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Transit Corporation*

-----	:	SUPERIOR COURT OF NEW JERSEY
NEW JERSEY TRANSIT CORPORATION,	:	LAW DIVISION: ESSEX COUNTY
	:	
Plaintiff,	:	Docket No. _____
v.	:	
	:	
	:	<b><u>CIVIL ACTION</u></b>
CERTAIN UNDERWRITERS AT LLOYD’S,	:	
LONDON; HUDSON SPECIALTY	:	
INSURANCE COMPANY; IRONSHORE	:	<b><u>COMPLAINT</u></b>
SPECIALTY INSURANCE COMPANY;	:	
MAIDEN SPECIALTY INSURANCE	:	
COMPANY; RSUI INDEMNITY COMPANY;	:	<b><u>JURY TRIAL DEMANDED</u></b>
TORUS SPECIALTY INSURANCE	:	
COMPANY; and WESTPORT INSURANCE	:	
CORPORATION,	:	
	:	
Defendants.	:	
-----	:	

New Jersey Transit Corporation (“NJ Transit”), by and through its undersigned attorneys,  
as and for its Complaint against Defendants, alleges as follows:

**PRELIMINARY STATEMENT**

1. This action is for declaratory relief as well as damages for anticipatory breach of contract.
2. NJ Transit seeks to have this Court declare the parties’ respective rights and obligations under all-risk property insurance policies (the “Policies”) that were part of a

comprehensive insurance program that NJ Transit purchased from the Defendant insurance companies.

3. The Policies cover NJ Transit for the policy period of July 1, 2012, to July 1, 2013, and provide \$400,000,000 in coverage for a wide variety of property damage and other losses.

4. NJ Transit suffered significant damage to its facilities and equipment throughout the state when Superstorm Sandy struck New Jersey on October 29, 2012, and in the days that followed.

5. Fortunately, NJ Transit had purchased the Policies sold by Defendants, which were designed specifically to cover exactly the type of losses sustained by NJ Transit. Indeed, “Named Windstorm” is a peril insured against under the Policies. A Named Windstorm under the Policies includes “wind driven water, storm surge and flood associated with, or which occurs in conjunction with, a storm or weather disturbance which is named by the National Weather Service or any other recognized meteorological authority.”

6. Defendants have not disputed that Superstorm Sandy falls within the Named Windstorm definition in the Policies.

7. The Policies provide insurance for up to \$400,000,000 of losses that are covered under the Policies. The \$400,000,000 limit applies to all coverages to which a sublimit does not apply.

8. There is no sublimit for Named Windstorm; thus the coverage limit for losses caused by a Named Windstorm such as Superstorm Sandy is \$400,000,000.

9. Following Superstorm Sandy, NJ Transit immediately notified its broker, Marsh & McLennan, Inc. (“Marsh”), and all of its insurance carriers that it sustained significant damage

as a result of Sandy, and the parties began the process of quantifying the extent of the damage. In the meantime, NJ Transit restored necessary equipment and resumed providing bus, train, and light rail service.

10. Despite Defendants' acknowledgement that Superstorm Sandy is a Named Windstorm under the Policies, Defendants refuse to honor their obligations by arguing that a \$100,000,000 sublimit for losses caused by Flood (the "Flood Sublimit") limits the coverage available under the Policies. Defendants' argument in this regard ignores that a Named Windstorm by its terms encompasses losses caused by wind-driven water, storm surge and flood, when that wind-driven water, storm surge and flood arises out of a Named Windstorm. Defendants further ignore that the Flood definition on which they rely to limit NJ Transit's losses, unlike many definitions of flood used in the insurance industry, is narrowly defined and does not apply to all water damage. In fact, unlike the definition of Named Windstorm, the Flood definition in the Policies does not encompass and makes no mention of "wind driven water" or "storm surge."

11. Because all of NJ Transit's water damage arose out of Superstorm Sandy, a Named Windstorm, and the storm surge and wind-driven water associated therewith, the coverage is not capped by the Flood Sublimit, but instead the full \$400,000,000 in coverage under the Policies is available for NJ Transit's Sandy-related losses.

12. NJ Transit seeks a declaration that the Flood Sublimit does not apply to cap NJ Transit's Sandy-related losses because the losses were caused by a Named Windstorm.

13. Further, NJ Transit seeks damages for anticipatory breach of contract against Defendants. Despite the fact that NJ Transit has suffered hundreds of millions of dollars of losses as a direct result of Superstorm Sandy, Defendants have indicated they will not provide

coverage beyond the \$100,000,000 Flood Sublimit for any Sandy-related water damage, notwithstanding that under the Policies such damage was caused by a Named Windstorm.

### **THE PARTIES**

14. Plaintiff is the State of New Jersey's public transportation corporation, created by the Public Transportation Act of 1979. N.J. Stat. Ann. §§ 27:25-1 to -24 (West 2014). NJ Transit is responsible for public rail and bus transportation throughout the state. It is organized under the laws of New Jersey and has a principal place of business at One Penn Plaza East, Newark, New Jersey 07105.

15. Upon information and belief, Defendant Certain Underwriters at Lloyd's, London ("Lloyd's") consists of natural persons and/or business entities who are or have been members of underwriting syndicates, which conduct or have conducted business in the insurance marketplace known as Lloyd's, London, which is chartered under the laws of the United Kingdom.

16. Upon information and belief, Defendant Hudson Specialty Insurance Company ("Hudson") is an insurance company organized under the laws of the State of New York with its principal place of business in New York, New York. Upon information and belief, Hudson is authorized to sell or write insurance in New Jersey and, at all material times, has conducted and continues to conduct substantial insurance business in the State of New Jersey.

17. Upon information and belief, Defendant Ironshore Specialty Insurance Company ("Ironshore") is an insurance company organized under the laws of the State of Arizona with its principal place of business in New York, New York. Upon information and belief, Ironshore is authorized to sell or write insurance in New Jersey and, at all material times, has conducted and continues to conduct substantial insurance business in the State of New Jersey.

18. Upon information and belief, Defendant Maiden Specialty Insurance Company ("Maiden") is an insurance company organized under the laws of the State of North Carolina

with its principal place of business in Mount Laurel, New Jersey. Upon information and belief, Maiden is authorized to sell or write insurance in New Jersey and, at all material times, has conducted and continues to conduct substantial insurance business in the State of New Jersey.

19. Upon information and belief, Defendant RSUI Indemnity Company (“RSUI”) is an insurance company organized under the laws of the State of New Hampshire with its principal place of business in Atlanta, Georgia. Upon information and belief, RSUI is authorized to sell or write insurance in New Jersey and, at all material times, has conducted and continues to conduct substantial insurance business in the State of New Jersey.

20. Upon information and belief, Defendant Torus Specialty Insurance Company (“Torus”) is an insurance company organized under the laws of the State of Delaware with its principal place of business in Jersey City, New Jersey. Upon information and belief, Torus is authorized to sell or write insurance in New Jersey and, at all material times, has conducted and continues to conduct substantial insurance business in the State of New Jersey.

21. Upon information and belief, Defendant Westport Insurance Corporation (“Westport”) is an insurance company organized under the laws of the State of Missouri with its principal place of business in Overland Park, Kansas. Upon information and belief, Westport is authorized to sell or write insurance in New Jersey and, at all material times, has conducted and continues to conduct substantial insurance business in the State of New Jersey.

### **JURISDICTION AND VENUE**

22. This Court has general subject matter jurisdiction pursuant to the New Jersey Declaratory Judgments Act, N.J. Stat. Ann. § 2A:16-50 to -62 (West 2014), to determine questions of actual controversy between the parties to this action as more fully set forth herein.

23. This Court has jurisdiction over each of the named Defendants because, upon information and belief, Defendants:

- (a) are licensed or authorized to do business in New Jersey; or
- (b) are eligible surplus lines insurers in New Jersey; or
- (c) have, within the relevant time periods, transacted business in New Jersey.

24. Venue is proper in this County pursuant to R. 4:3-2(a) because NJ Transit and Defendants are doing business in this County.

### **FACTUAL ALLEGATIONS**

#### **I. The Relevant Terms and Conditions of the Insurance Policies**

25. In consideration of significant premiums, Defendants sold NJ Transit the following Policies for the policy period July 1, 2012 to July 1, 2013:

- (a) Policy No. GEP 3097, issued by Lloyd's;
- (b) Policy No. HCS100133, issued by Hudson (the "Hudson Policy");
- (c) Policy No. 001408600, issued by Ironshore (the "Ironshore Policy");
- (d) Policy No. S2LPY0219705S, issued by Maiden (the "Maiden Policy");
- (e) Policy No. NHT377669, issued by RSUI;
- (f) Policy No. 03678A123APR, issued by Torus (the "Torus Policy"); and
- (g) Policy No. 31-3-75070, issued by Westport.

26. The Policies provide coverage for a wide variety of risks, including many forms of property damage and consequential expenses.

27. The Policies are mainly comprised of an identical form of coverages, terms, and conditions (the "Coverage Form"), with the result that the relevant terms have the same definitions in almost all of the Policies. In some cases, however, Defendants attached their own endorsements, terms, and conditions to the Policies that supersede certain terms and conditions of the Coverage Form.

28. The Policies sold by Defendants to NJ Transit are part of a \$400,000,000 comprehensive insurance program. The Policies provide coverage in four layers above a per-occurrence deductible of \$500,000. The first layer of coverage is \$50,000,000, the second layer of coverage is also \$50,000,000, the third layer of coverage is \$175,000,000, and the fourth layer of coverage is \$125,000,000. With the exception of the first layer, which is insured by non-party insurer Lexington Insurance Company (“Lexington”), multiple insurance companies, including Defendants, are responsible for the coverage available in each layer, with each company assuming a certain percentage of each layer’s coverage limit.

29. Where there are no applicable sublimits for a peril insured against under the Policies, such as for fire, explosion, lightning, and Named Windstorm, the \$400,000,000 limit is available. The Policies also have various sublimits, capping the available coverage for certain causes of loss or types of coverage, including the Flood Sublimit.

30. The Flood Sublimit provides:

B. \$100,000,000 per occurrence and in the aggregate in any one policy year as respects losses caused by flood.

31. All of the Policies provide coverage for “Real and Personal Property,” defined in the Coverage Form as:

All Real and Personal Property including bridges and tunnels now or hereafter existing in any form including newly acquired property of the Insured and property of others for which the Insured may be liable, or in which they may have an insurable interest, or for which they are legally responsible, to insure, while in transit or wherever located, including while under incidental construction, installation or assembly.

32. This coverage specifically includes:

(m) Bridges and tunnels owned or leased by the Insured.

(n) Railroad cars, Locomotives, and other Railroad Rolling Stock, Light Rail Vehicles, Buses, Automobiles and similar items pertinent to operation

owned or leased by the Insured are specifically covered as Personal Property.

33. The Policies also all provide coverage for “Extra Expense”:

Extra expense incurred resulting from insured direct physical loss, damage or destruction to property by any of the perils covered herein during the term of this policy.

“Extra Expense” shall mean the excess of the total cost during the period of restoration of the damaged property chargeable to the operation of the Insured’s business over and above the total cost that would normally have been incurred to conduct the business during the same period had no direct loss or damage occurred.

34. All of the Policies also have “Named Storm” coverage, which contains a definition of “Named Windstorm”:

The term “Named Windstorm” shall mean wind or wind driven water, storm surge and flood associated with, or which occurs in conjunction with, a storm or weather disturbance which is named by the National Weather Service or any other recognized meteorological authority.

Such storm or weather disturbance shall be considered to be a Named Windstorm until the time such storm or weather disturbance has been downgraded, meaning that the storm or weather condition is no longer considered by the U.S. National Weather Service or any other recognized meteorological authority to be a hurricane, typhoon, tropical storm or cyclone.

35. Windstorm is listed as a “peril” alongside other perils, including flood, in an exclusion for loss or damage to track, roadbed, and overhead and underground lines, as well as in the Occurrence Limit of Liability Endorsement attached to all of the Policies.

36. The Torus and Hudson Policies have a slightly different definition of Named Windstorm:

Named windstorm shall mean direct action of wind including ensuing storm surge when such wind/storm surge is associated with, or occurs in conjunction with a storm or weather disturbance which is named by the National Oceanic and Atmospheric Administration’s (NOAA) National Hurricane Center or similar body until sustained wind speeds drop below the parameter for naming storms.



Storm surge is defined as water driven inland from coastal waters by high winds and low atmospheric pressure.

37. Additionally, the Policies also provide a wide variety of other potentially applicable coverages (the “Other Coverages”). The Other Coverages include, but are not limited to, coverage for Debris Removal, Demolition and Increased Cost of Construction, Expediting Expense, loss caused by acts of civil or military authority, loss caused by lack of ingress or egress to premises, and Loss Adjustment Expenses. In addition to the Flood Sublimit, the Policies also have sublimits for several of the Other Coverages.

38. The Coverage Form defines “Flood” as:

The term Flood shall mean a temporary condition of partial or complete inundation of normally dry land from:

1. The overflow of inland or tidal waters outside the normal watercourse or natural boundaries[;]
2. The overflow, release, rising, back-up, runoff or surge of surface water; or
3. The unusual or rapid accumulation or runoff of surface water from any source.

such . . . flood shall be deemed to be a single occurrence within the meaning of this policy.

39. The Ironshore Policy modifies the above Coverage Form definition for “Flood” to add: “Further, ensuing physical loss, damage or destruction arising from a peril not otherwise excluded herein caused by such Flood shall not be considered Flood within the terms and conditions of this Policy.”

## **II. Superstorm Sandy and the Resulting Damage to NJ Transit’s Operations**

40. NJ Transit is the third-largest provider of bus, rail, and light rail transit in the United States. It operates over 2000 buses, 700 trains, and 45 light rail vehicles, and provides

nearly 223,000,000 passenger trips per year, with nearly 900,000 passenger trips per average weekday.

41. NJ Transit has facilities throughout New Jersey, with over 250 bus, rail, and light rail stations and maintenance facilities, as well as over 500 miles of track, thousands of signals, and over 500 bridges.

42. Superstorm Sandy, the second-largest Atlantic storm on record, made landfall in southern New Jersey on October 29, 2012.

43. The Storm was classified as a hurricane as it made its way toward the Eastern Seaboard, and was classified by the National Weather Service and the National Hurricane Center as a post-tropical or extratropical cyclone when it made landfall.

44. Superstorm Sandy worked its way up the New Jersey coast and caused significant damage to everything in its path, including NJ Transit's facilities and equipment. Across the State stations, tracks, bridges, tunnels, power stations and all manner of equipment were damaged by wind and water, including a record 13-foot storm surge.

45. Even train lines that were not directly damaged were crippled by power outages that made it impossible for NJ Transit to operate signals and switches.

46. As soon as it was safe to do so, NJ Transit dispatched crews to begin repairs and was able to restore a large percentage of pre-storm service within weeks.

47. Many projects are still ongoing, and extensive repairs remain to be made on certain facilities.

### **III. NJ Transit's Claim for Coverage**

48. NJ Transit immediately notified its broker, Marsh, and all of its insurance carriers, including Defendants, of the damage it sustained as a result of Superstorm Sandy.

49. Employees of NJ Transit, Marsh, the insurance carriers, and the designated loss adjustor, York Risk Services Group, Inc. (“York”), quickly set about arranging for inspections of damaged property and valuation of equipment that needed to be repaired and/or replaced.

50. Over the next several months, inspections, valuations, and necessary repairs proceeded, with NJ Transit keeping all of the carriers, including Defendants, informed as total damage estimates developed.

51. On April 3, 2013, however, NJ Transit received a letter (the “April 3 Letter”) from its insurers ACE Bermuda Insurance Company, Partner Reinsurance Europe PLC, and Defendants Hudson, Ironshore, RSUI, Torus, Lloyd’s, and Westport (collectively, the “Excess Market Insurers”) informing it that despite the fact that the Policies have an overall limit of \$400,000,000 in coverage with no Named Windstorm sublimit, the Excess Market Insurers believed all Superstorm Sandy-related water damage fell within the Policies’ definition of “Flood” and that they therefore would pay no more than the Flood Sublimit of \$100,000,000 (or \$50 million in excess of the first-layer coverage provided by Lexington) for all Sandy-related water damage. In April and September 2013, respectively, both Hudson and Torus acknowledged that their Policies had slightly different definitions of Named Windstorm, but nevertheless adhered to the position expressed in the April 3 Letter.

52. On April 4, 2013, non-party Arch Specialty Insurance Company (“Arch”), whose policy provides coverage in the second, third, and fourth layers (the “Arch Policy”) and has the exact same Coverage Form, Flood Sublimit, and Flood and Named Windstorm definitions as almost all of Defendants’ Policies, sent NJ Transit a letter in which it confirmed that the Flood Sublimit should not apply to NJ Transit’s Superstorm Sandy-related water damage and that it would pay its percentage of NJ Transit’s loss above the \$100,000,000 Flood Sublimit.

53. After receiving the April 3 Letter, Marsh notified loss adjustor York that NJ Transit disagreed with the Excess Market Insurers' self-interested interpretation of the Policies and their position that the Flood Sublimit applied. Marsh explained to the Excess Market Insurers that because there was no deductible or sublimit associated with Named Windstorm, Named Windstorm was clearly a separate peril insured under the Policies and, with no applicable sublimit, the full \$400,000,000 in coverage available under the Policies is available to cover NJ Transit's Superstorm Sandy-related losses. This position was communicated directly to the Excess Market Insurers at an in-person conference between representatives of NJ Transit and of the Excess Market Insurers on June 10, 2013.

54. On December 16, 2013, the Excess Market Insurers officially agreed to pay the \$50,000,000 in combined policy limits of the second-layer policies, which, when combined with the \$50,000,000 that NJ Transit's primary insurer had previously paid, brought NJ Transit's total insurance recovery to \$100,000,000 – the Flood Sublimit. To date, NJ Transit has not received any further payment of the remaining \$300,000,000 in coverage from Defendants or any other insurer, although Defendants and other insurers who participated in the program have continued to work with NJ Transit and Marsh to quantify the loss.

55. By letter dated September 12, 2014, NJ Transit requested that the Excess Market Insurers acknowledge that the Flood Sublimit does not apply to Superstorm Sandy-related water damage and commit to pay for NJ Transit's otherwise covered Sandy-related losses in excess of \$100,000,000. As of the date of this filing, Defendants have not substantively responded to NJ Transit's September 12 letter.

## **FIRST CAUSE OF ACTION**

### **(Declaratory Judgment)**

56. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 55 of this Complaint as if fully set forth herein.

57. Upon the triggering and attachment of their respective Policies, Defendants are obligated to pay NJ Transit for the hundreds of millions of dollars of losses that NJ Transit sustained as a result of Superstorm Sandy.

58. Superstorm Sandy was a Named Windstorm under the Policies' definitions, and the losses arising from Superstorm Sandy therefore are not subject to any sublimit, including the Flood Sublimit.

59. Defendants dispute their legal obligation to pay for the Superstorm Sandy-related water damage sustained by NJ Transit in excess of the Flood Sublimit.

60. An actionable and justiciable controversy exists between NJ Transit and Defendants concerning the proper construction of the Policies, and the rights and obligations of the parties thereto, with respect to water-related damage caused by Superstorm Sandy.

61. NJ Transit is entitled to a declaration that the Flood Sublimit in the Policies does not apply to the losses caused by Superstorm Sandy, a Named Windstorm, and its ensuing storm surge, and that Defendants must pay for the full amount of NJ Transit's losses from Superstorm Sandy, up the Policies' overall limit of \$400,000,000.

62. The issuance of declaratory relief by this Court will terminate the existing controversy among the Parties.

## **SECOND CAUSE OF ACTION**

(Anticipatory Breach of Contract)

63. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 62 of this Complaint as if fully set forth herein.

64. Under the terms of the Policies, Defendants must pay up to \$400,000,000 for any damage covered under the Policies, including damage to Real and Personal Property and Extra Expense, as well as losses covered by the Other Coverages.

65. Defendants have disputed or, upon information and belief, will dispute their legal obligation to pay for any Superstorm Sandy-related water damage sustained by NJ Transit beyond the \$100,000,000 Flood Sublimit.

66. NJ Transit has suffered hundreds of millions of dollars of losses that are insured under the Policies. Defendants' position with respect to the Flood Sublimit has rendered NJ Transit insecure as NJ Transit reasonably believes that each of the Defendants will not perform its contractual obligations to NJ Transit as and when due.

67. As a direct and proximate result of Defendants' respective anticipatory breaches of the Policies, NJ Transit has suffered or will suffer direct and consequential damages in an amount to be determined at trial, and such damages are continuing.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff NJ Transit prays for relief as follows:

(a) On the First Cause of Action, that this Court enter a declaratory judgment in favor of NJ Transit against Defendants, declaring that the Flood Sublimit in the Policies does not apply to water damage caused by Superstorm Sandy and that Defendants are obligated to pay NJ Transit, up to the applicable limits of the Policies, for any losses covered under the Real and

Personal Property coverage, Extra Expense coverage, or the Other Coverages caused by Superstorm Sandy.

(b) On the Second Cause of Action, that this Court enter judgment against Defendants, awarding NJ Transit damages in an amount to be determined at trial, plus pre- and postjudgment interest;

(c) On all Causes of Action, that this Court award Plaintiff all costs incurred to prosecute this lawsuit for declaratory relief, breach of contract, and anticipatory breach of contract, including attorneys' fees, as well as pre- and postjudgment interest and/or other relief as otherwise provided by law; and

(d) Additionally, that the Court award such other and further relief as the Court deems just and proper.

**JURY DEMAND**

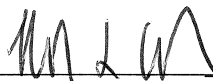
Plaintiff hereby demands a trial by jury on all issues so triable.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Robin L. Cohen, Esq., is hereby designated as trial counsel for  
Plaintiff NJ Transit.

Dated:           New York, New York  
                  October 1, 2014

KASOWITZ, BENSON, TORRES  
& FRIEDMAN LLP

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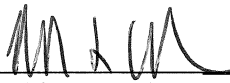


**RULE 4:5-1 CERTIFICATION**

I HEREBY CERTIFY that the matter in controversy is not the subject of any action pending in any court or of a pending arbitration proceeding. NJ Transit contemplates arbitration proceedings during the pendency of or following this litigation against two of its excess insurance carriers, ACE Bermuda Insurance Company and Partner Reinsurance Europe PLC, neither of which is amenable to suit in this action due to unambiguous arbitration provisions in their respective policies.

Dated:           October 1, 2014

KASOWITZ, BENSON, TORRES  
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