

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MAINE

	)	
In re:	)	
	)	
MONTREAL, MAINE &	)	CHAPTER 11
ATLANTIC RAILWAY LTD.,	)	Case No. 13-10670
	)	
Debtor.	)	
	)	

MOTION OF TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA  
FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)(1)

Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, and D. Me. LBR 400-1 Travelers Property Casualty Company of America (“Travelers”) requests relief from the automatic stay, for cause, to file a declaratory judgment action (the “Declaratory Judgment Action”) in the United States District Court for the District of Maine (the “District Court”), that would include the Debtor, Montreal, Maine & Atlantic Railway Ltd. (the “Debtor”), as a defendant.<sup>1</sup> A copy of the proposed Complaint in the Declaratory Judgment Action is attached as Exhibit A hereto. The proposed Declaratory Judgment Action seeks a judicial declaration, pursuant to 28 U.S.C. § 2201, that a commercial property insurance policy issued by Travelers to the Debtor, the Canadian Debtor, and affiliates and parent companies thereof does not provide coverage for certain losses to railcars and railroad track and roadbed being claimed, and certain losses of business income or extra expense resulting therefrom, arising out of the derailment of parts of a train in Lac-Megantic, Quebec, Canada, on July 6, 2013 (the “Incident”). The

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<sup>1</sup> Travelers also contemplates that the Declaratory Judgment Action would name as a defendant Montreal, Maine & Atlantic Canada Company (the “Canadian Debtor”), which filed a petition seeking relief under Canada’s Companies’ Creditors Arrangement Act in the Superior Court of Quebec. Accordingly, on this date, Travelers is also filing a Motion to Lift the Stay of Proceedings in the *Matter of the Arrangement Relating to Montreal, Maine & Atlantic Canada Co. et al.*, No. 500-11-045094-139 in the Superior Court of the Province of Quebec, District of Montreal.

Declaratory Judgment Action also seeks, alternatively, reformation of the insurance policy to reflect that the mutual intent of the parties was not to provide insurance for losses of business income arising from damage to the railroad rolling stock.

Relief from stay is appropriate because: the issues to be determined with respect to the Debtor in the Declaratory Judgment Action are identical to those issues presented with respect to each of the other U.S. defendants that have not filed for bankruptcy protection; with respect to the Debtor, the Declaratory Judgment Action is a non-core proceeding which would require ultimate determination by the District Court even if initially litigated in this Court; the Declaratory Judgment Action will not interfere with the orderly administration of the Debtor's estate; and the hardship to Travelers by the continuation of the automatic stay outweighs the hardship to the Debtor if the requested relief is granted.

In support of its Motion, Travelers states as follows:

#### JURISDICTION

1. This motion is a core proceeding over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(G) and 1334. Venue is proper pursuant to 28 U.S.C. § 1409.

#### FACTS

##### A. The Policy

2. Travelers issued to the defendants in the proposed Declaratory Judgment Action a commercial property insurance policy, bearing Policy no. QT-630-6357L188-TIL-13, with a policy period of April 1, 2013 to April 1, 2014 (the "Policy"). The Policy was issued in Maine.

3. The Policy provides only first-party property insurance coverage for certain "Covered Property" described in the Declarations of the Policy, which include certain locomotives involved in the Incident (the "Covered Property"), but do not include the railcars,

the railroad track or the roadbed. The Policy does not provide any third-party liability coverage, and therefore does not provide liability insurance for any claims which may be asserted against the Debtor or its affiliates by third parties who sustained personal injuries or damage to their property as a result of the Incident.

4. The Policy provides coverage only for that property which is described within the Policy's declarations and specifically excludes from coverage "[p]roperty contained on or in railroad rolling stock," and, subject to an endorsements described in paragraphs 5 and 6, "[r]ailroad tracks, [and] beds."

5. The Policy contains an endorsement entitled "Railroad Rolling Stock Damage to Track and Roadbed Coverage" which, subject to certain conditions, provides \$250,000 of coverage for the Debtor's "reasonable and necessary expense to repair or replace damaged track and roadbed."<sup>2</sup>

6. The Policy also contains an endorsement entitled "Railroad Track & Roadbed Deductible" providing for a deductible of \$250,000 with respect to the track and roadbed coverage provided through the endorsement described in paragraph 5.

7. The Policy contains an additional endorsement entitled "Railroad Rolling Stock 'Business Income' and 'Extra Expense' Coverage," which provides certain coverage for loss of business income and extra expenses occasioned by a "loss of or damage to Covered Property from a Covered Cause of Loss."

8. The endorsement described in paragraph 7 does not provide coverage for loss of business income or extra expense occasioned by a loss of or damage to property which is not "Covered Property."

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<sup>2</sup> As a result of an error, the Policy specifies a \$25,000 limit for damage to railroad track and roadbed. However, the limitation of coverage was intended to be \$250,000 rather than \$25,000.

9. The parties intended the Policy to provide only Extra Expense coverage with respect to the rolling stock, and did not intend the Policy to provide any coverage for loss of Business Income caused by damage to the rolling stock. Due to mistake and inadvertence, the written Policy that was issued and accepted contained form CM T5 27 02 08, which stated that it was providing both “Business Income” and “Extra Expense” coverage for Railroad Rolling Stock. Also due to the mistake and inadvertence, there was no endorsement in the policy which deleted the “Business Income” coverage provided under form CM T5 27 02 08, despite the fact that it was the mutual intent of the parties that the policy provide coverage for Extra Expense only, and not provide coverage for loss of Business Income.

B. The Declaratory Judgment Action

9. Travelers intends to proceed against the Debtor, as well as those parent companies, subsidiaries, and affiliates of the Debtor which are named as insureds under the Policy, in a declaratory judgment action concerning the Policy.

10. The proposed Complaint in the Declaratory Judgment Action alleges, in part:

36. An actual controversy has arisen as to whether, or to what extent, the Policy provides coverage for the Railcars, property contained in the Railcars, the track, the roadbed, and/or loss of business income caused by damage to any such property damage.

37. Travelers is entitled to a declaration that, under the terms of the Policy, it is not required to provide coverage for any damage to the Railcars arising from the Incident.

38. Travelers is also entitled to a declaration that, under the terms of the Policy, it is not required to provide coverage for any damage to property contained in the Railcars arising from the Incident.

39. Travelers is also entitled to a declaration that, under the terms of the Policy, any expense incurred for repairing the track and/or roadbed arising from the Incident is covered only up to a limit of \$250,000, in excess of a deductible of \$250,000.

40. Travelers is also entitled to a declaration that, under the terms of the Policy, it is not required to provide coverage for any loss of “Business Income” or “Extra Expense” which was due to loss of or damage to the Railcars, property contained in the Railcars, or the track and/or roadbed.

11. The proposed Complaint in the Declaratory Judgment Action further pleads a claim for reformation, including the following allegations:

42. The parties intended that the Railroad Rolling Stock insurance provided in the Policy not provide insurance for loss of Business Income, and that the only time element coverage to be provided under the Policy would be Extra Expense.

43. The written Policy was mistakenly issued and accepted with form CM T5 27 02 08, and without an endorsement which would make it clear that the Business Income coverage outlined in form CM T5 27 02 08 would not be applicable.

44. The written Policy should be reformed to delete any coverage for Business Income resulting from damage to Railroad Rolling Stock.

#### STANDARD FOR RELIEF

12. Relief from the automatic stay imposed by 11 U.S.C. § 362(a) is governed by 11 U.S.C § 362(d) which provides, in relevant part, as follows:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay—

(1) for cause...

13. Pursuant to 11 U.S.C. § 362(d)(1), the Court “shall” grant relief from the automatic stay “for cause.” Cause is not defined within the statute and courts have generally determined that a finding of cause must be made on a case-by-case basis. See Piombo Corp. v. Castlerock Properties (In re Castlerock Properties), 781 F.2d 159,163 (9th Cir. 1986); Peerless Ins. Co. v. Rivera, 208 B.R. 313, 315 (D.R.I. 1997); Goya Foods, Inc. v. Unanue-Casal (In re Unanue-Casal), 159 B.R. 90, 95-96 (D.P.R. 1993), aff’d, 23 F.3d 395 (1st Cir. 1994). Cause may

be found to exist whenever the stay harms the party seeking relief and “lifting the stay will not unduly harm the debtor or the debtor's estate.” In re Turner, 161 B.R. 1, 3 (Bankr. D. Me. 1993); see also Shaughnessy v. United States (In re Shaughnessy), BAP No. MW 06-068, 2007 Bankr. LEXIS 3164, at \*6-\*7 (BAP 1st Cir. Aug. 17, 2007).

14. Courts have considered a variety of factors to determine whether cause exists. Sonnax Indus., Inc. v. Tri Components Products Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286-87 (2d Cir. 1990)(citing In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984) which identified twelve factors gleaned from various decisions); Peerless Insurance Co., 208 B.R. at 315 (considering four factors suited to the particular circumstances of the case); In re Unanue-Casal, 159 B.R. at 96 (same). However, no formulaic approach to determine whether cause exists has emerged, and the factors to be considered depend upon the circumstances under which relief from the stay is being sought. In re Shaughnessy, 2007 Bankr. LEXIS 3164, at \*6-\*7; Peerless Insurance Co., 208 B.R. at 315; In re Unanue-Casal, 159 B.R. at 96.

15. In Peerless Ins. Co. v. Rivera, the court identified four factors which were applicable in order to determine whether an insurer had demonstrated cause to pursue a pending declaratory judgment action concerning the scope of coverage under a policy issued to the debtor:

1. the harm to the party seeking relief from the stay...if the stay is not lifted;
2. the harm to the debtor...if the stay is lifted;
3. the interests of creditors; and
4. the effect on the fair and efficient administration of justice.

Peerless Ins. Co., 208 B.R. at 315.

BASIS FOR RELIEF

Based upon the factors identified by the Peerless court, cause exists to grant Travelers relief from the automatic stay to include the Debtor as a defendant in the proposed Declaratory Judgment Action.

**A. Travelers will suffer harm if it is not granted relief from the stay.**

If Travelers is not permitted to pursue the Declaratory Judgment Action against the Debtor, it may have to litigate identical coverage issues in multiple actions. For example, even if Travelers were to prevail against the Debtor's co-insureds in a declaratory judgment action, the trustee of the Debtor's estate might still attempt to subsequently pursue claims against Travelers under the Policy in this Court or perhaps a different court. Since the District Court may not enter a declaratory judgment which binds a non-party, Travelers would have to defend itself against a potential claim from the trustee and assert as defenses those arguments which it had already successfully asserted in the Declaratory Judgment Action. Re-litigation of the same issues would be costly and a waste of the parties' resources and judicial resources.

Additionally, and in light of the complex nature of the Debtor's business and the bankruptcy proceeding, Travelers may be unable to obtain a resolution of its potential liability until the assuredly-long process of the Debtor's reorganization is well underway. Preventing Travelers from obtaining a judicial determination of its liability, if any, on account of the Incident would unduly interfere with Travelers' ability to determine its liability, if any, and set its reserves.

**B. The Debtor will not be harmed if the stay is lifted in order for Travelers to pursue the Declaratory Judgment Action.**

Whether in the context of the proposed Declaratory Judgment Action or in connection with a claim asserted against Travelers under the Policy, the Debtor will ultimately have to litigate the coverage issues raised in the proposed Declaratory Judgment Action, if it does not accede to Travelers' position. Therefore, the relief requested by Travelers will not impose any additional burden or cost upon the estate beyond those which it should already expect to bear as a consequence of the tragic circumstances. In fact, from a purely economic perspective it would be more efficient for the Debtor to determine its rights under the Policy in one proceeding, in the context of the proposed Declaratory Judgment Action.

**C. The interests of creditors would be best served by the Debtor's involvement in the Declaratory Judgment Action.**

The Debtor presently "contemplates using the proceeds from all [estate] assets, including insurance policies, to fund one or more trusts for the benefit of claimants."<sup>3</sup> If the Debtor, or the trustee appointed to administer its estate, intends to propose a plan which pays creditors out of a limited pool of liquidation and insurance proceeds, then creditors should, to the greatest extent feasible, be made aware in advance of solicitation what assets will be available for distribution on account of their claims. The Debtor's involvement in the proposed Declaratory Judgment Action will allow for the speedy resolution of Travelers' potential liability under the Policy, thereby resolving one variable which will confront the trustee in proposing, and the creditors in evaluating, a proposed plan which depends upon a post-confirmation vehicle for recovering assets and resolving claims.

From a creditor's perspective, it would be best for the issue to be decided expeditiously, in a manner which minimizes the expense of litigation. This is especially true given that the

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<sup>3</sup> Affidavit of Donald Gardner, Jr. in Support of First Day Pleadings, Dkt. No. 11, ¶ 18.



Debtor's rights under the Policy are likely to be determined by the District Court irrespective of the Court's decision on this motion, as explained below.

**D. The Debtor's involvement in the Declaratory Judgment Action is essential to the fair and efficient administration of justice.**

Given the limited authority conferred upon this Court with respect to non-core proceedings, and the importance of the issues presented in the proposed Declaratory Judgment Action, those issues will almost inevitably be determined by the District Court whether or not the Debtor is included as a defendant. A declaratory judgment action to determine the scope of an insurance policy's coverage is a non-core proceeding. See 28 U.S.C. § 157(b); Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.), 837 F.2d 325, 330 (8th Cir. 1988); U.S. Brass Corp. v. California Union Ins., 198 B.R. 940, 945-46 (N.D. Ill. 1996) vacated in part on other grounds by 110 F.3d 1261 (7th Cir. 1997); Gray v. Exec. Risk. Indem. Inc. (In re Molten Metal Technology, Inc.), 271 B.R. 711, 714-15 (Bankr. D. Mass. 2002). Therefore, this Court cannot issue a final judgment with respect to the issues raised in the proposed Declaratory Judgment Action. See 28 U.S.C. § 157(c). Rather, any determination made by this Court with respect to the Policy's scope of coverage would be subject to de novo review by the District Court upon objection by Travelers or the Debtor. See 28 U.S.C. § 157(c). It would be inefficient to address the issues raised in the proposed Declaratory Judgment Action in a separate Debtor-specific proceeding in this Court only to later have this Court's report and recommendation sent to the District Court for de novo review.

CONCLUSION

For the foregoing reasons, and for any other reasons which may be stated at any hearing on this motion, Travelers respectfully requests that the Court grant it relief from the automatic stay in order to file the proposed Declaratory Judgment Action against the Debtor.

Dated at Bangor, Maine, this the 27<sup>th</sup> day of August, 2013.

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA,

By its attorneys,

/s/ Frederick J. Badger, Jr.

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Frederick J. Badger, Jr., Esq. (#215)  
[fbadger@rwl.com](mailto:fbadger@rwl.com)  
Attorney for Travelers Property  
Casualty Company of America

/s/ Joshua A. Randlett

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Joshua A. Randlett, Esq. (#4681)  
[jrandlett@rwl.com](mailto:jrandlett@rwl.com)  
Attorney for Travelers Property  
Casualty Company of America

RICHARDSON, WHITMAN, LARGE & BADGER  
One Merchants Plaza  
P.O. Box 2429  
Bangor, ME 04402-2429  
(207) 945-5900

**CERTIFICATE OF SERVICE**

I hereby certify that on August 27, 2013, I electronically filed the foregoing Motion For Relief From Automatic Stay with the Clerk of Court by using the CM/ECF system, which will send notification of such filing to each of the following:

Roger J. Clement, Jr., Esq.  
Verrill Dana, LLP  
One Portland Square  
P.O. Box 586  
Portland, ME 04112-0586  
[rclement@verrilldana.com](mailto:rclement@verrilldana.com)  
(Attorney for Debtor)

Nathan R. Hull, Esq.  
Verrill Dana, LLP  
P.O. Box 586  
Portland, ME 04112-0586  
[nhull@verrilldana.com](mailto:nhull@verrilldana.com)  
(Attorney for Debtor)

Robert J. Keach, Esq.  
Bernstein, Shur, Sawyer & Nelson  
100 Middle Street, 6<sup>th</sup> Floor  
P.O. Box 9729  
Portland, ME 04104-5029  
[rkeach@bernsteinshur.com](mailto:rkeach@bernsteinshur.com)  
(Trustee)

Stephen G. Morrell, Esq.  
Office of the U.S. Trustee  
537 Congress Street  
Portland, ME 04101  
[stephen.g.morrell@usdoj.gov](mailto:stephen.g.morrell@usdoj.gov)  
(Office of U.S. Trustee)

Jennifer H. Pincus, Esq.  
Office of the U.S. Trustee  
537 Congress Street  
Portland, ME 04101  
[jennifer.h.pincus@usdoj.gov](mailto:jennifer.h.pincus@usdoj.gov)  
(Office of U.S. Trustee)

Richard P. Olson, Esq.  
Perkins Olson, PA  
32 Pleasant Street  
P.O. Box 449  
Portland, ME 04112  
[rolson@perkinolson.com](mailto:rolson@perkinolson.com)  
(Creditor Committee / Unofficial Committee of Victims)

I further certify that on August 27, 2013, pursuant to Fed. R. Bankr. P. 4001(a)(1) and D. Me. LBR 4001-1(a), I made due notice of this Motion For Relief From Automatic Stay by mailing a confirmed copy thereof via United States Postal Service, postage prepaid, to the Debtor and the following creditors that were included in the list filed pursuant to Fed. R. Bankr. P. 1007(d):

Montreal, Maine & Atlantic Railway, Ltd.  
c/o Norma Jean Griffiths, Registered Agent  
15 Iron Road  
Hermon, ME 04401

New Brunswick Southern Railway Co. Ltd.  
P.O. Box 5777  
Saint John, NB E2L 4M3  
CANADA

Rail World, Inc.  
c/o Edward A. Burkhardt, President & CEO  
6400 Shafer Court, Suite 275  
Des Plaines, IL 60018

Flex Leasing I, LLC  
SDS 12-2315  
P.O. Box 86  
Minneapolis, MN 55486-0086

Canadian Pacific Railway Co.  
c/o E. Hunter Harrison, CEO  
Lock Box M101979  
P.O. Box 2078, Station B  
Montreal, PQ H3B 4H4  
CANADA

Valero Marketing & Supply  
c/o Bill Klesse, Chairman & CEO  
One Valero Way  
San Antonio, TX 78249-1616

Rail World Locomotive Leasing  
c/o Edward A. Burkhardt, President & CEO  
6400 Shafter Court, Suite 275  
Des Plaines, IL 60018

Gowling Lafleur Henderson LLP  
c/o Denise St-Onge  
1400, 700 – 2<sup>nd</sup> Street S.W.  
Calgary, AB T2P 4V5  
CANADA

Cattron Theimeg  
Box 200477  
Pittsburgh, PA 15251-0477

Petro Sud-Ouest Inc.  
619, Laurent  
Granby, PQ J2G 8Y3  
CANADA

Ville De Sherbrooke  
145 Rue Wellington Nord  
C.P. 610  
Sherbrooke, QC J1H 5H9  
CANADA

RWC, Inc.  
248 Lockhouse Road  
P.O. Box 876  
Westfield, MA 01086-0876

St. Lawrence & Atlantic RR  
M2118, Case Postale 11500  
Succursale Centre-Ville  
Montreal, PQ H3C 5N7  
CANADA

Maine Northern Railway  
P.O. Box 905, Station A  
71 Alison Boulevard  
Fredericton, NB E3B 5B4  
CANADA

AC Electric Corp.  
c/o Dan Parsons, President & CEO  
120 Merrow Road  
P.O. Box 1508  
Auburn, ME 04211-1508

Debroussailleurs GSL, Inc.  
5646 Chemin Saint-Remi  
St-Adien-De-Ham, PQ J0A 1C0  
CANADA

Helm Financial Corporation  
Lock Box 13499  
13499 Collections Center Drive  
Chicago, IL 60693

State of Maine  
Maine Revenue Service  
c/o Stanley D. Campbell, Deputy Director  
P.O. Box 9107  
Augusta, ME 04332-9107

Canadian Pacific Railway  
c/o E. Hunter Harrison, CEO  
P.O. Box 2078  
Station B  
Montreal, QC H3B 4H4  
CANADA

Gowling Lafleur Henderson LLP  
c/o R. Scott Jolliffe, Chair & CEO  
1400, 700 – 2<sup>nd</sup> Street S.W.  
Calgary, AB T2P 4V5  
CANADA

Progress Rail Services  
c/o William P. Ainsworth, CEO  
24601 Network Place  
Chicago, IL 60673-1246

**/s/ Joshua A. Randlett, Esq.**  
Attorney for Travelers Property  
Casualty Company of America

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA,

Plaintiff,

V.

MONTREAL, MAINE & ATLANTIC  
CORPORATION; MONTREAL, MAINE &  
ATLANTIC RAILWAY, LTD.; LMS  
ACQUISITION CORPORATION;  
MONTREAL, MAINE & ATLANTIC  
CANADA COMPANY; and RAIL WORLD,  
INC.,

Defendants.

Civil Action No. \_\_\_\_\_

**[PROPOSED] COMPLAINT**

**Nature of the Action**

1. This is an action for a declaratory judgment under a commercial property insurance policy issued by Plaintiff, Travelers Property Casualty Company of America (“Travelers”) to Defendants, Montreal, Maine & Atlantic Corporation, LMS Acquisition Corporation, Montreal, Maine & Atlantic Railway, Ltd., Montreal, Maine & Atlantic Canada Company, and Rail World, Inc. (collectively, “MMA”). Travelers seeks a declaratory judgment that the policy does not provide coverage for certain losses to railcars and railroad track and roadbed being claimed by MMA, and certain losses of business income or extra expense resulting therefrom, arising out of the derailment of parts of a train in Lac-Megantic, Quebec, Canada, on July 6, 2013. In the alternative, Travelers seeks reformation of the insurance policy to reflect that the parties intended the policy to provide only Extra Expense





coverage with respect to the rolling stock, and did not intend the policy to provide any coverage for loss of Business Income caused by damage to the rolling stock.

**Parties**

2. The plaintiff, Travelers, is an insurance company organized under the laws of Connecticut, with its principal place of business located at One Tower Square, Hartford, Connecticut 06103.

3. Defendant Montreal, Maine & Atlantic Corporation is a corporation organized under the laws of Delaware, with its principal place of business located at 15 Iron Road, Hermon, Maine 04401.

4. Defendant Montreal, Maine & Atlantic Railway, Ltd. is a corporation that was organized under the laws of Delaware, with its principal place of business located at 15 Iron Road, Hermon, Maine 04401.

4. Defendant LMS Acquisition Corporation is a corporation organized under the laws of Delaware, with its principal place of business located at 15 Iron Road, Hermon, Maine 04401.

5. Montreal, Maine & Atlantic Canada Company is organized under the laws of Nova Scotia, Canada, with a registered office in Halifax, Nova Scotia, Canada, and a principal place of business located at 15 Iron Road, Hermon, Maine 04401.

6. Defendant Rail World, Inc. is a corporation organized under the laws of Illinois with its principal place of business located at 6400 Shafer Court, Suite 275, Rosemont, IL 60018.

### **Jurisdiction and Venue**

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties are citizens of different States and the amount in controversy exceeds \$75,000, exclusive of interest and costs. The value of the property damage at issue, as described below, substantially exceeds \$75,000, and the total aggregate policy limit is \$7,500,000.

8. All of the Defendants are subject to personal jurisdiction in Maine because the insurance policy was issued in Maine and some or all of the Defendants regularly do business in Maine.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the property that is the subject of the action was garaged in Maine, and/or § 1391(b)(3) because the defendants are subject to personal jurisdiction in this District.

### **Facts**

10. On or about March 15, 2013, Defendants submitted an application for property and inland marine insurance to Travelers that contained the specifications for the insurance they were seeking for the April 1, 2013 to April 1, 2014 policy term. One of the coverages being applied for was Railroad Rolling Stock Insurance, which was intended to insure certain scheduled items of railroad rolling stock owned by and/or in the care, custody, or control of one or more of the Defendants.

11. The application for Railroad Rolling Stock insurance specified that Defendants were seeking limits of \$5,000,000 for “Any One Occurrence inclusive of Extra Expense, Flood and Earth Movement.” (emphasis in original). The application for Railroad Rolling Stock

Insurance did not make any other mention of seeking coverage for either Extra Expense or for loss of business income.

12. On March 20, 2013, Zachary Bowling, the underwriter for Travelers, sent an email to Peter Bleach, the broker for and representative of the Defendants, and asked the following question: "We are doing our final review today, and the BI [i.e., Business Income] for the RRRS [i.e, Railroad Rolling Stock] came up. I know we had discussed, but do we need to include this year?"

13. On March 21, 2013, in the morning, the broker, Peter Bleach, responded to Travelers' question as follows: "Sorry abt the delay in responding. We do not need full BI for the rolling stock. All we need is a combined limit of \$5,000,000 or \$7.5mm to include Extra Expense which is the real exposure. I think the clause is very clear. In the event of a derailment or a collision, the R/R could incur an EE claim for rerouting expenses and other additional costs to clear track, etc.. Freight trains don't have a business income exposure. If there is a derailment or collision, the freight eventually arrives at the intended destination. If the freight is damaged, this is a liability exposure insured under the railroad liability coverage." The Travelers policy did not provide the railroad liability coverage, which was underwritten by a different insurance company unaffiliated with Travelers.

14. Having received this information, during the afternoon of March 21, 2013, Zachary Bowling obtained approval to issue the policy with combined limits of \$7,500,000, in accordance with the application and the March 20, 2013 clarifying email from the broker. The written approval instructions Bowling received from his supervisor contained the following instruction: "RRRS-\$5mm EE not BI-let's review the form."

15. After receiving the above described approval, Zachary Bowling sent a formal detailed proposal to the broker for the Defendants. The proposal included the following specification for the Railroad Rolling Stock insurance: “RR Rolling Stock BI and EE is Extra Expense Only\*\*\*” The proposal was subsequently finalized and accepted by the Defendants without any change to this provision.

16. On or about April 19, 2013, Travelers issued to Defendants a commercial property insurance policy, bearing Policy No. QT-630-6357L188-TIL-13, with a policy period of April 1, 2013 to April 1, 2014 (the “Policy”). A certified copy of the Policy that was issued is attached as Exhibit A hereto. The Policy was issued to Defendants in Maine.

17. Due to mistake and inadvertence, the written Policy that was issued and accepted contained form CM T5 27 02 08, which stated that it was providing both “Business Income” and “Extra Expense” coverage for Railroad Rolling Stock. Also due to the mistake and inadvertence, there was no endorsement in the policy which deleted the “Business Income” coverage provided under form CM T5 27 02 08, despite the fact that it was the mutual intent of the parties that the policy provide coverage for Extra Expense only, and not provide coverage for loss of Business Income.

18. On or about July 6, 2013, a portion of a train operated by MMA, consisting of locomotives, railcars, and a caboose, derailed in Lac-Megantic, Quebec, Canada (the “Incident”). Some of the railcars (the “Railcars”) derailed. Some of the Railcars and their contents were damaged in connection with the derailment.

19. The Policy provides only first-party property insurance coverage for certain “Covered Property” described in the Declarations of the Policy, as described in further detail

below. The Policy does not provide any third-party liability insurance coverage, and therefore does not provide liability insurance for any claims that may be brought against MMA by other third parties who sustained personal injuries or damage to their property as a result of the Incident. Upon information and belief, MMA obtained third-party liability insurance from another insurance company or companies unaffiliated with Travelers. This lawsuit does not involve third-party liability insurance.

20. MMA has made a claim with Travelers under the Policy for damage to a locomotive, the Railcars, and railroad track and roadbed arising from the Incident. Travelers has not yet completed its investigation of the claim because the authorities investigating the Incident have only recently permitted Travelers access to the scene to evaluate the claimed damage. MMA has also made a claim with Travelers under the Policy for losses of business income resulting from the damage to the locomotive, the Railcars and the Track.

**The Policy Does Not Cover the Railcars or Property Contained Therein**

21. The “Railroad Rolling Stock Coverage Form” in the Policy contains the following grant of coverage and provisions concerning “Covered Property”:

We will pay for direct physical loss of or damage to Covered Property from any of the Covered Causes of Loss.

1. Covered Property

Covered Property, as used in this Coverage Form, means the following property described in the Declarations:

- a. Your railroad rolling stock including locomotives, railcars, and other equipment operated on railroad tracks;
- b. Your mobile equipment not licensed for highway use, which you use in the course of your railroad operations; and
- c. Similar property of others in your care, custody or control.

2. Property Not Covered

Covered Property does not include:

- a. Property that you loan, lease or rent to others;
- b. Property for sale or in the course of manufacture;
- c. Property while waterborne;
- d. Property contained on or in railroad rolling stock or mobile equipment;
- e. Railroad tracks, beds, switches, signals, trestles, bridges, tunnels or ties; or
- f. Contraband or property in the course of illegal transportation or trade.

(Policy, "Railroad Rolling Stock Coverage Form," at 1 (emphasis added).)

22. The Railcars do not fall within the definition of "Covered Property," quoted in Paragraph 21 above, because the Railcars are not "described in the Declarations" of the Policy, or in the Railroad Rolling Stock Schedule which is incorporated by reference into the Declarations.

23. Property contained in the Railcars is not "Covered Property" as that term is defined in the Policy because: (a) property contained in the Railcars does not fall within the definition of "Covered Property" quoted in Paragraph 21 above; and (b) the "Property Not Covered" section, quoted in Paragraph 21 above, specifies that "Covered Property does not include . . . d. Property contained on or in railroad rolling stock . . . ."

24. The Policy does not provide coverage for damage to the Railcars.

25. The Policy does not provide coverage for damage to any property in the Railcars.

**Coverage for Damage to the Track Is Limited to \$250,000 Excess of a \$250,000 Deductible**

26. As quoted in Paragraph 21 above, the "Railroad Rolling Stock Coverage Form" in the Policy specifies that "Covered Property does not include . . . Railroad tracks, beds . . . or ties . . . ."

27. The Policy contains an endorsement entitled “Railroad Rolling Stock Damage to Track and Roadbed Coverage,” which provides as follows:

This endorsement modifies insurance provided under the RAILROAD ROLLING STOCK COVERAGE FORM.”

A. The following Additional Coverage is added to Section – A Coverage:

1. Damage to Track and Roadbed

We will pay your reasonable and necessary expense to repair or replace damaged track and roadbed located on your premises or for which you are legally liable if the damage is caused by derailment or collision. The most we will pay under this Additional Coverage is \$25,000 for the sum of all covered expenses arising during each separate 12 month period of this policy.

The limit for this Additional Coverage is in addition to the Limit of Insurance.

28. The endorsement quoted in Paragraph 27 above was intended to provide a limit of \$250,000 instead of \$25,000.

29. The Policy also contains an endorsement entitled “Railroad Track & Road Bed Deductible” providing for a “Railroad Track and Roadbed Deductible” of \$250,000. The Policy thus provides coverage of up to \$250,000 for expense to repair or replace damaged track and roadbed that exceeds \$250,000. For example, if one of the defendants incurs expenses of \$350,000 to repair or replace damaged track or roadbed, the policy would provide coverage of \$100,000.

**The Policy As Written Does Not Provide Coverage for Loss of Business Income or Extra Expense Caused by Damage to the Railcars, Property in the Railcars, or the Track**

30. The Policy (as issued) contains form CM T5 27 02 08, an endorsement entitled “Railroad Rolling Stock ‘Business Income’ and ‘Extra Expense’ Coverage.” That form provides as follows:

This endorsement modifies insurance provided under the RAILROAD ROLLING STOCK COVERAGE FORM.”

A. The following Additional Coverage is added to Section – A Coverage:

1. “Business Income” and “Extra Expense”

We will pay:

- (a) The amount by which your “Business Income” is actually reduced during the “period of restoration” due to loss of or damage to Covered Property from a Covered Cause of Loss; and
- (b) Your necessary “Extra Expense” to continue normal operations following loss of or damage to Covered Property from a Covered Cause of Loss.

31. As noted above, it was not the intent of the parties that the Policy provide insurance for loss of Business Income. In any event, however, even as mistakenly issued, the written Policy does not provide coverage for loss of “Business Income” due to loss of or damage to the Railcars because the Railcars are not “Covered Property” as that term is defined in the “Railroad Rolling Stock Coverage Form.” The Policy also does not provide coverage for “Extra Expense” due to loss of or damage to the Railcars because the Railcars are not “Covered Property” as that term is defined in the “Railroad Rolling Stock Coverage Form.”

32. As noted above, it was not the intent of the parties that the Policy provide insurance for loss of Business Income. In any event, however, even as mistakenly issued, the written Policy does not provide coverage for loss of “Business Income” due to loss of or damage to property contained in the Railcars because property contained in the Railcars was not “Covered Property” as that term is defined in the “Railroad Rolling Stock Coverage Form.” The Policy also does not provide coverage for “Extra Expense” due to loss of or damage to property contained in the Railcars because property contained in the Railcars was not “Covered Property” as that term is defined in the “Railroad Rolling Stock Coverage Form.”



33. As noted above, it was not the intent of the parties that the Policy provide insurance for loss of Business Income. In any event, however, even as mistakenly issued, the written Policy does not provide coverage for loss of “Business Income” due to loss of or damage to the track or roadbed because neither the track nor the roadbed property were “Covered Property” as that term is defined in the “Railroad Rolling Stock Coverage Form.” The Policy also does not provide coverage for “Extra Expense” due to loss of or damage to the track or roadbed because neither the track nor the roadbed were “Covered Property” as that term is defined in the “Railroad Rolling Stock Coverage Form.”

34. The Policy does not provide coverage for loss of “Business Income” or “Extra Expense” due to loss of or damage to the track or roadbed because neither the track nor the roadbed were “Covered Property” as that term is defined in the “Railroad Rolling Stock Coverage Form.”

**COUNT ONE**  
**(Declaratory Judgment Pursuant To 28 U.S.C. § 2201)**

35. Travelers repeats and realleges the allegations contained in Paragraphs 1 through 34 above, as if fully set forth herein.

36. An actual controversy has arisen as to whether, or to what extent, the Policy as issued provides coverage for the Railcars, property contained in the Railcars, the track, the roadbed, and/or loss of business income and/or Extra Expense caused by damage to any such property damage.

37. Travelers is entitled to a declaration that, under the terms of the Policy, it is not required to provide coverage for any damage to the Railcars arising from the Incident.

38. Travelers is also entitled to a declaration that, under the terms of the Policy, it is not required to provide coverage for any damage to property contained in the Railcars arising from the Incident.

39. Travelers is also entitled to a declaration that, under the terms of the Policy, any expense incurred for repairing the track and/or roadbed arising from the Incident is covered only up to a limit of \$250,000, in excess of a deductible of \$250,000.

40. Travelers is also entitled to a declaration that, under the terms of the Policy as issued, it is not required to provide coverage for any loss of "Business Income" or "Extra Expense" which was due to loss of or damage to the Railcars, property contained in the Railcars, or the track and/or roadbed.

**COUNT TWO**

**(Reformation)**

41. Travelers repeats and realleges the allegations contained in Paragraphs 1 through 34 above, as if fully set forth herein.

42. The parties intended that the Railroad Rolling Stock insurance provided in the Policy not provide insurance for loss of Business Income, and that the only time element coverage to be provided under the Policy would be Extra Expense.

43. The written Policy was mistakenly issued and accepted with form CM T5 27 02 08, and without an endorsement which would make it clear that the Business Income coverage outlined in form CM T5 27 02 08 would not be applicable.

44. The written Policy should be reformed to delete any coverage for Business Income resulting from damage to Railroad Rolling Stock.

**REQUESTS FOR RELIEF**

WHEREFORE, Travelers respectfully requests that the Court grant it the following relief:

- A. Enter a declaratory judgment that the Policy does not provide coverage for any damage to the Railcars, or to property contained in the Railcars;
- B. Enter a declaratory judgment that any expense incurred for repairing damage to the track or the roadbed arising from the Incident is covered only up to a limit of \$250,000, in excess of a deductible of \$250,000;
- C. Enter a declaratory judgment that the Policy does not provide coverage for any loss of "Business Income" or "Extra Expense" which was due to loss of or damage to the Railcars, property contained in the Railcars, or the track or the roadbed;
- D. Reform the Policy to delete any coverage for loss of Business Income resulting from loss to Railroad Rolling Stock; and
- E. Grant such other relief as this Court deems just and appropriate.