IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

THE WEITZ COMPANY, LLC, Plaintiff, vs. LEXINGTON INSURANCE COMPANY; ALLIED WORLD ASSURANCE COMPANY (U.S.), INC.; WESTCHESTER SURPLUS LINES INSURANCE COMPANY; ESSEX INSURANCE COMPANY; AXIS SURPLUS INSURANCE COMPANY; LLOYD'S OF LONDON, et al., a/k/a/ UNDERWRITERS AT LLOYD'S; and various unknown insurers hereby named JOHN DOE INSURERS, Defendants.	No. 4:10-cv-00254-JAJ **ORDER**

This matter comes before the Court pursuant to Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants are Lexington Insurance Company ("Lexington"); Allied World Assurance Company (U.S.), Inc. ("Allied"); Westchester Surplus Lines Insurance Company ("Westchester"); Essex Insurance Company ("Essex"); Axis Surplus Insurance Company ("Axis"); and Lloyd's of London, et al., a/k/a/ Underwriters at Lloyd's ("Lloyd's Underwriters").

Plaintiff The Weitz Company, LLC ("Weitz") filed a Complaint against the Defendants on June 4, 2010. [Dkt. No. 1.] Plaintiff has since filed a First Amended Complaint[1] on October 28, 2010, and a Second Amended Complaint on March 3, 2011.

[1]Weitz filed a motion to dismiss Defendant RSUI Indemnity Corporation without prejudice, which the Court granted on March 9, 2011. [Dkt. Nos. 65, 73.]

[Dkt. Nos. 24, 68.] The Defendants filed the motions to dismiss[2] pursuant to the Second Amended Complaint (the "Amended Complaint"). They assert that the allegations do not meet the requirements of Federal Rule of Civil Procedure 8 or the pleading requirements set forth in *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), because the statements are vague, conclusory, and do not contain sufficient facts upon which a claim against the Defendants can be based.

The Court finds that Weitz has complied with Fed. R. Civ. P. 8 and has alleged sufficient facts upon which claims against the Defendants can be based. Accordingly, the Court denies the motions.

I. BACKGROUND

The Weitz Company, LLC is an Iowa limited liability company with its principal place of business in Des Moines, Iowa. [Second Am. Compl., Dkt. No. 66 ¶ 1.] The sole

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[2]Allied and Lexington filed a Motion to Dismiss the Complaint on October 1, 2010, and although this motion was withdrawn with the subsequent filing of the First Amended Complaint, the motion and its exhibits remains pertinent to Weitz's present claims because it is incorporated by reference in later motions. [Dkt. No. 19.]

Defendants filed Motions to Dismiss the First Amended Complaint and the Second Amended Complaint. The Motions to Dismiss the First Amended Complaint were filed on November 29, 2010, by Lloyd's Underwriters, RSUI Indemnity Company, Axis, Allied, and Lexington. [Dkt. Nos. 33, 36, 37.] Weitz responded on December 16, 2010, and replies were filed on January 6 and 7, 2011. [Dkt. Nos. 43, 46, 49, 51, 52.]

With the exception of Westchester, the motions filed by the Defendants relating to the Second Amended Complaint largely incorporate by reference the motions and briefing from the First Amended Complaint. Allied and Lexington filed their motion on March 3, 2011; Axis filed its on March 9, 2011; and Lloyd's Underwriters and Essex filed theirs on March 10, 2011. [Dkt. Nos. 69, 74, 75.] Weitz responded on March 21 and 28, 2011, to these motions. [Dkt. Nos. 77, 78, 79.] Replies were filed by Lexington on April 1, 2011, and Essex, Lloyd's Underwriters, and Axis, on April 7, 2011. [Dkt. Nos. 82, 83, 84.]

Westchester only filed a Motion to Dismiss the First Amended Complaint on February 16, 2011, with Weitz responding on March 18, 2011. [Dkt. No. 62, 76.] However, because the Second Amended Complaint is unchanged, with the exception of excluding RSUI Indemnity Company and adding Essex as a defendant, the legal issues addressed in Westchester's motion relate to the Second Amended Complaint.

member of Weitz is The Weitz Group, LLC, with its principal place of business in Des Moines, Iowa. Id. ¶¶ 2-3. The corporate members of The Weitz Group, LLC, all of whom are Iowa corporations with their principal places of business in Des Moines, Iowa, are the Weitz Company I, Inc., The Weitz Company II, Inc., The Weitz Company III, Inc., and The Weitz Company IV, Inc. Id. ¶ 4. The individual members of the Weitz Group, LLC are citizens of Arizona, Arkansas, Colorado, Florida, Hawaii, Iowa, and Wisconsin. Id. ¶ 5.

The Defendants are all corporations in the business of providing insurance, including property insurance, to businesses and individuals. Lexington is a Delaware corporation with its principal place of business in Boston, Massachusetts. Id. ¶ 7. Allied is a Delaware corporation with its principal place of business in New York, New York, or Boston, Massachusetts. *Id.* ¶ 8. Westchester is a Georgia corporation with its principal place of business in Roswell, Georgia. *Id.* ¶ 9. Essex is a Delaware corporation with its principal place of business in Glen Allen, Virginia. *Id.* ¶ 10. Axis is a Georgia corporation with its principal place of business in Illinois. *Id.* ¶ 11. Lloyd's Underwriters is a British corporation licensed to undertake insurance business in the United States of America. *Id.* ¶ 12.

On January 8, 2011, Weitz entered into a written "Agreement Between Owner and Contractor" (the "Contract") with CC-Aventura, Inc. ("Hyatt") for the construction of a luxury life-care "Classic Residence" retirement community located at 10333 West Country Club Drive, Aventura, Florida (the "Project"). *Id.* ¶ 16. The Project consisted of two 23-story residential buildings (the "Towers"), an amenities building, an adjacent health center ("Care Center"), and a parking garage. *Id.* The Contract had an insurance section specifically detailing obligations of each party to the other. The Contract required Weitz to purchase and maintain its own comprehensive general liability coverage including:

> Bodily Injury Liability . . . Property Damage Liability . . . Blanket Contractual Liability, Completed Operations, Broad Form Property Damage . . . [with the above insurance] to also include products and complete operations endorsement which

> shall be maintained for a term ending not sooner than two (2) years after Final Completion.

[Dkt. No. 19, Exh. E – Owner-Contractor Agreement at cl. 7.A.(ii)(a)-(d).] The Contract also stated that "[a]ll insurance required to be maintained by [Weitz] . . . shall be primary to any other valid and collectible insurance . . . ." *Id.* at cl. 7.M. Pursuant to paragraph 7.N. of the Contract,

> [the] Owner and Contractor waive all rights against each other and any of their Subcontractors, any Separate Contractor and their respective agents and employees, each of the other, for damages caused by fire or other perils to the extent covered by property insurance . . . The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to the person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person had an insurable interest in the property damaged.

According to the Complaint, Allied, Axis, Essex, Lexington, Lloyd's Underwriters, and Westchester issued "all risk" property insurance policies to Hyatt covering the Project (the "Policies"). Second Am. Compl., ¶ 17. All-risk policies cover all causes of loss and physical damage to the Project property unless expressly excluded. *Id.* ¶ 24. For example, the Policy entered into between Lexington, Allied, and Hyatt provided "Perils Insured Against" to include "all risks of direct physical loss of or damage to property described herein including general average, salvage and all other similar charges on shipments covered hereunder, if any, except as hereinafter excluded." [Dkt. No. 19, Exh. C ¶ 9.] Pertinent "Perils Excluded" consisted of a range of perils such as mechanical breakdown, natural disasters, etc., but also included,

> the cost of making good defective design or specifications, faulty materials or faulty workmanship. But if loss or damage from a covered peril herein results, to covered property, from such defective design or specifications, faulty material or faulty

> workmanship, then this policy will cover such ensuing loss or damage not otherwise excepted or excluded from coverage . . .

Id. ¶ 10.C. The policy covered "losses occurring [during] the Policy Period," but had a contractual twenty-four month limitations period, which ran from the inception of loss:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twenty-four months next after inception of the loss.

Id. ¶¶ 1, 28.

According to Weitz, the terms of the Contract and the Policies meant that the Defendants were primarily liable to pay for property damages covered by the Policies. Second Am. Compl., ¶ 26.

In or about September 2004, the Care Center sustained damages and Hyatt made a claim on one or more of the Policies for the damages. *Id.* ¶ 18. In or about July 2005, the Towers sustained damages and Hyatt made a claim on one or more of the Policies for the damages. *Id.* ¶ 19. Finally, in or about the fall of 2008, Hyatt discovered additional property damage on the plaza deck of the Towers. *Id.* ¶ 20. In the complaint, Weitz claims that these damages were all insured under one or more of the Policies by the Defendants. *Id.* ¶¶ 18-20, 23-26.

Weitz asserts that Hyatt made a claim for the damages to the Care Center and the Towers under one or more of the Policies.[3] *Id.* ¶ 21. These structures were insured under Defendants' Policies. *Id.* ¶ 23. Weitz claims the property damages to the Project were not expressly excluded and are therefore covered under Defendants' Policies. *Id.* ¶ 25.

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[3]On November 2, 2005, Hyatt, Lexington, and Allied entered into a "Settlement Agreement and Release of All Claims." [Dkt. No. 19, Exh. F at 1.] Lexington and Allied, pursuant to Policy Numbers 1282118 and AW1282118, agreed to pay Hyatt $750,000 for reported claims arising from the Project. Although not attached to the Amended Complaint, it is a central document as Weitz seeks recovery for damages to the Project from Lexington and Allied.

Hyatt also sued Weitz for damages in June of 2006 in the United States District Court for the Southern District of Florida, Miami Division ("Florida Action")[4] *Id.* ¶ 21. In the Florida Action, Hyatt alleged breach of contract, code-violation, and breach of guaranty claims arising out of Weitz's untimely and defective workmanship and subpar, code-violating construction practices.[5] [Dkt. No. 37, Exh. A ¶¶ 9-41 & Counts VI, VII, VIII, and IX.] Shortly before trial, Weitz entered into a confidential settlement agreement with Hyatt (the "Settlement Agreement"). *Id.* ¶ 27. Pursuant to the Settlement Agreement, Weitz paid Hyatt for the property damage Hyatt suffered. *Id.* ¶ 28. The terms of the Settlement Agreement provided for Weitz to pay the sum of $53,000,000 ("settlement amount") to Hyatt, with some undisclosed portion of the settlement amount paid by MSA Architects, Inc. ("MSA"). [Dkt. No. 37, Exh. B ¶ 2.] Weitz preserved its right to pursue claims against the Defenants in the Settlement Agreement. *Id.* ¶¶ 5.2, 5.3. Weitz alleges that this Settlement Agreement also, to an undisclosed amount, "extinguished" any primary liability the Defendants' Policies incurred from the property damage. Second Am. Compl., ¶ 27.

Weitz alleges that the property damage paid for in the Settlement Agreement should have been covered by the Policies. Further, that the Defendants failed to pay for damages caused by covered perils and damages covered under the Policies because the damages were not expressly excluded. Second Am. Compl., ¶¶ 29-30. Weitz states that as a result of the Settlement Agreement, it incurred significant damage and the Defendants have refused to reimburse it for any portion of the settlement amount. *Id.* ¶¶ 31-32. Finally, Weitz asserts that the collective per occurrence limit of the Policies is in excess of the damages incurred by the Project. *Id.* ¶ 33.

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[4] *CC-Aventura, Inc., et al. v. The Weitz Co., L.L.C.*, Case No. 1:06-cv-21598-PCH.

[5] Hyatt alleged a sundry list of defects in workmanship including, but not limited to, cracks in the stucco on the Towers and Care Center, cracks and water intrusion in the concrete floor slabs in the Towers, defects in waterproofing, inadequate drainage in the Towers and Care Center, and water and moisture intrusion through the window system in the Care Center and Towers. [Dkt. No. 37, Exh. A ¶ 36.] The complaint in the Florida Action is public record and central to the case.

In the Amended Complaint,[6] Weitz alleges two causes of action: equitable and/or legal subrogation and unjust enrichment. As to its equitable and/or legal subrogation claim, Weitz argues that the Defendants are primarily liable for the property damage to the Project, because Weitz paid Hyatt for the property damage, the payment was not voluntary, and the payment extinguished the entire debt. *Id.* ¶¶ 36-40. Because Weitz made the settlement payment that should have been paid by the Defendants, Weitz argues a subrogation claim against the Defendants is appropriate. *Id.* ¶ 41. Similar reasoning applies to the unjust enrichment claim. Weitz states that the Defendants received premium payments from Hyatt in exchange for the coverage of the Policies and that the property damages Hyatt claimed were covered primarily by the Policies. *Id.* ¶¶ 43-44. Weitz claims that through the confidential settlement payment, it conferred a benefit on the Defendants because covering the property damages was the responsibility of the Defendants under the Policies. *Id.* ¶ 45. As a result, Weitz argues that the Defendants were unjustly enriched by the benefit conferred by Weitz, and it would be inequitable to allow the Defendants to retain that benefit without paying for its value. *Id.* ¶ 46-47.

II. ANALYSIS

A. Standard of Review

Federal Rule of Civil Procedure 8 requires that a complaint present "a short and plain statement of the claim showing that the pleader is entitled to relief." The court may only consider matters within the pleadings.[7] *Moble Sys. Corp. v. Alorica Cent., L.L.C.*, 543 F.3d

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[6]Weitz's sole claim in the original Complaint was breach of insurance contract.

[7]The Court notes that it may consider matters in the public record and "materials that are necessarily embraced by the pleadings." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999); *see also Noble Sys. Corp. v. Alorica Central, L.L.C.*, 543 F.3d 978, 982 (8th Cir. 2008). This includes taking "judicial notice of public records, such as documents filed with the Secretary of State and judicial rulings . . . ." *Shirley Medical Clinic, P.C. v. United States*, 446 F. Supp. 2d 1028, 1035 (S.D. Iowa 2006) (citations omitted). A court may not consider materials

978, 982 (8th Cir. 2008). To survive a 12(b)(6) motion, the claim "may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). The complaint must also "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)); *Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 716 (8th Cir. 2011) (quoting *Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 832 (8th Cir. 2009)). While not a "probability requirement," the "plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a 'sheer possibility.'" *Id.* To adequately state a claim, the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see also Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010) (citing *C.N. v. Willmar*

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outside the complaint, such as facts presented in briefs, affidavits, or discovery materials. William Schwarzer, A. Wallace Tashima, and James M. Wagstaffe, *Federal Civil Procedure Before Trial*, § 9:211, at 9-66 (2011).

However, documents attached to or incorporated within a complaint are considered part of the pleadings, and a court may look at such documents "for all purposes," including to determine whether a plaintiff has stated a plausible claim for relief. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459-60 (8th Cir. 2010) (citations omitted); *see also Sioux Biochemical, Inc. v. Cargill, Inc.*, 410 F. Supp. 2d 785, 791 (N.D. Iowa 2005) (court viewed underlying contractual agreements "as submitted by the parties in support of or resistance to [defendant's] motion to dismiss") (alteration added). Documents not physically attached to a complaint may be considered in a Rule 12(b)(6) motion if "the complaint *refers* to such document; the document is 'central' to plaintiff's claims; and no party questions the authenticity of the document." *Federal Civil Procedure Before Trial*, § 9:212.1(a), at 9-67, 9-68. But if the complaint alleges a "contract," without referring to a specific document, "the court may not consider documents that are *not indisputably* the basis for the alleged 'contract,' without converting the motion to summary judgment." *Id.* at 9-68 (citing *BJC Health System v. Columbia Cas. Co.*, 348 F.3d 685, 687 (8th Cir. 2003)).

Here, the Court finds that the documents in the Florida Action, the Settlement Agreement, insurance policies between Lexington/Allied and Hyatt, the Contract, and the settlement document between Lexington/Allied and Hyatt, are all properly considered in this Rule 12(b)(6) motion because they are "materials that are necessarily embraced by the pleadings." *Porous Media*, 186 F.3d at 1079. The Amended Complaint references these documents and the authenticity has not been challenged.

Pub. Sch., Indep. Sch. Dist. No. 347, 591 F.3d 624, 629-30 (8th Cir. 2010)). "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

When analyzing the adequacy of a complaint's allegations under Rule 12(b)(6), the court must accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiff. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint" (citations omitted)). "The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims." *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1376 (8th Cir. 1989) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds, *Davis v. Scherer*, 468 U.S. 183 (1984) (quotation marks omitted)).

Further, "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden*, 588 F.3d at 594 (citations omitted). "Ultimately, evaluation of a complaint upon a motion to dismiss 'is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (citing *Iqbal*, 129 S. Ct. at 1950).

B. Applying the Pleading Standards to the Second Amended Complaint

Weitz's Amended Complaint, the Defendants assert, falls "woefully short" of the Fed. R. Civ. P. 8 pleading standards and the Supreme Court's standards in *Twombly* and *Iqbal.* The Defendants allege that the Amended Complaint's allegations are not plausible on its face and are "scant on the facts and consist of a series of conclusory statements." The

Defendants assert that there are insufficient facts to establish a claim because the Amended Complaint fails to identify basic policy information, and is silent as to loss amount and damages.

The Defendants argue that the Amended Complaint does not establish basic policy information, such as policy numbers, policy periods, or policy limits for the respective insurers. In other words, the Amended Complaint does not identify the policies in place that allegedly cover the damages. The facts are also scant on loss amounts, the Defendants allege, as it is unclear if Weitz is asserting three separate losses or two losses with additional discovery of more property damage. Moreover, there is an absence of specific property damage in any given loss. The Amended Complaint does not state what "perils" caused each loss, and instead, draws legal conclusions that the perils "were not expressly excluded" under the policies. Specific information as to loss amount is important, the Defendants claim, because it informs the insurers whether their policies cover the underlying losses.

Finally, the Defendants argue that Weitz's failure to provide facts on damages results in a lack of information as to whether the Defendants are liable to Hyatt at all for property damage. The Amended Complaint is silent as to the settlement amount Weitz paid to Hyatt and if any portion of that settlement amount was either allegedly covered under the policies for property damage or was an obligation Weitz owed to Hyatt for its own unrelated liabilities. The Defendants note that Weitz also does not apportion the consideration provided by MSA for its share in the Settlement Agreement, which would influence whether Policies would be triggered and how much money Weitz could expect to recover from the Defendants. Because Weitz did not state damages sustained in total or for each of the two or arguably three losses, the Defendants argue that Weitz has failed to show that any policies were implicated and on what grounds. In other words, without specific dollar amounts for damages, the Defendants claim they have no information as to whether an individual

insurance policy would be responsible for loss because the policies are "layered."[8]

Weitz asserts that the facts are sufficient in the Amended Complaint and satisfy pleading standards. Specifically, Weitz asserts that the Amended Complaint sets forth facts that the Care Center and Towers sustained property damage in 2004, 2005, and 2008, and that Hyatt had purchased property insurance from the Defendants which covered property damage at the Project during those periods. It also explains that Hyatt was contractually obligated to seek recovery from the Defendants before turning to Weitz and that Hyatt did in fact submit damage claims to the Defendants for covered perils that they failed to pay. Weitz says it was compelled to pay Hyatt (through the Florida Action) for damages that the Defendants should have paid. "These facts clearly permit the reasonable inference that the Defendants are liable for all or a portion of the settlement amount that Weitz paid to Hyatt on the Insurers' behalf." Weitz rebuffs the Defendants' assertion that they are unable to determine which of their policies apply from the facts as alleged because "each carrier is well aware of what policy is potentially triggered by the date of the damages alleged in this action."

Moreover, Weitz argues that because the Defendants have copies of the policies, the federal rules do not require more specific detail and there can be "no reasonable debate" as to the amount of liability for each Defendant. In a resistance, Weitz also attached a list of all the policies at issue, policy years, and policy limits. Weitz rejects the contention that it has not provided sufficient detail of the policies and the liability of each Defendant. While acknowledging the Defendants may be liable for different amounts as a result of the "layering" of insurance, Weitz argues that the Defendants "collectively provided insurance coverage in different layers for each of the three years identified" and that Weitz "named all

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[8]Insurance companies "layer" when their obligation to pay is activated at different loss amounts. For example, Company *A* contracts with Insurer *B* and Insurer *C*. Insurer *B* contracts to pay for damages sustained for the first $100,000 of loss and Insurer *C* contracts to pay for damages sustained for loss over $100,000. If Company *A* reports $85,000 in loss, only the policy in place under Insurer *B* would be liable for the loss.

Defendants it understood to have issued property insurance to Hyatt covering damages in 2004, 2005, and 2008 with collective limits up to the $53 million settlement amount." Therefore, as the Court understands Weitz's argument, all Defendants had adequate notice "that their liability arises from policies they issued with policy periods covering property damages at the Project," because otherwise Weitz would not have included them in the Amended Complaint.

Here, the Court accepts as true all of the Amended Complaint's factual allegations and views them in the light most favorable to Weitz. *Pardus*, 551 U.S. at 94. However, the Court must determine whether Weitz has stated a "claim for relief that is plausible on its face," or whether the Defendants are correct in their assertion that the paucity of facts result in allegations that do not rise "above the speculative level." *Braden*, 588 F.3d at 594; *Twombly*, 550 U.S. at 555. Assisting the Court in this undertaking are the documents that are necessarily embraced by the pleadings and can be considered in this motion. *See Porous Media*, 186 F.3d at 1079; *supra*, note 7.

The Court accepts as true that Weitz entered into the written Contract with Hyatt to build the Project. The Contract, in its entirety, is a central part of the present claims. The relevant terms in the Contract specify the insurance obligations of each party, including the waiver in paragraph 7.N. between Weitz and Hyatt for "damages . . . to the extent covered by property insurance." Weitz refers to courts that have treated such a clause as signaling that the parties have shifted the risk of property loss from each other to an insurance company,[9] supporting his claim that the Defendants would be liable for covered property damage. Likewise, the Court accepts as true that the Defendants issued "all risk" insurance policies to Hyatt for the Project. Although only one contract (covering two policy periods) between Lexington/Allied and Hyatt was attached in responsive pleadings, the Court accepts

[9]The Court need not conduct extensive analysis as to how courts interpret these so-called exculpatory clauses. Weitz cited numerous cases including, *Employers Mutual Cas. Co.a v. A.C.C.T.*, 580 N.W.2d 490 (Minn. 1998).

as true that the terms of "all risk" insurance are similar, as well as the exclusions of coverage. *See Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 831 (8th Cir. 2006) (in "all risk" insurance policy, coverage extends to all fortuitous losses unless expressly excluded). Indeed, none of the individual Defendants have denied issuing "all risk" insurance policies or attempted to clarify the terms and conditions of any particular insurance policy. The damage events are also accepted at face value. The Amended Complaint, while not proffering the types or source of damage incurred, stated that damage occurred in or about September of 2004, July of 2005, and the Fall of 2008. It must be true that Hyatt made a claim on one or more of the Defendants' Policies, and, for the purposes of this motion, that Weitz believed that the damages were all covered under one or more of the Policies.

It is at this point in the Amended Complaint that the *Iqbal* and *Twombly* standards become particularly important. Weitz states that it settled with Hyatt in the Florida Action and that part of the settlement agreement amount of $53 million went to extinguish the Defendants' liability and that MSA contributed an undisclosed amount. The Court examined the Amended Complaint, the Florida Action Complaint and the Settlement Agreement, and the documents are silent as to: 1) the Defendants' liability; 2) the amount MSA contributed; 3) the amount or liability of what Weitz considers its own liability; 4) any attempt to seek indemnification or contribution from the Defendants before the Settlement Agreement; or 5) if the damage events in the Florida Action for which Weitz settled are the same three events claimed here. The Settlement Agreement implies liability to the Defendants because Weitz reserved the right to pursue claims against the Defendants, but this is insufficient to form a conclusion that the Defendants were liable, or, conversely, that the Defendants were *not* liable. These aforementioned gaps in the factual record are a deficiency in the pleadings as Weitz bases its equitable claims against the Defendants on the basis of the settlement amount of $53 million it paid to Hyatt. What is also missing from the Amended Complaint are the policy numbers, the policy years in effect, the policy limits, the

type of damage inflicted on the Project, and the specific dollar amount of damages. Whether these omissions collectively result in a failure to show that success on the merits is more than a "sheer possibility" is something the Court carefully considers.

First, the Court notes that Weitz must show its claim is plausible and submit sufficient factual matter to enable the Court to determine whether Weitz has adequately stated a claim. Even without specific detail regarding policies and their coverage, Weitz's allegation is sufficient that the Defendants all insured the Project with an "all risk" policy. Whether each policy would specifically cover the two to three damage events is not a conclusion the Court can make at this stage of the pleadings. Likewise, determining the amount of the Settlement Agreement that is *not* the Defendants' liability is also inappropriate to consider. Complaints should be liberally construed and not dismissed "simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations." *Young v. Principal Fin. Group, Inc.*, 547 F. Supp. 2d 965, 969 (S.D. Iowa 2008) (citations omitted). The Court also cannot automatically accept as true that the property damages were expressly excluded under the Defendants' Policies because that is a legal conclusion and there is insufficient factual detail before the Court. *See Zutz*, 601 F.3d at 848.

The question at this stage is whether Weitz has sufficiently alleged that the Defendants have an obligation under the Policies to pay for property damage and whether part of Weitz's settlement amount was, in fact, a liability of the Defendants. It is possible one or more of the Defendants may have been liable to Hyatt for the damages because Weitz expressly reserved the right to seek damages from the Defendants. *See Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group L.L.C.*, 635 F.3d 1106, 1109 (8th Cir. 2011) (per curiam) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)) ("a court may dismiss a complaint only if it is clear that *no* relief could be granted under *any* set of facts that could be proved consistent with the allegations").

For example, the court in *Citizens Ins. Co. v. Foxbilt*, 226 F.2d 641 (8th Cir. 1955), held that an insurer was still liable to an insured under a fire policy, when the tenant had paid

for the damages. The court noted that "restoration of the insured property by a third party without cost to the insured cannot relief the insurer of its accrued liability." *Id.* at 644. Moreover, had the tenant not paid pursuant to contract to restore the property, then the insurer, under the terms of the policy, would have been liable. *Id.* at 645. Although in *Foxbilt*, the tenant did not bring suit to recover against the insurer, the case still supports Weitz's assertion that if the Defendants were liable, then they would need to pay under their Policies. Weitz's argument is that he stepped into the shoes of the Defendants and paid on their behalf, and there seems to be some merit in his argument if his assertions are correct.

The present question is not whether Weitz actually paid Defendants' obligation because that question is a factual one, inappropriate to be decided on a motion to dismiss. Here, there are sufficient factual allegations for the Court to conclude that some relief could be granted to Weitz if the Defendants should have paid Hyatt or had liability under the Policies.

Although the Amended Complaint satisfies pleading standards, the Court briefly considers each cause of action to ascertain if, as a matter of law, they are insufficient.

B. Causes of Action

The Defendants urge this Court to find that, as a matter of law, Weitz cannot recover in equity when there is a controlling express contract or when the debt is primarily Weitz's. They assert that because unjust enrichment is based in equity, this claim cannot co-exist with an express contract that covers the same subject matter. The Defendants suggest that by the very terms of the Amended Complaint, Weitz's settlement amount in the Florida Action was covered under the property insurance policies, and Weitz cannot now circumvent the policy terms by claiming unjust enrichment. In further support, the Defendants point out that the Eighth Circuit Court of Appeals affirmed a lower court's finding that Weitz was "an intended third-party beneficiary under a similar predecessor property policy covering this same construction project." *See The Weitz Co., LLC v. Lloyd's of London, et al.*, 574 F.3d

885, 888 n.1 (8th Cir. 2009) (citing *Weitz Co. v. Lloyd's of London, et al.*, No. 4:04-cv-90353, 2004 WL 3158070, at *5 (S.D. Iowa Dec. 6, 2004)).

Alternatively, the Defendants argue that Weitz's claims are premised on its third-party liability Weitz owed to Hyatt for breach of contract, statutory building code violations, and breach of guaranty, and not for any first-party property damage that Weitz itself suffered because of direct physical loss to insured property. According to this argument, Weitz cannot recover for unjust enrichment or subrogation because the settlement amount was never the Defendants' to pay, rather, it was a result of Weitz's own liability to Hyatt.

Weitz argues that its equity claims are proper because there is not a controlling express contract and Weitz was not primarily liable for the settlement amount. Weitz states that it never alleged that there was an express contract between itself and Defendants regarding recovery of all or a portion of its settlement with Hyatt. It states that the earlier case in the Southern District of Iowa, in which Weitz was found to be a third party beneficiary of "all risk" insurance contracts, is distinct from the present case. That lawsuit "cover[ed] Weitz's interests in the Project during the course of construction," and Weitz is now seeking recovery for damages that arose *after* the project's completion. Hyatt, Weitz claims, was not required by contract to insure Weitz for damages arising after construction finished and indeed, there is no contract covering the present claims.

For similar reasons, Weitz argues that Paragraph 7.N. of the Contract operated as a waiver by Hyatt and Weitz for all claims against each other arising from "damages caused by . . . other perils to the extent covered by property insurance." There was no time limit in this clause, Weitz asserts, meaning that Weitz and Hyatt waived claims against each other for the duration of the Project and after its completion. As a result, Weitz asserts that a portion of the settlement amount should have been covered by the Defendants pursuant to the "all risk" policies they wrote for Hyatt, because the waiver clause between Hyatt and Weitz would have been operative. Hyatt's sole avenue for recovery should have been under the Policies, and Weitz argues a portion of the settlement amount was in fact attributable to

Defendants' failure to pay under the Policies.

1. Unjust Enrichment

"The theory of unjust enrichment 'is premised on the idea that it is unfair to allow a person to benefit from another's services when the other expected compensation.'" *Waldner v. Carr*, 618 F.3d 838, 848 (8th Cir. 2010) (quoting *State Pub. Defender v. Iowa Dist. Court for Woodbury County*, 731 N.W.2d 680, 684 (Iowa 2007)); *see also Brown v. Kerkhoff*, 504 F. Supp. 2d 464, 543 (S.D. Iowa 2007); Black's Law Dictionary (3d ed.) ("The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected."). The doctrine of unjust enrichment is based on "quasi-contract" and is considered equitable in nature as a basis for restitution. *Iowa Network Serv., Inc. v. Qwest Corp.*, 363 F.3d 683, 694 (8th Cir. 2004) (applying Iowa law); *Smith v. Harrison*, 325 N.W.2d 92, 94 (Iowa 1982). "However, '[a]n express contract and an implied contract cannot coexist with respect to the same subject matter,' and Iowa courts refuse to imply a contract where an express contract exists.'" *Iowa Network Serv., Inc.*, 363 F.3d at 694 (quoting *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985)).

Under Iowa[10] law, there are three elements in analyzing a claim for unjust enrichment:

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[10]Because no conflict exists on the issue of unjust enrichment among the three states (Iowa, Illinois, and Florida) whose law potentially governs, the Court does not conduct a choice-of-law analysis. *Weitz Co., L.L.C. v. Lloyd's of London*, 574 F.3d 885, 889-90 (8th Cir. 2009) (citing *Modern Equip. Co. v. Cont'l W. Ins. Co.*, 355 F.3d 1125, 1128 n.7 (8th Cir. 2004) ("If there is not a true conflict between the laws . . . on the pertinent issue, then no choice-of-law is required.")).

The Court notes that should it need to conduct a conflict of laws analysis, the elements are the same under both Illinois and Florida law. *See Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) ("To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.") (citing *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989)); *Intercoastal Realty, Inc. v. Tracy*, 706 F. Supp. 2d 1325, 1331 (S.D. Fla. 2010) ("The doctrine applies only where (1) the plaintiff conferred a benefit on the defendant, who had knowledge of the

(1) whether the recipient was enriched by the receipt of the benefit; (2) if the enrichment was at the expense of the provider; and (3) whether it is unjust to allow the recipient to retain the benefit under the circumstances. *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001); *see also PFS Distribution Co. v. Raduechel*, 574 F.3d 580, 598 (8th Cir. 2009). Some courts also add a fourth element, requiring that there be no at-law remedy that can appropriately address the claim. *See Union Pac. Railroad Co. v. Cedar Rapids and Iowa City Railway Co.*, 477 F. Supp. 2d 980, 1000 (N.D. Iowa 2007) (citing *Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000)). "So long as 'the benefit received [is] at the expense of the plaintiff,' it is unnecessary that the benefit be conferred directly by the plaintiff: Direct or indirect benefits or benefits conferred by third parties obtained from the plaintiff are sufficient.'" *Brown*, 504 F. Supp. 2d at 543 (quoting *Unisys Corp.*, 637 N.W.2d at 155) (alteration in original); *Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 683, 694 (8th Cir. 2004) (quoting *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 506 (Iowa 1997)) (a plaintiff "must prove the defendant received a benefit that in equity belongs to the plaintiff.").

Here, the Defendants argue that because there was an express contract, Weitz cannot recover through unjust enrichment, and moreover, that the Defendants were not responsible for any of the liability (and resulting money) Weitz paid to Hyatt. Weitz disputes that there is an express contract and maintains that part of the settlement amount it paid to Hyatt should have been paid by the Defendants.

The Court finds that the earlier Southern District of Iowa case, finding that Weitz was a third party beneficiary of the Policies between Hyatt and the Defendants, is not dispositive for the facts presented here. This present suit is for a time period after the construction

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benefit; (2) the defendant voluntarily accepted and retained the benefit; and (3) under the circumstances, it would be inequitable for the defendant to retain the benefit without paying for it.") (citing *Shands Teaching Hosp. & Clinics, Inc. v. Beech Street Corp.*, 900 So. 2d 1222, 1227 (Fla. Dist. Ct. App. 2005)). However, under Illinois law, a claim for unjust enrichment is not a separate cause of action. *Siegel*, 612 F.3d at 937.

finished at the Project, whereas the claims brought in the earlier case related to problems during construction. Indeed, the Defendants assert there is an express contract (thereby defeating the unjust enrichment claim), by saying that the settlement payment in the Florida Action is covered under the property insurance policies and "[b]ecause Weitz directly relies on insurance contracts that govern the conditions of coverage, it cannot avoid applicable coverage limitations by resorting to unjust enrichment."

But at this stage in the pleadings, the Court need only determine if the facts sufficiently allege a cause of action, and the Court finds that they do. Weitz does not allege there was an express contract between itself and the Defendants, or that it was an intended third party beneficiary of any of the Policies.[11] *Compare Brinkmann v. St. Paul Fire & Marine Ins. Co.*, 723 N.W.2d 449 (table text), 2006 WL 1750491, at *2-*4 (Iowa Ct. App. June 28, 2006) (parties to a contract cannot use unjust enrichment to avoid contractual obligations), *with Saunders v. Countrywide Home Loans of Minn., Inc.*, 2009 WL 383601, at *2 (D. Minn. Feb. 12, 2009) (unreported) (plaintiffs' valid contracts with other parties, not with defendant, "does not preclude plaintiffs from maintaining an unjust-enrichment claim"). Weitz alleges only that Hyatt and Weitz had signed a waiver for claims against each other; the Defendants were contractually obligated to pay Hyatt for covered damages; the Defendants received premiums for the insurance coverage; Hyatt reported covered claims to the Defendants; the Defendants failed to pay; Weitz "was compelled to settle with Hyatt paying the covered portion of the loss;" and Weitz's settlement conferred a benefit on the Defendants. If a portion of the settlement amount was properly attributable to the Defendants, then Weitz conferred a benefit on the Defendants. Similarly, there is insufficient detail to determine whether the "all risk exclusions" for construction defects

[11]The Defendants are troubled that Weitz changed his cause of action from breach of insurance contract in the original Complaint, to unjust enrichment and subrogation claims in the Amended Complaint. But Weitz had leave to amend and freedom to change his legal theory.

would apply to the damages sustained to the Project.[12]

The Court finds that pursuant to the standards of a motion to dismiss, Weitz alleges sufficient detail and states a claim upon which relief can be granted. While the Court questions that Weitz could survive summary judgment on this claim if there is an express contract, Weitz identifies the unjust enrichment claim adequately enough to survive a motion to dismiss.

2. Equitable Subrogation

According to the Supreme Court,[13] the doctrine of subrogation means "one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other." *American Surety Co. of New York v. Bethlehem Nat'l Bank of Bethlehem*, 314 U.S. 314, 315 (1941) (citations omitted). "'Subrogation is a doctrine that originated in equity to give relief to a person or entity that pays a legal obligation that should have, in good conscience, been satisfied by another.'" *Wilson v. Farm Bureau Mut. Ins. Co.*, 770 N.W.2d 324, 328 (Iowa 2009)

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[12]The parties cite and discuss *United States Fire Ins. Co. v. Sovran Constr. Co.*, 854 So. 2d 221 (Fla 1st Dist. Ct. App. 2003), and *Edward J. Gerrits, Inc. v. Nat'l Union Fire Ins. Co.*, 634 So. 2d 712 (Fla 1st Dist. Ct. App. 1994), at length. The Court accepts the Defendants' interpretation that first-party all-risk property policies do not cover liability claims based on faulty or defective construction. *Sovran*, 854 So. 2d at 221-23; *Gerrits*, 634 So. 2d at 712-13. But these cases, however, are not dispositive to the issues presented here, as to whether any portion of the settlement amount was covered by the "all risk" policies.

[13]Like unjust enrichment, the elements of equitable subrogation are the same under Illinois and Florida law as it is under Iowa law. *See American Family Ins. Group v. Cleveland*, 827 N.E.2d 490, 494 (Ill. App. Ct. 2005) ("Under the doctrine of subrogation, a person who has paid a debt for which another is primarily liable succeeds to the rights of the person whose debt has been paid in relation to the debt or claim."); *In re Hoey*, 364 B.R. 427, 431 (Bankr. S.D. Fl. 2005) ("[T]he party seeking to invoke the doctrine must establish: (1) that he paid the debt; (2) that he had a liability, right or fiduciary relationship which equated a direct interest in discharging the debt or lien; and (3) that injustice will not be visited upon the other party by applying equitable subrogation.") (citing *North v. Albee*, 20 So. 2d 682, 683 (Fla. 1945)). A choice-of-law analysis is unnecessary. *See Modern Equip. Co.*, 355 F.3d at 1128 n.7.

(quoting *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820, 824 (Iowa 2004)). Put more simply, subrogation is "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." Black's Law Dictionary (3d ed.) A party primarily responsible for the debt is not entitled to equitable subrogation. *See, e.g., In re Hagen*, 147 B.R. 166, 168 (Bankr. N.D. Iowa 1992).

"Equitable subrogation is a remedy resting on principles of unjust enrichment that attempts to accomplish justice between the parties." *Great Am. Ins. Co. v. Dover, Dixon Horne, PLLC*, 456 F.3d 909, 912 (8th Cir. 2006) (citation omitted). It allows a person to recover for a debt who has paid that debt "for which another was primarily liable and which that other person should have paid." *Id.* To summarize, the three elements are that (1) the person paid the debt; (2) that the person had some direct interest in discharging the debt; and (3) that it would be unjust to not allow the person to recover against another. *Id.*

"The rights to which the subrogee succeeds are the same as, and no greater than, those of the person for whom the subrogee is substituted. The subrogee can acquire no claim, security, or *remedy* the subrogor did not have." *Central Nat'l Ins. Co. of Omaha v. Ins. Co. of North Am.*, 522 N.W.2d 39, 44 (Iowa 1994) (emphasis in original). For example, when a party pays a legal obligation owed by another, whether arising by contract or an implied contract, the "'right to subrogation attaches by operation of law upon payment of the loss based on principles of equity.'" *Wilson*, 770 N.W.2d at 328 (quoting *Heiken*, 675 N.W.2d at 824-25 n.2).

Defendants again assert that Weitz cannot succeed on a subrogation claim because the money it paid to Hyatt resulted from its own liability, and was not from a failure of the Defendants to pay covered perils. The Court finds that, because the allegations were plausible, this claim is likewise sufficient. For a successful subrogation claim, Weitz need only prove that it paid the Defendants' debt; it had an interest in discharging the debt; and it would be unjust to prevent Weitz from recovering from the Defendants. *Great Am. Ins.*

Co., 456 F.3d at 912. The overarching issue with this subrogation claim is whether any portion of the settlement amount was a liability the Defendants owed. The Court accepts at this early stage that it is possible that Weitz paid a sum in excess of its own liability, knowing it had preserved its right to pursue claims against the Defendants.[14] Weitz stated that its interest in discharging the debt was to end costly litigation and if any portion of the debt was the Defendants, it would be unjust to have Weitz shoulder all the costs.

Accordingly, the Court finds that Weitz has identified a subrogation claim adequately enough to survive a motion to dismiss.

Upon the foregoing,

IT IS ORDERED that the motions to dismiss [33, 36, 37, 62, 69, 74, 75] are denied.

DATED this 25th day of May, 2011.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA

[14] Although the Court considered the settlement agreement between Lexington/Allied and Hyatt, that settlement may have been for damages unrelated to those presented herein. Without more factual information, the Court cannot dismiss a party on the basis that it may have signed a settlement agreement for the same damages, thereby discharging itself from future liability.