

[10] *See, e.g.*, Stip. Facts ¶ 37 (" Lone Star's demand for CSXT's services was impacted by Hurricane Katrina and has not returned to the level that CSX believes would have existed. . . ."); ¶ 51 ("Global Trading's demand for CSXT's services was impacted. . . ."); ¶ 64 ("Crowley's demand for CSXI's services was impacted by Hurricane Katrina. . . ."); ¶ 65 ("Matson's demand for CSXI's services was impacted. . . ."); ¶ 66 ("Birdsall's demand for CSXI's servies was impacted. . . ."); ¶ 83 ("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. . . ."). As a whole, CSX's operations and gross revenue have been at record-high levels in the years following Hurricane Katrina. CSX Corporation's operating revenue for 2006 showed a record increase of 11%. *See* CSX Corp. 2007 10-K at p. 24, *available at* http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-sec.

occurrence "to the time when with due diligence and dispatch the property could be repaired and restored to normal operations" and "for such additional time as may be required to restore revenue to the same level as would have existed had no loss occurred." CSX Policy Form ¶¶7.B.4(a) & (e). CSX focuses only on the phrase "restore revenue to the same level as would have existed had no loss occurred" and submits that this should be read in isolation as an unbounded guarantee of its revenue stream from the fifteen entities in question, continuing on – without limitation – even after any property damage that prevented normal operations or revenue generation had been fully repaired.

B. Plain Requirements Of The Business Interruption Provision Must Be Enforced

A plain reading of the business interruption provision as a whole allows for coverage when "loss, damage or destruction" to certain specifically identified categories of property cause a "partial, complete or potential *suspension*" of CSX's business and "*prevent[]*" it from earning revenue. *See supra*, pp. 5-6. Such a reading of the provision's requirements is (i) consistent with the purposes of business interruption insurance, (ii) gives meaning to the plain language of all of the clauses within the business interruption provision, and (iii) leads to a measurable claim and a reasonable overall result, as required under well-established case law. S*ee, e.g., Swire Pac. Holdings, Inc.*, 845 So. 2d at 165-66; *Siegle*, 819 So.2d at 739.

1. ***It Is Well-Established That The Purpose Of Business Interruption Insurance Is <u>Not</u> To Act As A Guarantee Of Financial Performance***

The Eleventh Circuit recognizes that the well-established purpose of a business interruption provision in a property insurance policy is to provide insurance for the loss of business revenue due to a physical loss to insured property and the resulting suspension of

operations. *See Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 813-14 (11th Cir. 1988). In this role, a business interruption provision provides a defined extension of insurance against property damage, where that damage causes a suspension of the insured's business that *prevents* the earning of revenue. *See, e.g.*, *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 991-92 (D. Kan. 1995) (collecting cases holding that a cessation of the insured's business is required to establish a recoverable business interruption claim, and that a mere lessening in demand is insufficient to do so).

A business interruption provision does *not* serve to improve the insured's financial performance by guaranteeing a level of revenue in an otherwise competitive and variable industry, *see Ramada Inn Ramogreen, Inc.*, 835 F.2d at 813-14, and is *not* to be construed to place an insured in a better position than had the interruption not occurred by eliminating the risk of such market variability. *See Cotton Bros. Baking Co., Inc. v. Indus. Risk Insurers*, 941 F.2d 380, 385 (5th Cir. 1991) ("Although the [business interruption clause in the policy] is designed to protect the insured, it is also designed to prevent the insured from being placed in a *better* position than if no loss or interruption of business had occurred."); *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 127 F. Supp. 2d 1239, 1243 (S.D. Fla. 1999) ("law is ... well established that business interruption insurance may not be used to put [an insured] in a better position than it would have occupied without the interruption); 33 Appleman on Ins. 2d § 196.02[H] (2008).

Courts routinely dispense with arguments – such as those advanced by CSX – seeking to turn business interruption insurance into a financial guarantee, rejecting claims such as those seeking unbounded periods of business interruption or a guaranteed revenue stream

from customers at a specific site. *See, e.g.*, *Pennbarr Corp. v. Ins. Co. of N. Am.*, 976 F.2d 145, 152 (3d Cir. 1992) (holding that a reading of a business interruption provision must be rejected as unreasonable where it "eliminates any outside time limit for the bringing of a claim of loss under the policy"); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 396 (2d Cir. 2005) (". . . it would be entirely unreasonable to interpret the [period of recovery] to include the time it would take for [the insured] to resume operations [at a specific site]" where that site was not mentioned in the policy); *Streamline Capital, L.L.C. v. Hartford Cas. Ins. Co*., No. 02 Civ. 8123(NRB), 2003 WL 22004888, at *8 (S.D.N.Y. Aug. 25, 2003) (holding, where business interruption applies to suspension of insured's business operations, that the conclusion of the period of interruption "is dependent only on replacing what is necessary to resume those operations . . . not a specific office at a specific location."). This Court should not depart from these well-established principles of business interruption insurance to adopt CSX's strained reading, but instead should enforce the plain requirements of the provision at issue.

2. *The Business Interruption Provision Requires "Suspension" Of Business During Which Revenue Is "Prevented" From Being Earned; A Lessening In Demand Is Not Insured*

Consistent with the recognized purpose of business interruption insurance set forth above, the threshold and defining paragraph of the business interruption provision in the CSX Policy Form states that it insures against a "loss resulting from partial, complete, or potential *suspension of business conducted by the Insured* . . . caused by loss, damage, or destruction" to the Insured's property and to certain other categories of property. CSX Policy Form ¶7.B.1 (emphasis added). The plain and unambiguous meaning of the term "suspension" is a cessation of activity arising from damage to property specified in the policy. *See Hyplains*

Beef, 893 F. Supp. at 991 (ruling that the term "suspension" is unambiguous and requires a complete cessation of operations); *id.* at 992 (collecting cases); *54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.*, 306 A.D. 2d 67, 67 (N.Y. App. Div. 2003) (same).[11] This is consistent with authority from the Eleventh Circuit and the Southern District of Florida examining business interruption provisions. *Ramada Inn Ramogreen, Inc.*, 835 F.2d at 814 ("recovery is intended when the loss is due to the *inability* to use the premises where the damage occurs"); *Dictiomatic, Inc.*, 127 F. Supp. 2d at 1242 (requiring the insured to prove that "there was an interruption to the business ('suspension of operations') which was caused by the property damage.").

Recognizing this same core requirement of a "suspension" of operations, courts consistently reject business interruption claims premised on a mere lessening in customer demand. *Hyplains Beef*, 893 F. Supp. at 991 ("the policy does not provide coverage for a slowdown or reduction in operations"); *Rothenberg v. Liberty Mut. Ins. Co.*, 153 S.E.2d 447, 448 (Ga. Ct. App. 1967) (holding that a diminution in sales does not constitute an interruption of business); *Hotel Props., Ltd. v. Heritage Ins. Co. of Am.*, 456 So. 2d 1249, 1250 (Fla. Dist. Ct. App. 1984) (holding that diminution in business does not constitute a business interruption); *Royal Indem. Ins. Co. v. Mikob Props., Inc.*, 940 F. Supp. 155, 159-60 (S.D. Tex. 1996) (holding that even if the marketability of the apartment complex as a whole was adversely affected by the fire damage to one building, it did not constitute a suspension under the policy to allow for the recovery of loss of rental income). This core requirement holds

[11] Business interruption provisions generally require either a "suspension" or a "necessary interruption" of the insured's business operations, and in considering one term courts consistently look to cases considering the other. *See, e.g.*, *Ramada Inn Ramogreen, Inc.*, 835 F.2d at 813-14 (considering "necessary interruption of [the insured's] business" language, but citing to cases where "suspension" language was at issue); *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 786 (Wash. Ct. App. 1992) (same).

regardless of whether the policy language encompasses "complete," "partial" or "potential" suspensions of business. *See, e.g., Apartment Movers of Am., Inc. v. OneBeacon Lloyd's of Tex.*, Civil Action No. 3:04-CV-0278-B, 2005 U.S. Dist. Lexis 695, at *10-11 (N.D. Tex. Jan. 19, 2005), *aff'd* 2006 U.S. App. LEXIS 6522 (5th Cir. Mar. 16, 2006) (holding that the court need not wrestle with whether the policy required a "partial" or "complete" cessation because – either way – a mere "business slowdown" was insufficient to establish a covered business interruption claim). A business interruption provision will apply only where a suspension of business results in "an *inability* to meet customer demand." *Id.*

The "suspension" of business requirement in the CSX Policy Form carries through to the provision setting forth measurement of a covered business interruption claim as: "ACTUAL LOSS SUSTAINED," "consisting of the net profit which is thereby *prevented* from being earned. . . ." *See* CSX Policy Form ¶7.B.3(a) (capitalization in original, italics added). The ordinary meaning of the word "prevent" when used in this context is unambiguous and means to "keep . . . from doing something: impede." WEBSTER'S II NEW COLLEGE DICTIONARY (3D ED., 2005). Again, a mere lessening in demand or changes in customer choices are insufficient to establish that CSX was "prevented" from earning net profits. *See Nat'l Children's Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 431 n.3 (2d Cir. 1960) (explaining that a snowstorm did not "prevent" the holding of an exposition, although there was a reduction in anticipated attendance); *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, CIV-02-923-C, 2003 U.S. Dist. LEXIS 18324, at *8 (W.D. Okla. Sept. 30, 2003) (holding, in the context of a business interruption claim, that while a FAA order grounding planes on 9/11 may have had an impact on the insured's hotel business, "it did not *prevent*

people from getting to the [insured's] hotels" and therefore did not trigger insurance coverage) (emphasis added); *aff'd* 393 F.3d 1137, 1140-42 (10th Cir. 2004).

Still other policy provisions further reinforce that a covered business interruption claim is one where specified property damage causes a "*suspension*" of CSX's business and "*prevent[s]*" it from earning revenue; and a mere lessening in demand is not insured. For example, the loss of market for CSX's services is not insured, a point reinforced by a specific exclusion. CSX Policy Form ¶9.H (excluding "loss of market"). Such an exclusion operates to underscore that changes in consumer habits or demand are not insured. *Boyd Motors, Inc. v. Employers Ins. of Wausau*, 880 F.2d 270, 273 (10th Cir. 1989) (distinguishing a loss of market – when "for example, due to delay in distribution, changes in consumer habits, etc., a certain type of product is no longer in demand with its intended purchasers" – from the case at issue where a loss of market "value" occurred); *App v. Zurich Assur. Co. of Am.*, Civil Action No. 07-8717, 2008 WL 4399385, at *6 (E.D. La. Sept. 23, 2008) (ruling a provision excluding "loss of market" clear and unambiguous, and affirming the dismissal of an insurance claim for lost income on this basis); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003) ("The loss of market exclusion relates to losses resulting from economic changes occasioned by, e.g., competition, shifts in demand."), *aff'd as modified by* 411 F.3d 384 (2d Cir. 2005). Provisions in the CSX Policy Form excluding indirect damages such as bankruptcy, CSX Policy Form ¶9.H, and the lapse or cancellation of any lease,

license, contract or order, *id.* ¶7.B.2(a), also reinforce these same requirements. [12]

Against the plain language of the business interruption provision read as a whole, and the weight of the cited authority, CSX submits what it acknowledges is a claim for lessened demand from fifteen entities. *See supra*, pp. 7 n.10. Such lessening in demand is not insured because no property damage caused a "suspension" of operations that "prevented" CSX from providing services to the these entities and generating revenue at pre-Katrina levels.

3. *The "Ramp-Up" Clause Does Not Negate Policy Requirements Or Permit A Claim For Unbounded Recovery*

CSX argues that a so-called "ramp-up" clause in the section of the business interruption provision, which describes how to measure a covered business interruption claim, should be read to render superfluous all of the requirements above. However, when the business interruption provision of the CSX Policy Form is read as a whole, to give force and meaning to all of its parts, it is clear that the ramp-up clause does no such thing.

The CSX Policy Form states that the restoration period for a 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 . . . ; . . .
>
> (e) for such additional time as *may be required* to restore revenue to the same level as would have existed had no loss occurred . . .

CSX Policy Form ¶¶7.B.4(a) & (e) (emphasis added). Thus, any restoration period is

[12] Moreover, these provisions specifically preclude the portion of CSX's claim attributable to alleged losses related to Gulf Atlantic. *Compare* CSX Policy Form ¶9.H ("This policy does not insure . . . bankruptcy.") *with* Stip. Facts ¶ 70 ("Gulf Atlantic filed for bankruptcy in November 2006."). Elsewhere, in litigation with Gulf Atlantic, CSX has taken the position that Gulf Atlantic ceased – and never resumed – operations *prior* to Hurricane Katrina, and reached a settlement with Gulf Atlantic that has already reimbursed CSX for its alleged lost revenue. *See* Declaration of Catherine A. Mondell ("Mondell Decl."), filed concurrently herewith, at Ex. A ("CSX v. Gulf Atlantic Compl.") ¶ 5; *id.*, at Ex. B ("CSX Proof of Claim"), at p.2; *id.*, at Ex. C ("Gulf Atlantic Settlement") § B.6. *See also Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc.*, 889 So. 2d 180, 199 (Fla. Dist. Ct. App. 2004) ("A double recovery based on the same element of damages is prohibited").

measured for a hypothetical period from the time of the loss-causing occurrence until the property damage is – or could be – repaired with due diligence and dispatch and normal operations are restored, plus such additional time as is – or may be – *required* to restore revenue. CSX Policy Form ¶¶7.B.4(a) & (e) (emphasis added). Often, the actual period of time to restore operations and revenue may be used, as was the case with scores of entities CSX submitted as part of its overall business interruption claim, and for which CSX's business interruption claims have been paid. *See supra*, p. 6. However, where the insured or its customers fail or choose not to repair damaged property or resume operations at a level sufficient to restore revenue, a hypothetical recovery period is applied to measure how long such a recovery period ought to last. CSX's refusal to acknowledge the application of this hypothetical recovery period is a key element – but by no means the only element – of the dispute with respect to the fifteen entities that have elected, for a variety of business reasons, not to do business with CSX at a level as high as CSX's expectations. *See supra*, p. 6 n.5.

Application of such hypothetical recovery periods in the context of business interruption claims is well-recognized. A number of cases addressing business interruption claims after the terrorist attack on September 11, 2001 analyzed the question of the appropriate period of recovery under the language of the business interruption insurance provisions before them, and determined that a hypothetical period should apply, rejecting arguments for potentially unbounded periods of recovery based upon the rebuilding of the World Trade Center. *See Duane Reade Inc.*, 411 F.3d at 393 ("Courts have consistently construed this or similar language as entitling the insured to continue to recover its lost profits until it can build a reasonably equivalent store in a reasonably equivalent location.");

Streamline Capital, L.L.C., 2003 WL 22004888, at *8 (ruling that business interruption provision applied only until the insured could replace what was necessary to resume "operations," not a specific office at a specific location); *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 365 F. Supp. 2d 434, 442 (S.D.N.Y. 2005) (limiting recovery for a business interruption claim to a theoretical period).

Consistent with the analysis in these cases, the period of restoration in the CSX Policy Form includes only the hypothetical period in which the property damage in question "could be repaired and restored to normal operations" plus such period as "may be *required*" to restore revenue to the same level "as *would* have existed" in the absence of the loss. *See* CSX Policy Form ¶¶7.B.4(a) & (e) (emphasis added). Indeed, the plain meaning of the term "required" in the ramp-up clause is "to have as a requisite: [to] need." WEBSTER'S II NEW COLLEGE DICTIONARY (3D ED. 2005). The inclusion of the phrase "as may be required" to modify and limit the duration of the "additional time" provided for in the paragraph unambiguously limits any ramp-up period to the hypothetical period of time *necessary* to restore revenue. *See Duane Reade, Inc.*, 411 F.3d at 396 (holding that it would be unreasonable to interpret the policy language to include coverage for a period of time beyond what was theoretically necessary to resume equivalent operations). The addition of the ramp-up period required to restore revenue does not alter either (i) the application of a hypothetical period of recovery to limit business interruption claims, or (ii) the bedrock principles of contract interpretation and business interruption insurance rejecting strained interpretations that would lead to unbounded periods of recovery. It merely acknowledges that there may be circumstances in which an insured is prevented from earning revenue because of the timing of

its resumption of operations. *See, e.g.*, *Rogers v. Am. Ins. Co.*, 338 F.2d 240, 243 (8th Cir. 1964) (finding that, in the absence of ramp-up language, a damaged bowling alley could not recover for revenue it was prevented from earning from bowling leagues that held sign-ups shortly before it resumed normal operations). The ramp up clause cannot be strained to turn the entire business interruption provision into an unbounded guarantee of revenue streams from specific entities that may have done business with CSX in the past.

C. CSX's Interpretation Of The Business Interruption Provision Is Untenable

In contrast to the reading of the business interruption provision set forth in the section above and supported by the great weight of authority from this and other jurisdictions, CSX urges a strained reading of the business interruption provision that must be rejected.

First, courts reject any business interruption claim where the insured fails to link the claimed loss of business income to the property damage specified in the policy. Thus, in *Dictiomatic, Inc. v. United States Fidelity & Guaranty Co.*, the court ruled that an insured could not establish a loss of business income during a period of business interruption allegedly caused by Hurricane Andrew. 127 F. Supp. 2d at 1242-43. The court confirmed in its ruling that, as a precursor to recovery, the insured must prove that it sustained property damage caused by a covered peril and that the property damage resulted in a suspension of business and an actual loss of business income. *Id.* at 1242. The court also ruled that the loss of business income had to be caused by the interruption of business and not by some other factor. *Id.* at 1242-44 (finding that the insured could not meet this burden, and that its claim for lost revenue was speculative and constituted an unfounded prediction of future profits). *See also Ramada Inn Ramgreen, Inc.*, 835 F.2d at 813-15 (holding that the loss of earnings

did not result directly from the interruption in the insured's business); *Beautytuft, Inc. v. Factory Ins. Ass'n*, 431 F.2d 1122, 1125 (6th Cir. 1970) (applying a theoretical restoration period because it should be "amenable to computation in advance and . . . not subject to vagaries like owner indecision, strikes, or failure of lease negotiations"); *Howard Stores Corp. v. Foremost Ins. Co.*, 441 N.Y.S.2d 674, 676 (N.Y. App. Div. 1981) (rejecting a business interruption claim for decline in continuing sales as pure speculation where no evidence showed it was directly attributable to the property damage).

Here, CSX's "continuing" loss claim components are unlinked to the requirements of the business interruption provision and are instead the result (in whole or in part) of business decisions or other intervening factors. *See, e.g.*, Stip. Facts ¶ 41 (Air Products' decision was "*unrelated to Hurricane Katrina*") (emphasis added); ¶ 50 (Calhoun Enterprises and Ona Foods decision to utilize different cold storage facilities); ¶ 57 (IMS and Hub City's use of a different mode of transport or service provider); ¶ 70 (Gulf Atlantic's bankruptcy); ¶ 77 (Luxco's decision to ship from an alternate facility). Such problems with CSX's claim are compounded by its reliance on projections of revenue over many years that do not appropriately account for the variability of CSX's business, such as its history of regularly gaining and losing business from specific customers and other factors that impact its financial performance. *See* Stip. Facts ¶¶ 33, 39, 45, 53, 59, 73, 80 (reciting history of regularly gaining and losing business from specific customers); *id.* ¶ 30 (acknowledging competition CSX faces from other modes of transportation for the services that are the subject of its claim); *see also* CSX Corp. 2007 10-K[13] at p. 11 (acknowledging that CSX "experiences competition in the form of pricing, service, reliability and other factors from other

[13] CSX's 2007 10-K is available at http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-sec.

transportation providers including railroads and motor carriers . . . and, to a less significant extent, barges, ships and pipelines" all of which "could negatively impact the Company's financial position, results of operations and liquidity.").

Second, CSX recognizes no outside time limit for the business interruption loss period other than an actual revenue stream that matches its expectations, and, as a result, has submitted "continuing" losses and claim calculations that span years after it repaired property damage and regained full operational capability. *See* Stip. Facts ¶ 10 (conceding CSX property damage was repaired by February 2006); First Amen. Compl. ¶ 25 (seeking to extend claim to encompass "any additional time period necessary to restore CSX's revenues . . .") (emphasis added). CSX's strained reading would lead to an unreasonable and absurd result – an unbounded period of recovery – and negates specific policy requirements, and is therefore impermissible under well-recognized rules of contract construction. *See, e.g.*, *W. Fla. Village Inn, Inc.*, 874 So. 2d at 30 ("Insurance policies will not be construed to reach an absurd result" and must be read as a whole, giving every provision its full meaning and operative effect).

Indeed, just such unbounded claims for business interruption have been rejected by appellate courts. In *Pennbarr Corp.*, the insured made a business interruption claim for lost profits allegedly suffered as a result of two earthquakes that damaged property used to produce typewriters. 976 F.2d at 147-48. The insured did not incur a loss of profits during the time that the production plant was inoperative due to the earthquake damage, but rather on sales after the property in question had been repaired. *Id.* at 148. The Court of Appeals for the Third Circuit held that the business interruption provision was unambiguous and rejected

as unreasonable any interpretation that "eliminates any outside time limit for the bringing of a claim of loss under the policy." *See id.* at 153 ("Without some cut-off date for the bringing of claims under the policy, 'claims would be open to a degree of speculation which would be absurd.'") (internal citations omitted). Similarly, in *Rogers v. American Insurance Co.*, the Court of Appeals for the Eighth Circuit held that an insured could not recover under business interruption insurance for the loss of income it expected to earn in the year following the reopening of a damaged bowling alley despite evidence that the suspension of operations affected the enrollment in league bowling – a significant percentage of income. 338 F.2d at 243-44. As noted above, a ramp-up provision, such as that in the CSX Policy Form, would have specifically insured that one year of lost revenue from the league sign-ups, because additional time was *necessary* to resume normal revenue generation. But the principles remain unchanged: "A 'cut off' date is a necessity. Otherwise, claims would be opened to a degree of speculation which would be absurd." *Id.* at 243. Although the period permitted under the CSX Policy Form includes an additional component – the ramp-up period – it cannot be read to eliminate all time limitations on the claim.

As a matter of law, CSX's strained reading of the business interruption provision cannot be sustained, and – moreover – CSX cannot meet its burden to bring its unbounded "continuing" claim within the scope of its property insurance policies. Summary judgment is appropriate with respect to CSX's claim for the fifteen entities included in its "continuing" loss claim to declare that these claim components are outside the plain language of the business interruption provision.

II. THE CSX POLICY FORM INSURES CLAIM ADJUSTMENT EXPENSES, NOT CLAIM PREPARATION EXPENSES

The CSX Policy Form, drafted with the participation of CSX's captive insurer in mind, insures for "claims adjustments expenses" arising from a covered claim. CSX Policy Form ¶7.A.1(b).[14] CSX strains the terms "claims adjustments expenses" to include any expense it incurred in hiring outside claim preparation experts to help maximize its insurance recovery, including the fees paid to the consulting firm PriceWaterhouseCoopers ("PwC"). Stip. Facts ¶ 21; *see* First Amen. Compl. ¶ 44.

Expenses related to the collection and analysis of data used by the insured to prepare and maximize an insurance claim are separate and distinct from adjustment expenses, which are incurred by the insurer. The Court need not look past the plain meaning of the term "claims adjustments expenses" to rule as a matter of law that it applies to the expenses incurred *by an insurer* through an adjuster in the settling of a claim. *See* CSX Policy Form ¶7.A.1(b). It is routinely and widely acknowledged in all realms of insurance that "adjustment" is an activity undertaken on behalf of insurers, in response to a claim prepared and submitted by an insured. *See, e.g.*, *Woodliff v. Cal. Ins. Guarantee Ass'n*, 3 Cal. Rptr. 3d 1, 3, 8 (Cal. Ct. App. 2003) (Adjustment expenses are understood as "the expense incurred *by the insurer* to investigate and settle a claim. . . . [A]n insured does not incur loss adjustment expenses because the insured does not initiate or control the loss adjustment process.") (emphasis added); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 137 n.2 (1982)

[14] This clause, although incorporated in all of the policies at issue, was generated as part of the CSX Policy Form issued by CSX Insurance Company ("CSXIC"), CSX's captive insurer. CSXIC provided the entire $25 million primary layer of insurance to CSX (as well as participating in smaller percentages on certain excess layers of insurance). The clause benefits CSXIC, as it is entitled to credit any adjustment expenses it incurs against the policy limits it underwrote, effectively reducing the amount of the primary layer of insurance.

(Rehnquist, J. dissenting) ("The adjustment (including payment) of claims represents the final act in the insurance process.") (citing Butler, Loss Adjustment in Fire Insurance, in Property and Liability Insurance Handbook 219 (J. Long & D. Gregg eds. 1965)); Fla. Stat. 626.855 (2008) (defining an "independent adjuster as "any person who is self-employed or is associated with or employed by an independent adjusting firm or other independent adjuster, and who *undertakes on behalf of an insurer* to ascertain and determine the amount of any claim, loss, or damage payable under an insurance contract or undertakes to effect settlement of such claim, loss, or damage.") (emphasis added); *Home Ins. Co. v. Crawford & Co.*, 890 So. 2d 1186, 1188 (Fla. Dist. Ct. App. 2005) ("An insurance adjuster acts on behalf of the insurer.") (internal citations omitted).

Here, CSX recognizes this important distinction for all purposes other than this component of its claim. CSX concedes that it retained PwC "to assist in the collection and analysis of data to help *prepare* CSX's Hurricane Katrina claim." Stip. Facts ¶ 21 (emphasis added). CSX similarly admits that the insurers retained "Jim Ratliff of Ratliff Property Adjusting *to adjust* CSX's claim. . . ." *Id.* ¶ 23 (emphasis added). As state and federal authority, as well as logic, makes clear, adjustment of a claim is the process whereby the insurer ascertains the amount of indemnity the insured is entitled to receive.

CSX cannot shoehorn its claim *preparation* expenses into the policy language that plainly provides for recovery of claim *adjustment* expenses, and summary judgment is appropriate to confirm this point.

III. CSX CANNOT DEMONSTRATE A "TOTAL LOSS" THAT ENTITLES IT TO FULL REPLACEMENT COSTS FOR THE PURCHASE OF UPGRADED DIESEL LOCOMOTIVES

The CSX Policy Form insures against damage to Rolling Stock, including locomotives. CSX Policy Form ¶7.A.3(f)(i). Two B30 diesel locomotives owned by CSXT sustained water damage – though no structural damage – from Hurricane Katrina. Stip. Facts ¶ 15. Though this damage does not meet the policy definition of a "total loss," CSX unilaterally chose to upgrade these units with more advanced models, rather than repairing them at a significantly lower cost.[15] *See id.* ¶¶ 17-19. Under the plain language of the CSX Policy Form, CSX may recover only the estimated repair cost of the two units.

When reading ¶7.A.3(f)(i) in its entirety – as the Court must, *see Siegle*, 819 So.2d at 739 – the CSX Policy Form contemplates three possible outcomes to a damaged locomotive: 1) repair; 2) replace; or 3) provide a payment for the insured loss with no repair or replacement ("actual cash value"). CSX's claim relies solely on a definition of "replacement cost coverage" that states: "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." CSX Policy Form ¶7.A.3(f)(i).[16] CSX submits that this definition of replacement cost coverage should permit it to *replace* the two B30 locomotives

[15] The paragraph upon which CSX relies addresses what the loss settlement should be when there is a total loss to a diesel locomotive no longer in manufacture and reads, "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." CSX Policy Form ¶7.A.3(f)(i).

[16] Such "replacement cost coverage," is a valuation used to protect the insured from "the shortfall in coverage which results under a property insurance policy [that compensates] the insured for actual cash value alone." *See* 12 Lee R. Russ & Thomas F. Segalla, Couch on Ins. § 176:56 (updated 2008).

with two next generation locomotives that cost $3.4 million combined, rather than repairing the locomotives at a cost of $800,000 each. Stip. Facts ¶¶ 17, 19. The provision for "replacement cost coverage" cannot, however, as CSX asserts, eliminate the option to repair the damaged property.

No plain reading of ¶7.A.3(f)(i) could equate replacement with repair or support a contention that the parties contemplated coverage for the replacement of diesel locomotives for *any damage* no matter how *de minimis*. *See W. Fla. Village Inn, Inc.*, 874 So. 2d at 29-30, 35 (prohibiting tortured interpretations of insurance policy provisions that lead to absurd results); *see also Siegle*, 819 So. 2d at 739-40 (recognizing and enforcing a distinction between repair and replacement cost coverage, and further holding that repair coverage does not insure against diminution in market value in the absence of explicit language making loss of value part of the repair cost). Following these general principles, the court in *Compagnie Des Bauxites De Guinee v. Three Rivers Insurance Company*, addressed and rejected arguments similar to CSX's. *See* No. 2:04cv393, Mem. and Order on Scope of Coverage, Doc. No. 231, at 6-17 (W.D. Pa. June 7, 2007) ("*Compagnie* Mem.") (attached hereto as Mondell Decl., Ex. E). In that case, the plaintiff claimed that an insurance policy with a valuation provision similar to the instant case entitled it to replace a large piece of mining production equipment with a new unit despite the fact that the language of the policy failed to define who held the authority to exercise that option. *Compagnie Des Bauxites De Guinee v. Three Rivers Ins. Co.*, No. 2:04cv393, 2008 WL 828035, at *1 (W.D. Pa. Mar. 26, 2008) (ruling on a Motion for a New Trial). The defendant-insurers maintained that the equipment could be repaired, and adjusted the claim to the cost of repair. *Id*. The trial judge agreed and

ruled that the settled meaning of the terms "repair" or "replace new" as used in the policy demonstrated that the parties intended alternative remedial measures to exist that "respectively limit each other based upon the degree of damage caused by a covered loss." *See Compagnie* Mem. at 7, 16. As a result, the cost to repair acted as a limit on the cost of replacement where the circumstances provided for adequate repair. *See id.* at 16-17.

Here, CSX concedes that repair of the damaged B30 locomotives was possible, s*ee* Stip. Facts ¶ 17, and the repair cost equals less than 80% of the replacement cost of the units, *see* First Amen. Compl. ¶ 38. Under the plain language of the CSX Policy Form and the authority cited above, those facts are dispositive – there is no "total loss," and the CSX Policy Form provides coverage only for the estimated cost of repair. *See* CSX Policy Form ¶7.A.3(f)(i). Summary judgment is appropriate to confirm this.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court enter summary judgment in their favor on all Counts, as each issue before the Court is capable of final resolution as a matter of law. The plain language of the CSX Policy Form cannot be strained to encompass CSX's claims for: (i) alleged "continuing" loss of revenue from certain customers or potential customers; (ii) expenses related to the preparation, but not adjustment, of its claim; or (iii) replacement of two diesel locomotives with new locomotives where the locomotives in question were not a "total loss."

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2009, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system. I further certify that I mailed the foregoing documents and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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