No. 21-1507

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MASHALLAH, INC., an Illinois corporation and RANALLI'S PARK RIDGE, LLC d/b/a HOLT'S, an Illinois limited liability company,

Plaintiffs-Appellants,

vs.

WEST BEND MUTUAL INSURANCE COMPANY, a Wisconsin corporation,

Defendant-Appellee.

Appeal from the United States District Court

For the Northern District of Illinois, Eastern Division

Case No. 20-cv-05472

Judge Charles P. Kocoras

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1507

Short Caption: Mashallah, Inc., et al v. West Bend Mutual Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
West Bend Mutual Insurance Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Husch Blackwell LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s Jason R. Fathallah Date: 4/12/21

Attorney's Printed Name: Jason R. Fathallah

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

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N/A

Attorney's Signature: /s AJ Fabianczyk Date: 4/12/21

Attorney's Printed Name: AJ Fabianczyk

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s Michael D. Hayes Date: 4/12/21

Attorney's Printed Name: Michael D. Hayes

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s Scott J. Helfand Date: 4/12/21

Attorney's Printed Name: Scott J. Helfand

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **vii**

JURISDICTIONAL STATEMENT **1**

STATEMENT OF THE ISSUES **1**

STATEMENT OF THE CASE **1**

A. Plaintiffs purchase insurance covering "direct physical loss of or damage to property." 1

B. Governor Pritzker issues Closure Orders in response to COVID-19. 5

C. West Bend informs Plaintiffs the Policies do not provide coverage. 6

D. Plaintiffs sue West Bend. 6

E. The district court grants West Bend's motion to dismiss. 7

SUMMARY OF ARGUMENT **8**

STANDARD OF REVIEW **10**

ARGUMENT **11**

I. Insurance policy interpretation under Illinois law **11**

II. The Virus Exclusions bar Plaintiffs' coverage claims. **12**

A. The Virus Exclusions are clear and unambiguous and apply to Plaintiffs' claimed losses. 13

B. Plaintiffs' attempts to avoid the Virus Exclusions are meritless. 14

1. The district court correctly held West Bend to the applicable burden under Illinois law, and West Bend met that burden. 15

2. The Virus Exclusions do not require that the virus actually be present on or at the insured premises. 16

3. Plaintiffs' losses were caused by or resulted from a virus. 19

4. The Virus Exclusions do not render coverage illusory. 23

III. Plaintiffs have not plausibly alleged an initial grant of coverage under the Policies. **24**

A. Plaintiffs have not alleged plausible entitlement to Business Income or Extra Expense coverage. 24

1. Courts have repeatedly found that closure orders do not constitute or cause "direct physical loss of or damage to property." 25

2. Plaintiffs' interpretation of "direct physical loss of or damage to property" is contrary to the Policies' plain language. 27

3. Plaintiffs' non-COVID-19 cases are inapposite. 31

B. Plaintiffs have not alleged plausible entitlement to Civil Authority coverage. 32

1. Plaintiffs have not alleged damage to other property. 33

2. Plaintiffs cannot plausibly allege a prohibition against access to their premises. 33

3. Plaintiffs cannot plausibly allege a causal nexus between damage to other property and the Closure Orders. 34

C. Because there is no coverage, the district court properly dismissed Plaintiffs' bad-faith claim 34

IV. Plaintiffs' premium-rebate claims fail under the terms of the Policies and the operation of insurance. 35

A. The district court properly dismissed Plaintiffs' ICFA claim because Plaintiffs failed to sufficiently allege that West Bend engaged in any deceptive or unfair conduct. 35

1. Plaintiffs have not sufficiently alleged that West Bend engaged in any deceptive conduct. 35

2. Plaintiffs fail to sufficiently allege that the coverage limitations and premiums were unfair because Plaintiffs' unfairness claim disregards how insurance operates and there is nothing unfair about enforcing contracts as written. 40

B. The district court properly dismissed Plaintiffs' unjust-enrichment claim because an express contract governs the parties' relationship and West Bend did not act unjustly in any event. 44

CONCLUSION 49

CERTIFICATE OF COMPLIANCE 51

CERTIFICATE OF SERVICE 52

TABLE OF AUTHORITIES

Page

Federal Cases

10E, LLC v. Travelers Indem. Co. of Connecticut,
483 F. Supp. 3d 828 (C.D. Cal. 2020) 26

AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co.,
No. 20 CV 3556, 2020 WL 6940984 (N.D. Ill. Nov. 25, 2020) 14, 21

Andrews v. Equitable Life Assur. Soc.,
124 F.2d 788 (7th Cir. 1942) 47, 48, 49

Archer Daniels Midland Co. v. Burlington Ins. Co. Grp.,
785 F. Supp. 2d 722 (N.D. Ill. 2011) 23

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 10, 38

Bancorpsouth, Inc., v. Fed. Ins. Co.,
873 F.3d 582 (7th Cir. 2017) 10

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 10

Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co.,
No. 20 C 4636, 2021 WL 271294 (N.D. Ill. Jan. 27, 2021) 26

Benson v. Fannie May Confections Brands, Inc.,
944 F.3d 639 (7th Cir. 2019) 35, 41

Bradley Hotel Corp. v. Aspen Specialty Ins. Co.,
No. 20 C 4249, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020) 26

Burger v. Cty. of Macon,
942 F.3d 372 (7th Cir. 2019) 11

Camasta v. Jos. A. Bank Clothiers, Inc.,
761 F.3d 732 (7th Cir. 2014) 39

Campos v. Cook Cty.,
932 F.3d 972 (7th Cir. 2019) 27, 38, 43

Causeway Auto., LLC v. Zurich Am. Ins. Co.,
2021 WL 486917 (D.N.J. Feb. 10, 2021) 14, 16

Federal Cases, cont'd **Page**

Chief of Staff LLC v. Hiscox Ins. Co. Inc.,
2021 WL 1208969 (N.D. Ill. Mar. 31, 2021) .... passim

Cleary v. Philip Morris Inc.,
656 F.3d 511 (7th Cir. 2011) 44

Cohen v. Am. Sec. Ins. Co.,
735 F.3d 601 (7th Cir. 2013) 44, 45

Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.,
No. CV 20-5927 (RMB/KMW), 2021 WL 1137994 (D.N.J. Mar. 12, 2021) 17

Collins v. Vill. of Palatine, Ill.,
875 F.3d 839 (7th Cir. 2017) 49

Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.,
No. 20 C 3463, 2021 WL 633356 (N.D. Ill. Feb. 18, 2021) 28

Dental Experts, LLC v. Massachusetts Bay Ins. Co.,
No. 20 C 5887, 2021 WL 1722781 (N.D. Ill. May 1, 2021) 14, 21

Diesel Barbershop, LLC v. State Farm Lloyds,
479 F. Supp. 3d 353 (W.D. Tex. 2020) 21

Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.,
No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) 17

Erie Ins. Grp. v. Sear Corp.,
102 F.3d 889 (7th Cir. 1996) 11

Euclid Nat. Bank v. Fed. Home Loan Bank Bd.,
396 F.2d 950 (6th Cir. 1968) 41

Eye Care Ctr. of New Jersey, PA v. Twin City Fire Ins. Co.,
2021 WL 457890 (D.N.J. Feb. 8, 2021) 17

Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.,
488 F. Supp. 3d 904 (N.D. Cal. 2020) 20, 21

Greenberger v. GEICO Gen. Ins. Co.,
631 F.3d 392 (7th Cir. 2011) 37

Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.,
No. 2:12-CV-04418 WHW, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) 31

Federal Cases, cont'd **Page**

Hajer v. Ohio Sec. Ins. Co.,
No. 6:20-CV-00283, 2020 WL 7211636 (E.D. Tex. Dec. 7, 2020) 17

Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.,
495 F. Supp. 3d 1289 (N.D. Ga. 2020) 26, 29, 30

Kimberly-Clark Corp. v. Factory Mut. Ins. Co.,
566 F.3d 541 (5th Cir. 2009) 48

L&J Mattson's Co. v. Cincinnati Ins. Co., Inc.,
2021 WL 1688153 (N.D. Ill. Apr. 29, 2021) 30

LJ New Haven LLC v. AmGUARD Ins. Co.,
No. 3:20-CV-00751 (MPS), 2020 WL 7495622 (D. Conn. Dec. 21, 2020) ... 16, 17, 21

M&E Bakery Holdings, LLC v. Westfield Nat'l Ins. Co.,
No. 20 C 5849, 2021 WL 1837393 (N.D. Ill. May 7, 2021) 14, 21, 38

Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut,
492 F. Supp. 3d 1051 (C.D. Cal. 2020) 26

Michael Cetta, Inc. v. Admiral Indem. Co.,
No. 20 CIV. 4612 (JPC), 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020) 29, 30

Monteleone v. Auto Club Grp.,
2015 WL 71915 (E.D. Mich. Jan. 6, 2015) 42

Moody v. Hartford Fin. Grp., Inc.,
No. CV 20-2856, 2021 WL 135897 (E.D. Pa. Jan. 14, 2021) 19, 20, 21

Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.,
487 F. Supp. 3d 834 (N.D. Cal. 2020) 26, 30

N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.,
499 F. Supp. 3d 74 (D.N.J. 2020) 14

Newchops Rest. Comcast LLC v. Admiral Indem. Co.,
No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) 20

Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,
17 F. Supp. 3d 323 (S.D.N.Y. 2014) 29

Ormond v. Anthem, Inc.,
799 F. Supp. 2d 910 (S.D. Ind. 2011) 48

Federal Cases, cont'd **Page**

Plan Check Downtown III, LLC v. AmGuard Ins. Co.,
485 F. Supp. 3d 1225 (C.D. Cal. 2020) 29

Platinum Supplemental Ins., Inc. v. Guarantee Tr. Life Ins. Co.,
989 F.3d 556 (7th Cir. 2021) 18

Prudential Ins. Co. of Am. v. Miller Brewing Co.,
789 F.2d 1269 (7th Cir. 1986) 48, 49

Puffer v. Allstate Ins. Co.,
675 F.3d 709 (7th Cir. 2012) 23

Randazzo v. Harris Bank Palatine, N.A.,
262 F.3d 663 (7th Cir. 2001) 38

Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.,
499 F. Supp. 3d 288 (S.D. Miss. 2020).. 26, 29

Resolution Tr. Corp. v. Aetna Cas. & Sur. Co. of Illinois,
25 F.3d 570 (7th Cir. 1994) 12

Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.,
No. 20 C 3768, 2021 WL 81659 (N.D. Ill. Jan. 7, 2021)........................... 15

System Optics, Inc. v. Twin City Fire Ins. Co.,
2021 WL 2075501 (N.D. Ohio May 24, 2021)... 18

Tanq's Inc. v. Scottsdale Ins. Co.,
No. 6:20-CV-2356-ACC-GJK, 2021 WL 1940291 (M.D. Fla. Apr. 16, 2021).......... 17

Toulon v. Continental Cas. Co.,
877 F.3d 725 (7th Cir. 2017) .... passim

TRAVCO Ins. Co. v. Ward,
715 F. Supp. 2d 699 (E.D. Va. 2010) 31. 32

United States v. Dunkel,
927 F.2d 955 (7th Cir. 1991) 32

UWM Student Ass'n v. Lovell,
888 F.3d 854 (7th Cir. 2018) 24

West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.,
498 F. Supp. 3d 1233 (C.D. Cal. 2020) 26

Federal Cases, cont'd **Page**

Westside Head & Neck v. Hartford Fin. Servs. Grp., Inc.,
No. 220CV06132JFWJCX, 2021 WL 1060230 (C.D. Cal. Mar. 19, 2021) 18

Windridge of Naperville Condo. Ass'n v. Philadelphia Indem. Ins. Co.,
932 F.3d 1035 (7th Cir. 2019) 27

Zagafen Bala, LLC v. Twin City Fire Ins. Co.,
No. CV 20-3033, 2021 WL 131657 (E.D. Pa. Jan. 14, 2021) 31

Zajas, Inc. v. Badger Mut. Ins. Co.,
No. 20-CV-1055-DWD, 2021 WL 1102403 (S.D. Ill. Mar. 23, 2021) 25

Zwillo V, Corp. v. Lexington Ins. Co.,
No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) 25

State Cases

Babbitt Municipalities, Inc. v. Health Care Serv. Corp.,
2016 IL App (1st) 152662, 64 N.E.3d 1178 47

Bozek v. Erie Ins. Grp.,
2015 IL App (2d) 150155, 46 N.E.3d 362 .... passim

Brown v. Fed. Life Ins. Co.,
353 Ill. 541 (1933) 41

Charles Hester Enters., Inc. v. Illinois Founders Ins. Co.,
137 Ill. App. 3d 84, 484 N.E.2d 349 (5th Dist. 1985) 23

Chatham Corp. v. Dann Ins.,
351 Ill. App. 3d 353, 812 N.E.2d 483 (1st Dist. 2004) 16

Connick v. Suzuki Motor Co.,
174 Ill. 2d 482, 675 N.E.2d 584 (1996) 40

Doctors Direct Ins., Inc. v. Bochenek,
2015 IL App (1st) 142919, 38 N.E.3d 116 11

Dundee Mut. Ins. Co. v. Marifjeren,
1998 ND 222, 587 N.W.2d 191 32

Founders Ins. Co. v. Munoz,
237 Ill. 2d 424, 930 N.E.2d 999 (2010) .... passim

<u>State Cases, cont'd</u> **<u>Page</u>**

Humana Health Care Plans v. Snyder-Gilbert,
596 N.E.2d 299 (Ind. Ct. App. 1992) 41

Illinois Farmers Insurance Co. v. Keyser,
2011 IL App (3d) 090484, 956 N.E.2d 575 24

Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.,
166 Ill. 2d 520, 655 N.E.2d 842 (1995) 11

Lubin v. Equitable Life Assur. Soc.,
326 Ill. App. 358, 61 N.E.2d 753 (1st Dist. 1945) 47

Mackinac v. Acadia Nat'l Life Ins. Co.,
271 Ill. App. 3d 138, 648 N.E.2d 237 (1st Dist. 1995) 36

Martin v. Illinois Farmers Ins.,
318 Ill. App. 3d 751, 742 N.E.2d 848 (1st Dist. 2000) 35

Martis v. Grinnell Mut. Reinsurance Co.,
388 Ill. App. 3d 1017, 905 N.E.2d 920 (3d Dist. 2009) 49

Murray v. State Farm Fire & Cas. Co.,
203 W. Va. 477, 509 S.E.2d 1 (1998) 31

Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.,
362 Ill. App. 3d 745, 841 N.E.2d 78 (1st Dist. 2005) 23

Noonan v. Northwestern Mut. Life Ins. Co.,
687 N.W.2d 254 (Wis. Ct. App. 2004) 48

Peddinghaus v. Peddinghaus,
295 Ill. App. 3d 943, 692 N.E.2d 1221 (1st Dist. 1998) 46

Pekin Ins. Co. v. Willett,
301 Ill. App. 3d 1034, 704 N.E.2d 923 (2d Dist. 1998) 15

Phoenix Ins. Co. v. Rosen,
242 Ill. 2d 48, 949 N.E.2d 639 (2011) 22, 23

Robinson v. Toyota Motor Credit Corp.,
201 Ill. 2d 403, 775 N.E.2d 951 (2002) .... passim

Sherrod v. Esurance Ins. Servs., Inc.,
2016 IL App (5th) 150083, 65 N.E.3d 471 12

State Cases, cont'd **Page**

State Farm Fire & Casualty Co. v. Trousdale,
285 Ill. App. 3d 566, 673 N.E.2d 1132 (1st Dist. 1996) 24

Travelers Insurance Co. v. Eljer Manufacturing, Inc.,
197 Ill. 2d 278, 757 N.E.2d 481 (2001) 27

Universal Sav. Bank v. Bankers Standard Ins. Co.,
No. B159239, 2004 WL 515952 (Cal. Ct. App. Mar. 17, 2004) 32

Western Fire Ins. Co. v. First Presbyterian Church,
165 Colo. 34, 437 P.2d 52 (1968) 31

State Statutes

Illinois Consumer Fraud and Deceptive Business Practices Act,
815 ILCS 505/1, et seq. 6

Illinois Insurance Code, 215 ILCS 5/155 .... 6, 34

Federal Rules

Circuit Rule 32(b) 51

Circuit Rule 32(c) 51

Federal Rule of Appellate Procedure 32(a)(5) 51

Federal Rule of Appellate Procedure 32(a)(6) 51

Federal Rule of Appellate Procedure 32(a)(7)(B) 51

Federal Rule of Appellate Procedure 32(f) 51

Federal Rule of Appellate Procedure 32(g) 51

Federal Rule of Civil Procedure 12(b)(6) 7, 10

Federal Rule of Civil Procedure 9(b) 40, 41

Other Authorities **Page**

5 STEVEN PLITT ET AL., *COUCH ON INSURANCE* § 79:7 (3d ed. 2020)............................ 42

7 STEVEN PLITT ET AL., *COUCH ON INSURANCE* § 101:55 (3d ed. 2020)........................ 20

BLACK'S LAW DICTIONARY, Physical (11th ed. 2019) 25

Exec. Order No. 2020-10 (March 20, 2020),https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx .... passim

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement of Plaintiffs-Appellants Mashallah, Inc. and Ranalli's Park Ridge, LLC (collectively, "Plaintiffs") is complete and correct.

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that, because Plaintiffs seek coverage for losses resulting from a virus (*i.e.*, COVID-19), the Virus Exclusions in the Policies bar coverage as a matter of law?

2. Have Plaintiffs—who have not alleged tangible injury to or permanent dispossession of property—sufficiently alleged "direct physical loss of or damage to property" to trigger an initial grant of coverage under the Policies?

3. Did the district court correctly conclude that, because Plaintiffs base their deception and unfairness claims on terms that were disclosed to them and because a contract controls the parties' relationship, Plaintiffs failed to sufficiently allege a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act or a claim for unjust enrichment?

STATEMENT OF THE CASE

A. Plaintiffs purchase insurance covering "direct physical loss of or damage to property."

West Bend issued to Mashallah Policy No. A178265 03 for the period August 1, 2019 to August 1, 2020. Complaint ("Compl."), Ex. A ("Mashallah Policy") p.1 (Dkt. No. 1-1).[1] West Bend issued to Ranalli's Policy No. A346701 02 for the period

[1] Citations to the district court record refer to the page numbers generated by that court's CM/ECF system.

October 8, 2019 to October 8, 2020. Compl., Ex. B ("Ranalli's Policy") p. 1 (Dkt. No. 1-2).[2]

Plaintiffs seek three types of coverage under the Policies: Business Income, Extra Expense, and Civil Authority. Each of these coverages requires a Covered Cause of Loss, defined as "[d]irect physical loss unless the loss is excluded or limited." Mashallah Policy p. 19.

The Business Income and Extra Expense coverages contain similar requirements to trigger coverage, such as "direct physical loss of or damage to property at the described premises":

- Business Income: "We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration'. The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss."

- Extra Expense: "We will pay necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss."[3]

Id. at 23-24; Ranalli's Policy p. 43.

[2] West Bend refers to the Mashallah Policy and the Ranalli's Policy together as the "Policies." Although the Policies contain different forms, most of the provisions at issue are materially identical. One difference—which the district court found substantively immaterial—lies in the Virus Exclusions, discussed in greater detail below.

Because most provisions at issue are materially identical, this brief cites to only one of the Policies except where the language is different.

[3] While the Policies' Extra Expense coverages are worded slightly differently, they are materially identical.

The Business Income and Extra Expense coverages are limited to the "period of restoration," which begins after "the time of direct physical loss or damage … caused by or resulting from any Covered Cause of Loss at the described premises" and ends on the earlier of (1) "[t]he date when the property at the described premises should be repaired, rebuilt or replaced;" or (2) "[t]he date when business is resumed at a new permanent location." Mashallah Policy pp. 23-25, 96.

The Civil Authority coverage similarly requires damage caused by a Covered Cause of Loss, but to "property other than property at the described premises," among other specific requirements:

- Civil Authority: "When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

  (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

  (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage ….

Id. at 26.

In addition to setting out the requirements to trigger coverage, the Policies contain exclusions to coverage. *Id.* at 34; Ranalli's Policy pp. 54, 57. One of these is the Virus Exclusion. Mashallah Policy p. 37; Ranalli's Policy p. 54. The Policies' Virus Exclusions have slightly different lead-in language regarding causation, but

each excludes "any virus" from being a Covered Cause of Loss. Mashallah Policy pp. 34, 37; Ranalli's Policy p. 54.

The Mashallah Virus Exclusion excludes coverage "for loss or damage caused directly or indirectly" by "[a]ny virus that induces or is capable of inducing physical distress, illness or disease." Mashallah Policy pp. 34, 37. "Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at 34.

The Ranalli's Virus Exclusion excludes coverage "for loss or damage caused by or resulting from any virus … that induces or is capable of inducing physical distress, illness, or disease." Ranalli's Policy p. 54.

In addition to setting out the coverage provisions and applicable exclusions, the Policies address the timing and the amount of premiums and whether such premiums are subject to rebate. The Policies each cover a one-year period. Mashallah Policy p. 1. At the outset, the Policies explain that, "[i]n return for the payment of the premium, and subject to all the terms of this policy, [West Bend] agree[s]…to provide the insurance" for the policy period. *See, e.g.*, *id.* at 1. The Policies explain that West Bend "will compute all premiums for this [coverage] in accordance with [its] rules and rates." *Id.* at 69, 70. The Policies specify that, unless the premium is identified as an "advance" premium, West Bend need not audit or rebate any part of the premium. *See id.* The Policies do not identify Plaintiffs' premiums as advanced. *See id.* at 1. Rather, the Policies specify that the premiums are "total." *See id.*

B. Governor Pritzker issues Closure Orders in response to COVID-19.

On March 20, 2020, months after Plaintiffs obtained their Policies, Illinois Governor J.B. Pritzker issued Executive Order 2020-10, mandating various measures "to slow and stop the spread of COVID-19" (the "Closure Orders"). *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx. The Closure Orders required "[a]ll businesses and operations … except Essential Businesses and Operations as defined [in the Orders], … to cease all activities … except Minimum Basic Operations," such as maintaining inventory value, preserving the condition of the business, and ensuring security. *Id.*

Mashallah operates a jewelry store. Compl., ¶ 1 (Dkt. No. 1). The Closure Orders did not classify retailers as essential. *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx.

Ranalli's operates a bar and restaurant. Compl., ¶ 2. The Closure Orders classified restaurants as "essential" for "consumption off-premises, through such means as … delivery, drive-through, curbside pick-up, and carry-out." *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx; Compl., ¶ 28 (alleging Ranalli's operations were restricted to takeout and delivery).

Plaintiffs allege they sustained financial losses following the issuance of the Closure Orders. Compl., ¶¶ 18-19.

C. West Bend informs Plaintiffs the Policies do not provide coverage.

Plaintiffs submitted claims for their alleged losses to West Bend, seeking coverage under the Policies. Compl., ¶ 8. West Bend determined there was no coverage and advised Plaintiffs accordingly in declination letters. Compl., Ex. C, (Dkt. No. 1-3), at 1 (declination letter to Mashallah dated May 11, 2020); Compl., Ex. D, (Dkt. No. 1-4), at 1 (declination letter to Ranalli's dated April 23, 2020). In each letter, West Bend reserved all its rights and defenses under the Policies. *See, e.g.*, Compl., Ex. C, (Dkt. No. 1-3), at 1. After West Bend declined coverage, each Plaintiff renewed its Policy. Mashallah Policy p. 1 (requiring renewal in August 2020); Ranalli's Policy p. 1 (requiring renewal in October 2020).

D. Plaintiffs sue West Bend.

Plaintiffs filed this action in the United States District Court for the Northern District of Illinois, Eastern Division. In total, Plaintiffs pleaded five counts. Plaintiffs' first three counts were individual claims for declaratory judgment, breach of contract, and bad-faith denial of insurance coverage pursuant to Section 155 of the Illinois Insurance Code, 215 ILCS 5/155. Compl., Counts I-III, pp. 25-28. Plaintiffs' remaining two counts were pleaded in the alternative. Plaintiffs claimed that, if West Bend's denial of coverage was correct, then West Bend had been unjustly enriched in the amount of "excess premium" charged and had violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq*. Compl., Counts IV & V, pp. 31-32, 36-38. Plaintiffs sought to represent a putative nationwide class on their alternative claims.

West Bend moved to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6). (Dkt. No. 12).

E. The district court grants West Bend's motion to dismiss.

The district court granted West Bend's motion and dismissed all of Plaintiffs' claims with prejudice. App. A.1-18 (Dkt. No. 28).

First, as to Plaintiffs' coverage claims, the district court concluded that the Virus Exclusions are "clear and free from any ambiguity," and that West Bend had met its burden to establish that the exclusions applied. App. A.6. The district court engaged in a detailed discussion to reach this result. For example, the district court found that, because a virus (*i.e.*, COVID-19) led in an unbroken chain to Plaintiffs' claimed losses, a virus was the efficient proximate cause of Plaintiffs' losses. App. A.7-8.

Because the Virus Exclusions bar coverage, the district court dismissed Plaintiffs' coverage claims without having to address whether Plaintiffs had plausibly alleged an initial grant of coverage. App. A.5-10.

Second, as to Plaintiffs' alternative premium-rebate claims, the district court rejected both the ICFA claim and the unjust-enrichment claim. App. A.10-16.

With regard to the ICFA claim, the district court found that Plaintiffs had failed to sufficiently allege a deceptive or unfair act or practice. App. A.12-13. In so doing, the district court recognized that Plaintiffs challenged policy terms that had been disclosed to them, enforcement of the Policies as written, and the basic operation of insurance (where risk attaches at the outset, and the premium is set *in advance*).

With regard to the unjust-enrichment claim, the district court found Plaintiffs' claim deficient on multiple levels. To begin with, the district court found that the

existence of an actual contract governing the parties' relationship foreclosed Plaintiffs' unjust-enrichment claim. App. A.15-16. And, while Plaintiffs had alleged their unjust enrichment claim in the alternative, the district court recognized that precedent prohibited such alternative pleading where the unjust-enrichment claim incorporated the existence of an express contract. App. A.16. In any event, the district court found that Plaintiffs had failed to allege that West Bend did anything unjust by enforcing the Policies as written. App. A.15.

Having rejected all of Plaintiffs' claims, the district court entered judgment in favor of West Bend. App. A.17 (Dkt. No. 29). Plaintiffs timely filed this appeal. (Dkt. No. 30).

SUMMARY OF ARGUMENT

The district court correctly dismissed Plaintiffs' coverage claims and their alternative premium-rebate claims.

On coverage, the Policies provide two independent bases to affirm dismissal of Plaintiffs' breach-of-contract, declaratory-judgment, and bad-faith claims.

First, consistent with the near-unanimous consensus of courts nationwide (including in Illinois), the district court correctly found that the Virus Exclusions are "clear and free from any ambiguity" and bar coverage. App. A.6. Plaintiffs make several attempts to avoid this result. None is persuasive, though. For example, Plaintiffs suggest that, because the district court used the words "clear and free from any ambiguity" as opposed to "clear and free from doubt," the district court disregarded Illinois law requiring that exclusions be clear. But Illinois courts use various formulations of this standard, so this is a distinction without a difference.

Next, Plaintiffs go from parsing language to parsing causation, insisting that the Closure Orders—rather than COVID-19—are the efficient proximate cause of Plaintiffs' losses. Yet this contention is doubly flawed. For one thing, the Closure Orders are not a Covered Cause of Loss. For another thing, the efficient proximate cause is the cause that sets everything else in motion, and Plaintiffs cannot seriously contend that COVID-19 did not set their claimed losses in motion.

Second, although the district court did not need to reach the issue because of the Virus Exclusions, this Court can affirm for another, independent reason. As many courts across the country (including in Illinois) have recognized, claims such as Plaintiffs' here do not plausibly allege an initial grant of coverage.

This is so for numerous reasons. For example, to trigger the coverages Plaintiffs seek, Plaintiffs must show "direct physical loss of or damage to property." And, as courts have repeatedly found, Plaintiffs' interpretation of this language reads the words "direct" and "physical" right out of the Policies. Thus, even putting the Virus Exclusions aside, Plaintiffs' coverage claims fail.

The district court's dismissal of Plaintiffs' alternative premium-rebate claims should also be affirmed.

As to Plaintiffs' ICFA claim, Plaintiffs assert West Bend engaged in deception and unfair conduct. With regard to deception, Plaintiffs contend that West Bend "misrepresented or omitted" the premiums and the scope of coverage that were specifically, repeatedly disclosed to them. With regard to unfairness, Plaintiffs contend that, by enforcing the Policies consistent with the operation of insurance

(including when premiums are set and when risk attaches), West Bend acted unfairly. The district court rightly rejected both of these unconvincing assertions.

As to unjust enrichment, Plaintiffs' claim is flawed on two levels. First, because Plaintiffs concede that an express contract governs the parties' relationship, Plaintiffs cannot state a claim for unjust enrichment. And, because Plaintiffs incorporate the express contract into their unjust-enrichment claim, alternative-pleading cannot save Plaintiffs' unjust-enrichment claim. Nor is that claim a separate claim sounding only in tort. Second, even if this was properly a separate tort claim, Plaintiffs have failed to allege that West Bend did anything unjust supporting a tort claim.

As the district court recognized, no one disputes COVID-19's impact on businesses and individuals across the country. Although COVID-19 is unprecedented, it does not change the terms of the Policies. Plaintiffs paid premiums sufficient to obtain Policies that cover certain risks, subject to all terms and conditions of coverage and applicable exclusions. But Plaintiffs did not pay for or obtain a guarantee of income.

The dismissal of Plaintiffs' claims should be affirmed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's order granting a motion to dismiss under Rule 12(b)(6). *Bancorpsouth, Inc., v. Fed. Ins. Co.*, 873 F.3d 582, 585 (7th Cir. 2017). To avoid dismissal, "a complaint must contain sufficient factual matter … to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); Fed. R.

Civ. P. 12(b)(6). Although the Court "accept[s] the well-pleaded facts in the complaint as true and draw[s] all reasonable inferences in the plaintiff's favor," the Court is "not bound to accept legal conclusions as true." *Burger v. Cty. of Macon*, 942 F.3d 372, 374 (7th Cir. 2019).

ARGUMENT

I. Insurance policy interpretation under Illinois law[4]

The rules applicable to contract interpretation govern the interpretation of insurance policies. *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433, 930 N.E.2d 999 (2010). Courts must determine and give effect to the parties' intention, as expressed by the policy language. *Id.* If the policy language is clear and unambiguous, the provision will be enforced as written. *Id.* "The rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage applies only if a provision is ambiguous." *Id.*

When interpreting a policy, courts give undefined terms their commonly used, ordinary meaning. *Doctors Direct Ins., Inc. v. Bochenek*, 2015 IL App (1st) 142919, ¶ 27, 38 N.E.3d 116. But policy language is not ambiguous simply because a term is undefined or "because the parties can suggest creative possibilities for its meaning." *Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co.*, 166 Ill. 2d 520, 529, 655 N.E.2d 842 (1995). Rather, ambiguity exists only "where the policy language is susceptible to more than one reasonable interpretation." *Munoz*, 237 Ill. 2d at 433. Courts "will

[4] The interpretation of an insurance policy is a question of state-contract law. *Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889, 892 (7th Cir. 1996). Here, the parties agree that Illinois law applies to the interpretation of the Policies.

not strain to find an ambiguity where none exists, nor … consider an interpretation that is unreasonable or leads to absurd results." *Bozek v. Erie Ins. Grp.*, 2015 IL App (2d) 150155, ¶ 19, 46 N.E.3d 362. Courts must consider the policy as a whole, and they should reject interpretations that would render a provision superfluous. *Munoz*, 237 Ill. 2d at 433, 437.

Ultimately, courts applying Illinois law engage in a two-step analysis when determining coverage under an insurance policy: (1) whether the general insuring agreements cover the loss and, if so, (2) whether an exclusion negates coverage. *See Sherrod v. Esurance Ins. Servs., Inc.*, 2016 IL App (5th) 150083, ¶ 15, 65 N.E.3d 471. The insured bears the burden to establish an initial grant of coverage. *See id.* If the insured establishes an initial grant of coverage, the burden shifts to the insurer to prove that an exclusion applies. *See id.*

II. The Virus Exclusions bar Plaintiffs' coverage claims.

While the two-step insurance coverage analysis under Illinois law ordinarily begins with whether the insured has established an initial grant of coverage, the district court found the first step unnecessary here because the Virus Exclusions bar coverage. App. A.5-10. For this reason, West Bend begins its analysis with the Virus Exclusions.[5]

[5] Contrary to Plaintiffs' suggestion, the district court's approach did not "concede" that Plaintiffs' losses were covered. Pls.' Br. 10. Rather, the district court took the established approach of bypassing the first step of the coverage analysis because, even if Plaintiffs had plausibly alleged an initial grant of coverage, the Virus Exclusions were dispositive. This Court has applied the very same approach to coverage disputes. *See, e.g.*, *Resolution Tr. Corp. v. Aetna Cas. & Sur. Co. of Illinois*, 25 F.3d 570, 577 (7th Cir. 1994) (court did not need to address whether the insured's losses fell within the general insuring agreement because the losses fell within an exclusion). In any event, this Court's review is *de novo*.

A. The Virus Exclusions are clear and unambiguous and apply to Plaintiffs' claimed losses.

The district court correctly found that the Virus Exclusions are clear and unambiguous and plainly bar coverage for Plaintiffs' claims. App. A.5-6. In doing so, the district court noted the peculiarity of Plaintiffs' assertion that the exclusions are "purported." App. A.6. Yet, on appeal, Plaintiffs again refer to the Virus Exclusions as "purported" exclusions. Pls.' Br. 6.

Contrary to Plaintiffs' assertion, the Virus Exclusions are actual and real. As the district court properly concluded, the Virus Exclusions' language is plain, clear, and unambiguous. App. A.5-6. The Mashallah Virus Exclusion excludes coverage for "loss or damage caused directly or indirectly by … [a]ny virus." Mashallah Policy pp. 34, 37. The Ranalli's Virus Exclusion excludes coverage for "loss or damage caused by or resulting from any virus." Ranalli's Policy p. 54. Thus, "any virus" is excluded as a Covered Cause Of Loss.

Plaintiffs' claims fall squarely within the Virus Exclusions. COVID-19 is undoubtedly "any virus." And, as Plaintiffs themselves allege, the Closure Orders were issued "in an effort to slow or stop the spread of COVID-19." Compl., ¶ 59. The language of the Closure Orders confirms that they were issued in direct response to COVID-19 and would not have been issued but for COVID-19. *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx ("I find it necessary to take additional measures … to slow and stop the spread of COVID-19."). Because COVID-19 set the Closure Orders in motion, Mashallah's losses were "caused directly or indirectly" by COVID-

19. Similarly, Ranalli's losses were "caused by or result[ed] from" COVID-19. Thus, the district court correctly applied the Virus Exclusions.

Courts across the country—including in Illinois—have repeatedly reached this same conclusion, finding identical virus exclusions to be clear and unambiguous and plainly applicable to claims indistinguishable from Plaintiffs' claims here. *See, e.g.*, *M&E Bakery Holdings, LLC v. Westfield Nat'l Ins. Co.*, No. 20 C 5849, 2021 WL 1837393, at *4 (N.D. Ill. May 7, 2021) (enforcing virus exclusion identical to Mashallah Virus Exclusion); *Dental Experts, LLC v. Massachusetts Bay Ins. Co.*, No. 20 C 5887, 2021 WL 1722781, at *4 (N.D. Ill. May 1, 2021) (enforcing virus exclusion identical to Ranalli's Virus Exclusion); *AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co.*, No. 20 CV 3556, 2020 WL 6940984, at *3–4 (N.D. Ill. Nov. 25, 2020) (same).[6]

B. Plaintiffs' attempts to avoid the Virus Exclusions are meritless.

On appeal, Plaintiffs make four arguments to try to get around the Virus Exclusions. Each argument fails.

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[6] Federal courts interpreting virus exclusions "have nearly unanimously determined that these exclusions bar coverage of similar claims." *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, 499 F. Supp. 3d 74, 79–80 (D.N.J. 2020) (enforcing virus exclusion identical to Mashallah Virus Exclusion and collecting cases); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No. CV208393FLWDEA, 2021 WL 486917, at *5 & n.5 (D.N.J. Feb. 10, 2021) (enforcing virus exclusion identical to Ranalli's Virus Exclusion and collecting cases).

1. The district court correctly held West Bend to the applicable burden under Illinois law, and West Bend met that burden.

First, Plaintiffs contend that the district court did not require West Bend to prove that the Virus Exclusions are "clear and free from doubt." Pls.' Br. 11-12. Yet the district court specifically stated that the Virus Exclusions are "clear and free from any ambiguity." App. A.6. And, contrary to Plaintiffs' contention, the district court did not fail to hold West Bend to the applicable burden under Illinois law. The district court correctly required that "West Bend … affirmatively establish that the exclusions apply." *Id.*

In an effort to avoid this conclusion, Plaintiffs insist that the district court was required to perform a talismanic incantation of the words "clear and free from doubt" and level the same baseless complaint at other Illinois decisions enforcing virus exclusions. *See* Pls.' Br. 12.[7] Illinois law, however, does not require that courts use magic words to enforce exclusions. *See, e.g.*, *Munoz*, 237 Ill. 2d at 436–37 (enforcing exclusion without using "clear and free from doubt" language); *Pekin Ins. Co. v. Willett*, 301 Ill. App. 3d 1034, 1037–38, 704 N.E.2d 923 (2d Dist. 1998) (same).

On a related point, Plaintiffs contend that the district court's rejection of their repeated reliance on the "clear and free from doubt" language conflated the insurer's burden to prove that an exclusion applies and the principle that ambiguous policy language is construed in favor of the insured. Pls.' Br. 11. To the

[7] One of these decisions expressly used Plaintiffs' preferred "clear and free from doubt" language. *See Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20 C 3768, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021) (Kocoras, J.).

contrary, the district court recognized that, under Illinois law, it was required to enforce the clear and unambiguous Virus Exclusions as written. *Munoz*, 237 Ill. 2d at 433. Indeed, the district court correctly noted that it was not required to defer to Plaintiffs' interpretation of the Virus Exclusions because "[t]he rule that policy provisions limiting an insurer's liability will be construed liberally in favor of coverage applies only if a provision is ambiguous." *Id.*; *see* App. A.6.

2. The Virus Exclusions do not require that the virus actually be present on or at the insured premises.

Second, in an attempt to create ambiguity, Plaintiffs assert that the Virus Exclusions are ambiguous regarding whether they require that the virus be physically present at the insured premises. Pls.' Br. 17-18. As the district court correctly concluded, however, the Virus Exclusions do not contain any such requirement. App. A.9. There is no textual basis to support Plaintiffs' interpretation, and a court "will not add terms to the contract of insurance which the parties have not included in the language of the policy." *Chatham Corp. v. Dann Ins.*, 351 Ill. App. 3d 353, 359, 812 N.E.2d 483 (1st Dist. 2004).

In addition to being consistent with the plain language of the Policies, the district court's conclusion—*i.e.*, that the Virus Exclusions do not require that the virus be physically present at the insured premises—is in line with decisions nationwide. *See, e.g.*, *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-CV-00751 (MPS), 2020 WL 7495622, at *6 (D. Conn. Dec. 21, 2020) (interpreting virus exclusion identical to Mashallah Virus Exclusion and finding that virus need not be present at the premises for exclusion to apply); *Causeway Auto.*, 2021 WL 486917,

at *5 (same with respect to exclusion identical to Ranalli's Virus Exclusion); *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*, No. CV 20-5927 (RMB/KMW), 2021 WL 1137994, at *4 (D.N.J. Mar. 12, 2021) (same with respect to language like both Mashallah and Ranalli's Virus Exclusions).[8]

Plaintiffs fail to acknowledge the great weight of authority rejecting their assertion and cite a single decision reaching the contrary result. Pls.' Br. 23 (citing *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *15 (E.D. Va. Dec. 9, 2020)). *Elegant Massage* does not help Plaintiffs, though. Contrary to Plaintiffs' description of the virus exclusion there as "near identical" to the Virus Exclusions here, the *Elegant Massage* virus exclusion referred to the "[g]rowth, proliferation, spread or presence" of virus and excluded coverage for "remediation or removal of virus … at the property." 2020 WL 7249624, at *12. Based on this language, the court found that the virus exclusion applied "where a virus has spread throughout the property." *Id.* But the Virus Exclusions here do not refer to the "presence" of virus at the property. Mashallah Policy pp. 34, 37; Ranalli's Policy p. 54. Thus, *Elegant Massage* is inapposite.[9]

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[8] *See also Hajer v. Ohio Sec. Ins. Co.*, No. 6:20-CV-00283, 2020 WL 7211636, at *5 (E.D. Tex. Dec. 7, 2020) (interpreting virus exclusion identical to Mashallah Virus Exclusion and finding that virus need not be present at the premises for exclusion to apply); *Tanq's Inc. v. Scottsdale Ins. Co.*, No. 6:20-CV-2356-ACC-GJK, 2021 WL 1940291, at *2 (M.D. Fla. Apr. 16, 2021) (same with respect to exclusion identical to Ranalli's Virus Exclusion).

[9] Courts have repeatedly declined to follow *Elegant Massage*. *See, e.g.*, *Eye Care Ctr. of New Jersey, PA v. Twin City Fire Ins. Co.*, No. CV2005743KMESK, 2021 WL 457890, at *4 n.4 (D.N.J. Feb. 8, 2021) (observing that "other federal courts have tagged *Elegant Massage* as a 'notable outlier' and have found it unpersuasive"); *LJ New Haven LLC*, 2020 WL 7495622, at *7 n.7 (finding *Elegant Massage* unpersuasive "in light of the weight of authority favoring application of the virus exclusion"). (Footnote continued).

Apparently recognizing that the Virus Exclusions themselves contain no textual basis to support their interpretation, Plaintiffs look for support elsewhere in the Policies and assert two structural arguments. Neither argument is persuasive.

Plaintiffs' first structural argument is that—because the Policies cover "direct physical loss of or damage to property"—any exclusions necessarily contemplate a physical manifestation of the excluded Cause of Loss at the insured premises. This argument fails because it ignores the Virus Exclusions' broad lead-in language. Mashallah Policy pp. 34, 37 (excluding coverage for "loss or damage caused directly or indirectly by … [a]ny virus"); Ranalli's Policy p. 54 (excluding coverage for "loss or damage caused by or resulting from any virus").

Plaintiffs' second structural argument is that other exclusions in the Policies distinguish between Causes of Loss originating at or away from the premises. *See* Pls.' Br. 19 (discussing Utility Services exclusion's distinction between utility service failure at premises and away from premises). Yet this point cuts against Plaintiffs' position because, while some exclusions distinguish between Causes of Loss occurring at or away from the premises, the Virus Exclusions do not make any such distinction. *See Platinum Supplemental Ins., Inc. v. Guarantee Tr. Life Ins. Co.*, 989 F.3d 556, 569 (7th Cir. 2021) ("[A] court cannot alter, change or modify

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Indeed, other courts interpreting virus exclusions containing similar "growth, proliferation, spread, or presence" language have concluded that these exclusions are not limited to incidents of on-premises contamination. *See, e.g.*, *System Optics, Inc. v. Twin City Fire Ins. Co.*, No. 5:20-CV-1072, 2021 WL 2075501, at *5 & n.4 (N.D. Ohio May 24, 2021) (rejecting actual presence requirement and collecting cases); *Westside Head & Neck v. Hartford Fin. Servs. Grp., Inc.*, No. 220CV06132JFWJCX, 2021 WL 1060230, at *4 (C.D. Cal. Mar. 19, 2021) (same).

existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented.") (alteration in original) (internal quotation marks omitted).

Plaintiffs' presence-of-the-virus argument fails.

3. Plaintiffs' losses were caused by or resulted from a virus.

Third, Plaintiffs argue that the district court erred by determining that Plaintiffs' losses were caused by or resulted from COVID-19. Plaintiffs assert that their losses were instead caused by or resulted from the Closure Orders. This argument fails for two reasons.

The first reason that Plaintiffs' argument fails is that Plaintiffs (incorrectly) assume that the Closure Orders are a Covered Cause of Loss. When viewed as a whole, however, the Policies demonstrate that construing the Closure Orders as a Covered Cause of Loss would create conflict between the Business Income and Extra Expense coverage provisions, on the one hand, and the Civil Authority coverage provision on the other hand. This is so because, if a civil authority action limiting use of or access to property constituted a Covered Cause of Loss that caused "direct physical loss of or damage to property," then civil authority actions prohibiting access would necessarily trigger Business Income and Extra Expense coverage, rendering the Policies' Civil Authority coverage superfluous. *See Moody v. Hartford Fin. Grp., Inc.*, No. CV 20-2856, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021). In other words, because the Civil Authority coverage contemplates a civil authority action taken in response to damage caused by a Covered Cause of Loss, a civil authority action (*i.e.*, the Closure Orders here) cannot itself be a Covered Cause

of Loss. *See* Mashallah Policy p. 26. As a matter of logic, and as courts have repeatedly recognized, the Closure Orders cannot have been issued in response to the Closure Orders. *See Moody*, 2021 WL 135897, at *6 & n.7; *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020 WL 7395153, at *6 (E.D. Pa. Dec. 17, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 488 F. Supp. 3d 904, 908 (N.D. Cal. 2020). Thus, the Closure Orders are not a Covered Cause of Loss under the Policies.

Because neither COVID-19 nor the Closure Orders are a Covered Cause of Loss, Plaintiffs have failed to allege that any Covered Cause of Loss has occurred. Therefore, the doctrine of efficient proximate cause does not apply here. 7 STEVEN PLITT ET AL., COUCH ON INS. § 101:55 (3d ed. 2020) (explaining that the efficient proximate cause doctrine applies where multiple causes produce a loss, one of which is included while the other is excluded from policy coverage). For this reason alone, Plaintiffs' causation argument fails.

The second reason that Plaintiffs' causation argument fails is that, even if the Closure Orders constitute a Covered Cause of Loss, COVID-19 is the efficient proximate cause, and COVID-19 is an excluded Cause of Loss. Under the efficient proximate cause approach, a loss is covered only "if a risk of loss that is specifically insured against in the insurance policy [*i.e.*, a Covered Cause of Loss] sets in motion, in an unbroken causal sequence, the events that cause the ultimate loss … or if it is simply the dominant cause." *See Bozek*, 2015 IL App (2d) 150155, ¶ 21. Applying this approach, the district court correctly asked whether COVID-19 was

"simply the dominant cause" that set the other cause (*i.e.*, the Closure Orders) in motion in an unbroken causal sequence, and the district court correctly answered that question in the affirmative. App. A.8. In so doing, the district court recognized that—notwithstanding Plaintiffs' insistence that causation is generally a question of fact—there was no genuine dispute that the Closure Orders were issued in direct response to COVID-19 and would not have issued but for COVID-19. App. A.8. Indeed, courts have widely rejected attempts to get around virus exclusions by characterizing closure orders as the cause of loss. *See, e.g.*, *M&E Bakery Holdings*, 2021 WL 1837393, at *4 (rejecting argument that closure orders, not virus, caused losses and enforcing virus exclusion identical to Mashallah Virus Exclusion); *Dental Experts*, 2021 WL 1722781, at *4 (same with respect to exclusion identical to Ranalli's Virus Exclusion); *AFM Mattress Co.*, 2020 WL 6940984, at *3 (same).[10]

Plaintiffs' assertion that the Closure Orders are the efficient proximate cause ignores *Bozek* and asks this Court to put on blinders as to why the Closure Orders were issued. Yet, as Plaintiffs themselves allege, the Closure Orders were issued "in an effort to slow or stop the spread of COVID-19." Compl., ¶ 59. As one court enforcing a virus exclusion explained: "[t]he causal links represented by the virus and the Order are interlocking – even intertwined." *LJ New Haven LLC*, 2020 WL

[10] Cases rejecting Plaintiffs' argument are legion. *See, e.g.*, *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 361 (W.D. Tex. 2020) (orders "only came about sequentially as a result of" COVID-19); *Franklin EWC*, 488 F. Supp. 3d at 908 (describing same argument that Plaintiffs make here as "nonsense" and finding that closure orders "were issued as the direct result of COVID-19—a cause of loss that falls squarely within the Virus Exclusion"); *Moody*, 2021 WL 135897, at *9 (finding that orders would not have issued but for COVID-19).

7495622, at *5.[11] Plaintiffs cannot avoid this result simply by insisting on a myopic view of causation.

With regard to Mashallah, moreover, there is yet another problem with Plaintiffs' position. Mashallah's coverage claims are barred even if the efficient proximate cause doctrine applies (it does not) and the Closure Orders are the efficient proximate cause (they are not). This is because Mashallah agreed to a narrower causation standard than the efficient proximate cause standard. Specifically, the Mashallah Virus Exclusion contains an anti-concurrent-causation clause. Mashallah Policy pp. 34, 37; *Bozek*, 2015 IL App (2d) 150155, ¶ 23 ("When an anti-concurrent-causation clause can be applied to the facts underlying the claim, there is no coverage if even one contributing cause is an excluded event.").

For their part, Plaintiffs insist that the anti-concurrent-causation clause violates Illinois public policy. Yet Plaintiffs do not explain why this is so. Pls.' Br. 23-26. Instead, Plaintiffs merely observe that the default causation rule in Illinois is efficient proximate causation. *Id.* at 25. True. But that does not upset Illinois courts' "long tradition of upholding the right of parties to freely contract." *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55, 949 N.E.2d 639 (2011). Indeed, the one authority that Plaintiffs discuss enforced an anti-concurrent-causation clause. *See Bozek*, 2015 IL App (2d) 150155, ¶ 34. While the court there declined to determine whether public

[11] As for Plaintiffs' assertion that the Closure Orders were issued "due to a variety of factors," *see* Pls.' Br. 23, the Closure Orders trace each of those factors back to COVID-19. *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx (finding it necessary to "slow and stop the spread of COVID-19" for "the preservation of public health and safety … and to ensure that our healthcare delivery system is capable of serving those who are sick").

policy prohibits enforcement of anti-concurrent-causation clauses, it observed that "[o]nly a minority of jurisdictions have found [such] clauses to be unenforceable." *Id.*, ¶ 37. *Bozek* does not provide a basis to find that the anti-concurrent-causation clause violates public policy.[12]

In any event, anti-concurrent-causation clauses aside, the Virus Exclusions bar Plaintiffs' claims. App. A.8.

4. The Virus Exclusions do not render coverage illusory.

In their fourth and final attempt to avoid the Virus Exclusions, Plaintiffs contend that the application of the Virus Exclusions to their claims would render the Business Income coverage illusory. Plaintiffs assert that, if their alleged losses are not covered, the Virus Exclusions must exclude all losses suffered during COVID-19. Not so. The district court correctly rejected Plaintiffs' illusory-coverage argument because, under Illinois law, "[t]he policy need not provide coverage against all possible liabilities; if it provides coverage against some, the policy is not illusory." App. A.9-10; *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 362 Ill. App. 3d 745, 754, 841 N.E.2d 78 (1st Dist. 2005); *see also Archer Daniels Midland Co. v. Burlington Ins. Co. Grp.*, 785 F. Supp. 2d 722, 735 (N.D. Ill. 2011) (finding that coverage was not illusory because "the exclusion d[id] not preclude any possibility of coverage under other facts"); *Charles Hester Enters., Inc. v. Illinois*

[12] Plaintiffs also appear to assert that the anti-concurrent-causation language violates public policy because insurance policies are contracts of adhesion. Pls.' Br. 25. Plaintiffs did not make this argument in the district court and thus the argument is waived. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012). Regardless, the Illinois Supreme Court has held that, even if an insurance policy is a contract of adhesion, "such a finding does not render the agreement unenforceable." *Phoenix Ins. Co.*, 242 Ill. 2d at 72.

Founders Ins. Co., 137 Ill. App. 3d 84, 98, 484 N.E.2d 349 (5th Dist. 1985) (finding that "the coverage was not false or 'phantom' merely because there was no present exposure"). The Virus Exclusions do not preclude any possibility of coverage on other facts. Thus, they do not render coverage illusory.[13]

In sum, the district court correctly found that the Virus Exclusions bar Plaintiffs' coverage claims. Thus, without reading further, this Court could affirm dismissal of these claims. As discussed below, however, there is a second, independent basis for affirming the district court's rejection of these claims. *See UWM Student Ass'n v. Lovell*, 888 F.3d 854, 859 (7th Cir. 2018) (court of appeals can affirm on any basis in the record).

III. Plaintiffs have not plausibly alleged an initial grant of coverage under the Policies.

While the Virus Exclusions bar coverage, Plaintiffs' coverage claims also fail because Plaintiffs have not plausibly alleged an initial grant of coverage under the Policies.

A. Plaintiffs have not alleged plausible entitlement to Business Income or Extra Expense coverage.

Plaintiffs are not entitled to Business Income or Extra Expense coverage because they have failed to allege "direct physical loss of or damage to property."

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[13] Plaintiffs' cited cases do not support their illusory-coverage argument. *See* Pls.' Br. 26. In *State Farm Fire & Casualty Co. v. Trousdale*, the court found that a policy endorsement was not illusory because it provided beneficial coverage. 285 Ill. App. 3d 566, 571, 673 N.E.2d 1132 (1st Dist. 1996). So, too, here. In *Illinois Farmers Insurance Co. v. Keyser*, the court found that the insurer's interpretation would lead to illusory coverage because it created internal inconsistency in the policy's definitions. 2011 IL App (3d) 090484, ¶ 14, 956 N.E.2d 575. Here, there is no such inconsistency.

Thus, courts in Illinois and across the country have repeatedly rejected coverage claims like Plaintiffs' here.

1. Courts have repeatedly found that closure orders do not constitute or cause "direct physical loss of or damage to property."

To trigger Business Income and Extra Expense coverage, Plaintiffs must have suffered a suspension of operations caused by "direct physical loss of or damage to property." Mashallah Policy pp. 23-24.

The Policies do not define "direct physical loss of or damage to property," so we look to the dictionary. The word "direct" means: "stemming immediately from a source" and "having no compromising or impairing element." *Direct*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/direct (last visited May 21, 2020). The word "physical" means: "having material existence: perceptible especially through the senses and subject to the laws of nature." *Physical*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/physical (last visited May 21, 2020); *see also Physical*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Of, relating to, or involving material things; pertaining to real, tangible objects."). "Direct" and "physical" modify both "loss of" and "damage to." *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110, at *4 (W.D. Mo. Dec. 2, 2020).

Consistent with the above definitions, scores of courts—including in Illinois—have granted insurers' dispositive motions in virtually identical cases based on the "direct physical loss or damage to property" requirement (or similar language). *See, e.g.*, *Chief of Staff LLC v. Hiscox Ins. Co. Inc.*, No. 20 C 3169, 2021 WL 1208969, at *3–4 (N.D. Ill. Mar. 31, 2021) (applying Connecticut law); *Zajas, Inc. v. Badger Mut.*

Ins. Co., No. 20-CV-1055-DWD, 2021 WL 1102403, at *3 (S.D. Ill. Mar. 23, 2021); *Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co.*, No. 20 C 4636, 2021 WL 271294, at *3 (N.D. Ill. Jan. 27, 2021); *Bradley Hotel Corp. v. Aspen Specialty Ins.* Co., No. 20 C 4249, 2020 WL 7889047, at *4 (N.D. Ill. Dec. 22, 2020). Specifically, these courts have found that "direct physical loss of or damage to property" does not encompass inability to use property in the absence of tangible harm to the property or permanent dispossession of the property. *See, e.g.*, *Chief of Staff*, 2021 WL 1208969, at *3–4 (collecting cases).[14]

These decisions are in accord with how courts applying Illinois law have interpreted the word "physical." In *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, the Illinois Supreme Court explained that "tangible property suffers a 'physical' injury when the property is altered in appearance, shape, color or in other

[14] *See also*, *e.g.*, *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 295 (S.D. Miss. 2020) (stating that "[m]ost courts have rejected [claims like Plaintiffs' here] and granted motions to dismiss based on the finding that the businesses' complete or partial closures due to government orders issued to slow the spread of COVID-19 do not constitute 'direct physical loss of or damage to property'" and collecting cases); *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 498 F. Supp. 3d 1233, 1239 (C.D. Cal. 2020) ("Plaintiffs cannot state a legally cognizable claim based on the temporary loss of use of property alleged here."); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F. Supp. 3d 1289, 1294–95 (N.D. Ga. 2020) (explaining that order did not have a "direct" effect upon insured premises and did not cause "physical loss" because the premises "underwent no physical change as a result"); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, 492 F. Supp. 3d 1051, 1056 (C.D. Cal. 2020) (rejecting plaintiff's theory that "'direct physical loss of' encompasses deprivation of property without physical change in the condition of the property" as having no "manageable bounds"); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 838–39 (N.D. Cal. 2020) (rejecting plaintiff's claim "that its inability to operate and occupy its storefront following the government closure orders is a direct physical loss of property covered by its insurance policy"); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020) (rejecting contention that temporary impaired use or diminished value constitutes physical loss or damage).

material dimension. Conversely … tangible property does not experience 'physical' injury if that property suffers intangible damage, such as diminution in value…." 197 Ill. 2d 278, 301-02, 757 N.E.2d 481 (2001). Similarly, this Court has "explained that 'physical' generally refers to tangible as opposed to intangible damage." *Windridge of Naperville Condo. Ass'n v. Philadelphia Indem. Ins. Co.*, 932 F.3d 1035, 1040 (7th Cir. 2019).

Remarkably, Plaintiffs' opening brief is silent on the vast number of COVID-19 business interruption cases.[15] Thus, Plaintiffs have waived any arguments regarding these cases. *See Campos v. Cook Cty.*, 932 F.3d 972, 976 & n.2 (7th Cir. 2019) (failure to develop an argument on appeal waives that argument, and the failure cannot be cured on reply). But waiver aside, as discussed below, Plaintiffs have not plausibly alleged "direct physical loss of or damage to property."

2. Plaintiffs' interpretation of "direct physical loss of or damage to property" is contrary to the Policies' plain language.

In alleging that the Closure Orders caused a temporary loss of use of their business premises, Plaintiffs do not allege any tangible, material, distinct, and demonstrable "direct physical loss of or damage to property." Plaintiffs do not allege property has been damaged, requiring repair, nor that property has been lost, requiring rebuilding or replacement. Instead, Plaintiffs allege purely economic loss caused by temporary limitations on their use of property. Compl., ¶ 54. As described above, courts have overwhelmingly rejected the contention that a temporary loss of

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[15] Plaintiffs cite three COVID-19-business-interruption cases, but they do so only in the context of Virus-Exclusion-related arguments. *See* Pls.' Br. 12, 23.

use of property for reasons exogenous to the premises constitutes "direct physical loss of or damage to property."

On appeal, Plaintiffs assert that the Closure Orders caused "direct physical loss of or damage to property" by limiting their ability to use their business premises. Pls.' Br. 14-15. There are three problems with Plaintiffs' position.

First, Plaintiffs contend that, because of the word "or" in "direct physical loss of or damage to property," "physical loss of" must mean something other than "physical damage to." Pls.' Br. 14. From there, Plaintiffs define "loss" as "the act of losing possession" and "deprivation" and assert that "loss" may include deprivation of their insured premises' function.[16]

In the process of separating "loss of" from "damage to," though, Plaintiffs read the words "direct" and "physical" out of the Policies. For this precise reason, courts have rejected Plaintiffs' argument, recognizing the need to tie together "direct" and "physical" with respect to both "loss of" and "damage to." *See, e.g.*, *Chief of Staff*, 2021 WL 1208969, at *3 (rejecting Plaintiffs' interpretation because it "would violate the surplusage-avoidance principle by reading the word 'physical' out of the Business Income provision"); *see also Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, No. 20 C 3463, 2021 WL 633356, at *3 (N.D. Ill. Feb. 18, 2021). These courts have explained that "physical loss of" indeed means something other than "physical damage to"—but it does not encompass "loss of use." *See, e.g.*, *Chief of*

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[16] Plaintiffs define "damage" as including "impairment of … propert[y] or a reduction in [its] functionality," but they do not cite any authority to support this definition or develop an argument based on it. Pls.' Br. 14.

Staff, 2021 WL 1208969, at *3. Instead, "physical loss of" means total destruction (such as by a tornado) or permanent dispossession (such as by theft), while "physical damage to" means a lesser injury (such as by fire). *See Michael Cetta, Inc. v. Admiral Indem. Co.*, No. 20 CIV. 4612 (JPC), 2020 WL 7321405, at *9 (S.D.N.Y. Dec. 11, 2020); *Real Hosp., LLC*, 499 F. Supp. 3d at 294–95; *Henry's Louisiana Grill*, 495 F. Supp. 3d at 1295.

Plaintiffs' interpretation, on the other hand, has no manageable bounds. Anything affecting Plaintiffs' ability to use their property (*e.g.*, new occupancy limits) would trigger coverage. *See Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F. Supp. 3d 1225, 1231–32 (C.D. Cal. 2020).

Second, Plaintiffs' interpretation cannot be reconciled with the broader context and structure of the Policies as a whole. *See Munoz*, 237 Ill. 2d at 437 (court must consider the policy as a whole). Specifically, the Business Income and Extra Expense coverages are limited to the "period of restoration," which begins after "the time of direct physical loss or damage" and ends on (1) "[t]he date when the property at the described premises should be repaired, rebuilt or replaced" or (2) "[t]he date when business is resumed at a new permanent location." Mashallah Policy pp. 23-25, 96.

The words "repair," "rebuild," and "replace" contemplate *physical* loss of or damage to property, as opposed to loss of use. *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014). Thus, the "period of restoration" provision strengthens the interpretation that "physical loss of"

relates to total destruction or permanent dispossession—where the property must be rebuilt or replaced—and "physical damage to" refers to any lesser injury—where the property must be repaired. *Michael Cetta*, 2020 WL 7321405, at *7. And courts have repeatedly relied upon materially identical "period of restoration" provisions when dismissing claims just like Plaintiffs' claims here. *See, e.g.*, *id.*; *Chief of Staff*, 2021 WL 1208969, at *3; *Henry's Louisiana Grill*, 495 F. Supp. 3d at 1295–96; *Mudpie, Inc.,* 487 F. Supp. 3d at 840. Plaintiffs do not allege that any property must be repaired, rebuilt, or replaced, nor that they were required to resume business at a new permanent location. The absence of such allegations confirms that no "direct physical loss of or damage to property" has occurred.[17]

On reply, Plaintiffs might argue that preventative actions taken to reduce the spread of COVID-19 (*e.g.*, erecting Plexiglass barriers) constitute repairs. *See* Pls.' Br. 14 (arguing that preventative actions constitute "direct physical loss of or damage to property"). But these measures do not square with the plain meaning of "repair," *i.e.*, "to restore by replacing a part or putting together what is torn or broken." *Repair*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/repair (last visited May 28, 2021). Consistent with that plain meaning, courts have rejected such characterizations. *See, e.g.*, *L&J Mattson's Co. v. Cincinnati Ins. Co., Inc.*, No. 20 C 7784, 2021 WL 1688153, at *6 n.3 (N.D. Ill.

[17] Another structural problem with Plaintiffs' interpretation, discussed in this brief in the context of the Virus Exclusions, is that Closure Orders are not a Covered Cause of Loss. *See supra* Section II.B.3.

Apr. 29, 2021); *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, No. CV 20-3033, 2021 WL 131657, at *6 (E.D. Pa. Jan. 14, 2021).

Third, Plaintiffs' interpretation collapses the Business Income coverage's requirements (or, at least, gets them backwards). For a valid Business-Income-coverage claim, a Covered Cause of Loss must cause "direct physical loss of or damage to property," which in turn must cause a suspension of operations. Plaintiffs' position is that the Closure Orders have suspended their operations and that their inability to use their property—in other words, the suspension itself—constitutes "direct physical loss of or damage to property." Pls.' Br. 15. Plaintiffs' interpretation thus conflates (or reorders) two distinct coverage requirements. But the Policies require that the suspension be caused by "direct physical loss of or damage to property"—not the other way around. Mashallah Policy, p. 23.

3. Plaintiffs' non-COVID-19 cases are inapposite.

Rather than address any COVID-19 business interruption decisions considering the phrase "direct physical loss of or damage to property," Plaintiffs cite several non-COVID-19 cases from outside of Illinois discussing when the presence of something on the insured premises constitutes "direct physical loss of or damage to property."[18] Here, however, Plaintiffs rely on the Closure Orders and do not allege

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[18] *See* Pls.' Br. 15-16 (citing *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (ammonia rendered property uninhabitable); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 702 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (toxic gas rendered home uninhabitable); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 481, 493, 509 S.E.2d 1 (1998) (rockfalls made home uninhabitable); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39, 437 P.2d 52 (1968) (gasoline accumulation rendered building uninhabitable)).

that anything physical intruded on their premises, so these cases are inapposite. Plaintiffs also cite non-COVID-19 cases where the policy covered loss of use or did not require "physical" damage."[19] But the Policies here do not cover loss of use; they require "physical loss of or damage to property." Finally, Plaintiffs cite a case involving physical dispossession of inventory.[20] Here, though, Plaintiffs allege only loss of use—not that any property has gone missing and requires replacement.

B. Plaintiffs have not alleged plausible entitlement to Civil Authority coverage.

While Plaintiffs assert that they are entitled to Civil Authority coverage, Plaintiffs offer no support for this claim. Pls.' Br. 7. Thus, any Civil Authority coverage arguments are waived. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim."). In any event, Plaintiffs' Civil-Authority-coverage claim fails because Plaintiffs have failed to allege any of the three requirements for a valid Civil Authority coverage claim: (1) damage to other property, (2) a prohibition against access to their premises, and (3) a causal nexus between the damage to other property and action of civil authority. For any one or all of these reasons, Plaintiffs' claim was properly dismissed.

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[19] Pls.' Br. 15-16 (citing *TRAVCO Ins. Co.*, 715 F. Supp. 2d at 702 (policy defined "property damage" as including "loss of use of tangible property"); *Dundee Mut. Ins. Co. v. Marifjeren*, 1998 ND 222, ¶ 15, 587 N.W.2d 191 (policy did not limit "wind damage" to "physical" damage)).

[20] Pls.' Br. 16 (citing *Universal Sav. Bank v. Bankers Standard Ins. Co.*, No. B159239, 2004 WL 515952, at *1, 6 (Cal. Ct. App. Mar. 17, 2004)).

1. Plaintiffs have not alleged damage to other property.

The Civil Authority coverage requires that a "Covered Cause of Loss cause[] damage to property other than property at the described premises." Mashallah Policy p. 26. Plaintiffs have not sufficiently alleged, and cannot plausibly allege, damage to other property for the same reasons that they have not sufficiently alleged "direct physical loss of or damage to" their insured property. *See supra* Section III.A.1. & 2.

2. Plaintiffs cannot plausibly allege a prohibition against access to their premises.

Plaintiffs' claim for Civil Authority coverage also fails because Plaintiffs cannot plausibly allege that the Closure Orders "prohibit[ed] access" to their insured premises. Mashallah Policy p. 26.

The text of the Closure Orders demonstrates that they did not prohibit access to Plaintiffs' insured premises. The Closure Orders classified Ranalli's as an essential business for purposes of off-premises consumption. *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx. Indeed, Plaintiffs concede that Ranalli's continued to operate and provide takeout and delivery. Compl., ¶ 28. As for Mashallah, the Closure Orders permitted it to conduct minimum basic operations at its insured premises. *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx.

3. Plaintiffs cannot plausibly allege a causal nexus between damage to other property and the Closure Orders.

Finally, Plaintiffs' claim for Civil Authority coverage fails because Plaintiffs cannot plausibly allege the required casual nexus between the action of civil authority and damage to other property, *i.e.*, that "[a]ccess … is prohibited by civil authority as a result of the damage" and "[t]he action of civil authority is taken in response to dangerous physical conditions resulting from the damage …." Mashallah Policy p. 26.

The language of the Closure Orders confirms that they were issued to prevent the spread of COVID-19, and not in response to property damage anywhere. *See* Exec. Order No. 2020-10 (March 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx ("I find it necessary to take additional measures … to slow and stop the spread of COVID-19."); *see also* Compl., ¶ 59.[21]

Thus, Plaintiffs are not entitled to Civil Authority coverage.

C. Because there is no coverage, the district court properly dismissed Plaintiffs' bad-faith claim.

Having found coverage unavailable, the district court correctly dismissed Plaintiffs' bad-faith claim under Section 155 of the Illinois Insurance Code, 215 ILCS 5/155. App. A.10. Where, as here, no benefits are owed, West Bend cannot have acted vexatiously and unreasonably, and Plaintiffs are not entitled to relief

[21] In addition, Plaintiffs' theory of coverage is logically inconsistent with the causal-nexus requirement because, as discussed in the context of the Virus Exclusions, the Closure Orders cannot have been issued as a result of the Closure Orders. *See supra* Section II.B.3.

under section 155. *See Martin v. Illinois Farmers Ins.*, 318 Ill. App. 3d 751, 764, 742 N.E.2d 848 (1st Dist. 2000).

IV. Plaintiffs' premium-rebate claims fail under the terms of the Policies and the operation of insurance.

In their alternative class-action claims, Plaintiffs assert that, if they are not entitled to coverage, they are entitled to an after-the-fact reduction in premiums. Specifically, Plaintiffs assert that, if West Bend can enforce the coverage limitations and premiums the parties agreed to before COVID-19, West Bend violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") and is liable for unjust enrichment. These claims ignore the Policies' terms and how insurance works.

A. The district court properly dismissed Plaintiffs' ICFA claim because Plaintiffs failed to sufficiently allege that West Bend engaged in any deceptive or unfair conduct.

"To prevail on a claim under the ICFA, a plaintiff must plead and prove that the defendant committed a deceptive or unfair act with the intent that others rely on the deception, that the act occurred in the course of trade or commerce, and that it caused actual damages." *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 646 (7th Cir. 2019). Here, the district court found that Plaintiffs failed to sufficiently allege either deception or unfairness. App. A.12-15. And the district court was right on both fronts.

1. Plaintiffs have not sufficiently alleged that West Bend engaged in any deceptive conduct.

To support a deception claim, Plaintiffs assert that West Bend "misrepresented and omitted facts regarding the premium charged … and the commensurate risk

actually taken on and the coverage actually afforded (including but not limited to that [West Bend] would not pay for business interruption losses for businesses whose income was already interrupted or reduced by Closure Orders)." Compl., ¶ 145. There are three problems with Plaintiffs' deception claim.

First, in their complaint (and in the district court), Plaintiffs asserted that, when they purchased their Policies in 2019, West Bend misrepresented or omitted that it would not provide coverage when COVID-19 struck. Yet, as Plaintiffs themselves plead, "[r]eports of a novel Coronavirus ("COVID-19") pandemic emerged out of Wuhan, China in early 2020." *Id.*, ¶ 58. Thus, as the district court found, West Bend could not have intended that Plaintiffs rely on a representation relating to a virus that it did not know existed. *See* App. A.12; *see also Mackinac v. Acadia Nat'l Life Ins. Co.*, 271 Ill. App. 3d 138, 142-143, 648 N.E.2d 237 (1st Dist. 1995) (affirming dismissal of ICFA claim where the plaintiff failed to allege that, when she obtained coverage, the defendant knew about the existence of a physical condition affecting coverage).

Second, apparently recognizing the logical flaw in their claim related to the *purchase* of their Policies, Plaintiffs appear to abandon that claim on appeal. Plaintiffs focus instead on their claim related to *renewal* of their Policies. *See* Pls.' Br. 27. But this claim, too, is badly flawed.

Plaintiffs renewed their Policies *after* West Bend denied their COVID-19-related coverage claims. *See* Mashallah Policy p. 1 (showing Mashallah Policy period ending in August 2020); Compl., Ex. C (Mashallah declination letter dated May 2020) (Dkt.

No. 1-3); Ranalli's Policy p. 1 (showing Ranalli's Policy period ending October 2020); Compl., Ex. D (Ranalli's declination letter dated April 2020) (Dkt. No. 1-4). And, as this Court and others have repeatedly recognized, when the terms a plaintiff complains about were disclosed before the plaintiff entered into the challenged transaction, the plaintiff cannot state a claim for deception. *See, e.g., Toulon v. Continental Cas. Co.*, 877 F.3d 725, 739-40 (7th Cir. 2017) (rejecting deception claim about increased premium rates where the policy documents "should have made clear to applicants that [the defendant] could change the premium rates without limitation"); *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 423, 775 N.E.2d 951 (2002) (stating that "there was no deception [about whether early termination of a lease was permitted] because the leases expressly stated that early termination was not permitted").

Third, a plaintiff bringing an ICFA claim cannot simply rely on "breach-of-contract allegations dressed up in the language of fraud." *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392, 395 (7th Cir. 2011) (rejecting ICFA claim that was "nothing more than restatements of the claimed breach of contract, albeit using the language of fraud"). A "deceptive act or practice involves more than the mere fact that a defendant promised something and then failed to do it," because "that type of 'misrepresentation' occurs every time a defendant breaches a contract." *Id*. at 399.

Here, Plaintiffs' assertions about coverage denials and premiums are (entirely baseless) "breach-of-contract allegations dressed up in the language of fraud." *Greenberger*, 631 F.3d at 395. And, as the district court correctly found, that is

insufficient. *See* App. A.13. Other courts have since followed suit. *See M&E Bakery Holdings*, 2021 WL 1837393, at *6.

On appeal, Plaintiffs simply ignore the district court's conclusion that their deception claim is a repackaged breach-of-contract claim. Yet failure to develop an argument on appeal waives that argument, and this shortcoming cannot be cured on reply. *See Campos*, 932 F.3d at 976 & n.2. For this reason alone, this Court may affirm the district court's dismissal of Plaintiff's deception claim.[22]

Waivers aside, though, Plaintiffs' efforts on appeal come up short. Plaintiffs make two unconvincing attacks on the district court's decision.

First, Plaintiffs argue that, by concluding that Plaintiffs were not deceived, the district court improperly "decided fact issues" at the motion-to-dismiss stage. Pls.' Br. 27. Yet this Court and the Illinois Supreme Court have repeatedly found that, in the face of written disclosures, there is *no question of fact* about deception. *See Toulon*, 877 F.3d at 739-40; *Robinson*, 201 Ill. 2d at 423.

Moreover, "determining whether a complaint states a plausible claim…requir[es] the reviewing court to draw on its experience and common sense." *Iqbal*, 556 U.S. at 663-64. Here, Plaintiffs apparently suggest that there is a question of fact about whether they "supposedly" knew about COVID-19 and West Bend's coverage

[22] At bottom, Plaintiffs appear to be arguing that, because they disagree with West Bend's interpretation of the Policies, West Bend misrepresented those terms. As discussed earlier in this brief, West Bend's interpretation is correct. Regardless, though, "alleged misrepresentations [about contractual rights] [a]re not of facts, thus removing them from the [ICFA's] ambit." *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 671 (7th Cir. 2001) ("Taking a position on the interpretation of legal documents, even if erroneous, is not a deceptive trade practice or act.").

position when they renewed their Policies in 2020. *See* Mashallah Policy p. 1 (showing Mashallah Policy period ending in August 2020); Compl., Ex. C (Mashallah denial letter dated May 2020) (Dkt. No. 1-3); Ranalli's Policy p. 1 (showing Ranalli's Policy period ending October 2020); Compl., Ex. D (Ranalli's denial letter dated April 2020) (Dkt. No. 1-4). In other words, Plaintiffs assert that there is a question of fact about whether—after COVID-19 exploded across the country, after the Closure Orders issued, after Plaintiffs limited their operations, after Plaintiffs submitted claims seeking COVID-19-related coverage, and after those claims were denied—Plaintiffs knew about COVID-19 or West Bend's position on coverage. Put simply, that is absurd.[23]

Second, Plaintiffs argue that—in finding that the disclosures doomed Plaintiffs' deception claim—the district court "overemphasized the need for 'actual deception'." Pls.' Br. 27. Plaintiffs stress that, "unlike common law fraud, '[p]laintiff's reliance is not an element of statutory fraud'." *Id*. (quoting *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501, 675 N.E.2d 584 (1996)).

True enough. As Plaintiffs themselves concede, however, a " 'valid [ICFA] claim must show that the consumer fraud proximately caused plaintiff's injury.'" *Id*. And courts have repeatedly recognized that—where the representation occurred after the plaintiff entered into the transaction or the alleged misrepresentation was the

[23] This is even putting aside that a claim for deception under the ICFA must do more than satisfy the plausibility standard. A deception claim under the ICFA claim must satisfy "the heightened pleading standard set forth in Federal Rule of Civil Procedure 9(b)." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014). Here, apparently recognizing how implausible Plaintiffs' deception claims are, the district court found those claims deficient without even getting into Rule 9(b). *See* App. A.11-15.

subject of a written disclosure before the plaintiff entered into the transaction—the plaintiff cannot plausibly allege the representation proximately caused the plaintiff harm. *See Connick*, 174 Ill. 2d at 502 (stating that "plaintiffs can state a valid claim of consumer fraud only where premised upon statements made prior to their dates of purchase"); *Toulon*, 877 F.3d at 739-40 (stating that plaintiffs could not state a deception claim under the ICFA where the alleged misrepresentation was the subject of written disclosure received before the challenged transaction); *Robinson*, 201 Ill. 2d at 423 (same).

Plaintiffs' claim for deception under the ICFA fails.

2. Plaintiffs fail to sufficiently allege that the coverage limitations and premiums were unfair because Plaintiffs' unfairness claim disregards how insurance operates and there is nothing unfair about enforcing contracts as written.

In their unfairness claim under the ICFA, Plaintiffs assert that, because they reduced their business operations after COVID-19 struck, there were fewer potential risks than anticipated when the premiums Plaintiffs agreed to pay were set. Compl., ¶¶ 121-22. Therefore, Plaintiffs assert that, by not rebating premiums while also not providing COVID-19-related coverage, West Bend acted unfairly in violation of the ICFA. This claim ignores how insurance works and pillories the practice of enforcing contracts as written.

As the Illinois Supreme Court has explained, a court assessing an unfairness claim considers "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Robinson*, 201 Ill. 2d at 417-18. Although an unfairness claim

(unlike a deception claim) does not trigger Rule 9(b)'s heightened-pleading standard, an unfairness claim must still be plausibly pled. *Benson*, 944 F.3d at 646.

Here, none of the applicable factors supports a finding of unfairness. To start, with regard to "public policy" and "injury to consumers," there are at least two problems with Plaintiffs' position.

First, Plaintiffs ignore how insurance works. Plaintiffs agreed to pay set premiums up front. Mashallah Policy p. 1. If a covered risk had arisen during the policy period, West Bend would have been on the hook. *Id.* at 46. As the district court found, there is nothing unfair about West Bend's having charged a set premium to protect Plaintiffs against *covered* risks. *See* App. A.13-14.

A long line of authority supports this conclusion. *See, e.g.*, *Brown v. Fed. Life Ins. Co.*, 353 Ill. 541, 547 (1933) (stating that "the premiums paid under a valid policy of insurance, *on which the insurance company has carried the risk for some time*, may not be recovered on a count of money had and received") (emphasis added); *Euclid Nat. Bank v. Fed. Home Loan Bank Bd.*, 396 F.2d 950, 951 (6th Cir. 1968) (stating that, "in the absence of an express agreement or one that may be implied in law, the rule is that an insured may not have any part of his premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned," and rejecting claim for premium rebate when it turned out that the insured's risk was less than expected); *Humana Health Care Plans v. Snyder-Gilbert*, 596 N.E.2d 299, 300 (Ind. Ct. App. 1992) (stating that "[i]t is axiomatic that a court cannot award a refund of premiums paid to secure insurance once the insurance company

has been put *at risk* on behalf of the insured," and rejecting the plaintiff's claim that, because the risk insured against did not materialize, the insurer should refund the plaintiff's premium) (emphasis in original); *see also Monteleone v. Auto Club Grp.*, No. 13-CV-12716, 2015 WL 71915, at *5 (E.D. Mich. Jan. 6, 2015) (dismissing premium-rebate claim based on the theory that insurer *might* not properly adjust losses in the future, and stating that "[t]he transfer of risk occur[s] when the policy [goes] into effect and the policy defines the risk assumed by the insurance companies").

A leading treatise has succinctly summarized the rationale underlying this rule. "This rule is based upon just and equitable principles, for the insurer has, by taking upon itself the peril, become entitled to the premium." 5 STEVEN PLITT ET AL., COUCH ON INS. § 79:7 (3d ed. 2020) (collecting numerous cases).[24]

Second, Plaintiffs insist that, because they have reduced operations since COVID-19 emerged, Plaintiffs' chances of suffering a *covered* risk have gone down. As Plaintiffs put it, a "shuttered kitchen (for example) has no fires." Compl., ¶ 6. This seems an odd example, given that Ranalli's concedes it has been open for takeout and delivery. *Id.*, ¶ 28. No matter. Plaintiffs' argument notwithstanding,

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[24] These authorities recognize that insurance involves the sharing and spreading of risks. Actual risk, of course, may differ from projected risk. One year, an insurer may pay more in claims than it receives in premiums for a given policyholder; another year, less. But, in either case, the insured has received protection, and the insurer has "taken upon itself the peril" and is entitled to the premium. 5 STEVEN PLITT ET AL., COUCH ON INS. § 79:7 (3d ed. 2020). Not surprisingly, then, the profitability (or lack thereof) for different insurance lines varies from year to year. *See* NATIONAL INSTITUTE OF INSURANCE COMMISSIONERS, REPORT ON PROFITABILITY BY LINE BY STATE, at 215 (2020) https://content.naic.org/sites/default/files/publication-pbl-pb-profitability-line-state.pdf (identifying profitability statistics for Illinois insurance lines from 2010 to 2019).

closed businesses still face substantial risk. For example, a closed business might experience damage from civil unrest or fires spreading from nearby locations. Indeed, these risks are potentially *greater* for closed businesses. After all, if the business is closed, there might not be someone there to board up the windows or ring the fire department. Plaintiffs' reduced-risk argument ignores reality.

In short, the "public policy" and "injury to consumers" factors do not support Plaintiffs' unfairness claim.

Turning to the final factor for an unfairness claim—*i.e.*, whether conduct is "immoral, unethical, oppressive, or unscrupulous"—courts consider whether the conduct "leave[s] the consumer with little alternative except to submit to it." *Robinson*, 201 Ill. 2d at 418. Here, Plaintiffs do not argue on appeal that West Bend forced them to submit to anything. Thus, any such argument is waived. *See Campos*, 932 F.3d at 976.

In any event, Plaintiff's position lacks merit. In the district court, "Plaintiffs argue[d] that they were forced to buy insurance like any prudent business would." App. A.14. "But Plaintiffs fail to allege that West Bend somehow forced them to obtain this insurance or, for that matter, any insurance at all." *Id*. Thus, the district court correctly found that Plaintiffs failed to sufficiently allege an unfairness claim under the ICFA.

On appeal, Plaintiffs make two attempts to get around this conclusion. Neither is persuasive.

First, Plaintiffs argue that, in concluding "that it 'struggles to see how West Bend did anything wrong,'" the district court acted "in blatant disregard of the 'unfairness' factors." Pls.' Br. 27 (quoting App. A.13). This argument is doubly unpersuasive. For one thing, Plaintiffs don't explain *how* the district court's conclusion ran afoul of the unfairness factors. For another thing, as discussed above, the relevant factors in the unfairness analysis completely support the district court's decision.

Second, Plaintiffs contend that "[a]ll of these [considerations] belong to the jury." Pls.' Br. 27. Plaintiffs apparently suggest that, because they filed a complaint containing an unfairness claim, they are entitled to a jury trial on that claim. That is not how the law works, though. *See Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 609-10 (7th Cir. 2013) (affirming dismissal of ICFA unfairness claim); *see also Robinson*, 201 Ill. 2d at 423-24 (same).

In sum, in addition to correctly dismissing Plaintiffs' deception claim under the ICFA, the district court correctly dismissed Plaintiffs' unfairness claim under the ICFA.

B. The district court properly dismissed Plaintiffs' unjust-enrichment claim because an express contract governs the parties' relationship and West Bend did not act unjustly in any event.

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." *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 516 (7th Cir. 2011) (cleaned up). Here, in their alternative claim for

unjust-enrichment, Plaintiffs assert that, "[i]f [West Bend's] denials of coverage for Plaintiffs' claims for business interruption coverage are upheld, then [West Bend] has been unjustly enriched in the amount of excess premium for business interruption coverage it has charged and retained while Plaintiffs' properties have been shut down or operationally impaired as the result of the Closure Orders." Compl., ¶ 120. In other words, Plaintiffs assert that, if the Policies do not provide coverage for Plaintiffs' alleged losses, West Bend is liable to Plaintiffs for unjust enrichment.

There are two problems with this claim.

First, a "claim for unjust enrichment is based upon an implied contract; where there is a specific contract that governs the relationship of the parties, the doctrine has no application." *Toulon*, 877 F.3d at 742 (internal quotation marks omitted). Here, as in *Toulon*, "[t]here is no question that a contract for insurance governs the relationship between" Plaintiffs and West Bend. *Id*. Indeed, here, as in *Toulon*, Plaintiffs "refer[] to the Polic[ies] throughout the Complaint, including within the unjust enrichment count, and attached [the Policies] as an exhibit to the Complaint." *Id*. Thus, here, as in *Toulon*, Plaintiffs' unjust-enrichment claim cannot survive.

Second, Plaintiffs stress that they bring their unjust-enrichment claim in the alternative. *See* Compl., ¶ 6. That does not help Plaintiffs, though.

"[A] party may plead claims in the alternative, *i.e.,* she may plead a claim for breach of contract as well as unjust enrichment." *Cohen*, 735 F.3d at 615 (internal

quotation marks omitted). But "the inconsistent-pleading option in this context is limited." *Id*. Specifically, a "plaintiff may plead as follows: (1) there is an express contract, and the defendant is liable for breach of it; and (2) if there is *not* an express contract, then the defendant is liable for unjustly enriching himself at my expense." *Id*. (emphasis in the original). That is not what Plaintiffs plead here. Thus, without reading further, this Court can affirm dismissal of Plaintiff's unjust-enrichment claim.

To try to get around this, Plaintiffs argue that, because their unjust-enrichment claim allegedly sounds in tort, the parties' express contracts (*i.e.*, the Policies) do not preclude the unjust-enrichment claim. Indeed, Plaintiffs suggest that the district court improperly concluded that the existence of a contract "automatically" forecloses an unjust-enrichment claim. Pls.' Br. 28.

For support, Plaintiffs cite *Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 692 N.E.2d 1221 (1st Dist. 1998). In *Peddinghaus*, however, the plaintiff did not incorporate breach-of-contract allegations into his unjust-enrichment claim. *See* 295 Ill. App. 3d at 946. And, in *Toulon*, this Court found that—even though the plaintiff based her unjust-enrichment claim on an alleged violation of the ICFA—the plaintiff's reliance on the parties' express contract throughout her complaint foreclosed her unjust-enrichment claim. *See* 877 F.3d at 742. As the district court recognized, the same is true in this case.

Moreover, even if Plaintiffs' unjust-enrichment claim had a sufficiently separate basis in tort (which it does not), Plaintiffs' unjust-enrichment claim is substantively

baseless. Other than challenging the Policies' terms and the operation of insurance, Plaintiffs simply assert that, because West Bend is a mutual company, West Bend has a duty to declare and provide a premium refund whenever Plaintiffs demand it. *See* Pls.' Br. 29. But the district court correctly rejected Plaintiffs' claim that West Bend's status as a mutual company supports Plaintiffs' claim.

As this Court has long recognized, "[w]hatever rights a member of a mutual company has are delineated by the terms of the [policy], and come from it alone." *Andrews v. Equitable Life Assur. Soc.*, 124 F.2d 788, 789 (7th Cir. 1942). Here, the Policies state that "[t]he policyholder is a member of the company and shall participate, *to the extent and upon the conditions fixed and determined by the Board of Directors* in accordance with the provisions of law, in the distribution of dividends so fixed and determined." *See, e.g.*, Mashallah Policy p. 5 (emphasis added). Thus, while Plaintiffs can participate in the distribution of dividends (*e.g.*, premium rebates), Plaintiffs cannot force such a distribution (let alone compel that distribution to take the form of a premium rebate). Thus, Plaintiffs' mutual-company argument fails. *See Andrews*, 124 F.2d at 789; *Babbitt Municipalities, Inc. v. Health Care Serv. Corp.*, 2016 IL App (1st) 152662, ¶¶ 31-32, 64 N.E.3d 1178 (rejecting argument that, because goal of a mutual company is to provide insurance substantially at cost, plaintiff could force a distribution of claimed surplus); *Lubin v. Equitable Life Assur. Soc.*, 326 Ill. App. 358, 371, 61 N.E.2d 753 (1st Dist. 1945) (same).

Plaintiffs make two unconvincing efforts to get around this conclusion.

In their first effort, Plaintiffs cite several cases where courts addressed the proper distribution of assets the company had already elected to distribute. *See Kimberly-Clark Corp. v. Factory Mut. Ins. Co.*, 566 F.3d 541, 550-51 (5th Cir. 2009); *Ormond v. Anthem, Inc.*, 799 F. Supp. 2d 910, 915-16, 940 (S.D. Ind. 2011); *Noonan v. Northwestern Mut. Life Ins. Co.*, 687 N.W.2d 254, 260-61 (Wis. Ct. App. 2004). None of these cases suggests that—contrary to the Policies and long-settled law—Plaintiffs can force West Bend to rebate premiums at a time and in an amount of Plaintiffs' choosing.[25] *See Andrews*, 124 F.2d at 789.

In their second effort, Plaintiffs argue that the district court "conflated a misinterpreted claim for contractual distribution with an equitable attempt to recover overcharged premiums stemming from Defendants' bad faith conduct and dereliction of its fiduciary duties owed to Plaintiffs." Pls.' Br. 29. Yet Plaintiffs do not explain the difference between an "attempt to recover overcharged premium" and a claim for "contractual distribution." Quite to the contrary, Plaintiffs themselves rely on case law involving contractual distributions in the form of premium refunds. *See Kimberly-Clark Corp.*, 566 F.3d at 543-44.

Regardless, Plaintiffs cite no authority for the proposition that a plaintiff can use a fiduciary-duty claim to force a mutual company to declare a distribution at a time

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[25] As this Court has observed, the "custom in the mutual fund insurance industry is to commit the declaration of the dividend to the discretion of the insurance company's board of directors, and its determination cannot be challenged absent a showing of bad faith." *Prudential Ins. Co. of Am. v. Miller Brewing Co.*, 789 F.2d 1269, 1279 n.13 (7th Cir. 1986). And there is good reason for this. These determinations involve complex considerations relating to calculation of anticipated risk, year-over-year reserves, etc., etc.

(and amount) of the plaintiff's choosing. This lack of citation is telling, in light of this Court's long-standing precedent holding that "[w]hatever rights a member of a mutual company has are delineated by the terms of the [policy], and come from it alone."[26] *Andrews*, 124 F.2d at 789.

In sum, like Plaintiffs' ICFA claim, Plaintiffs' unjust-enrichment claim fail. The district court properly dismissed both claims.[27]

CONCLUSION

This Court should affirm the district court's dismissal of Plaintiffs' complaint with prejudice.

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[26] Plaintiffs also appear to contend that their fiduciary-duty argument supports their unfairness claim under the ICFA. Pls.' Br. 28. The district court, for its part, addressed this argument under the unfairness prong of the ICFA (and rejected it). App. A.14-15. On appeal, however, Plaintiffs confusingly say that their "ICFA claim does not hinge on [this argument] nor were these issues raised in connection [with] the ICFA claim." *Id*. Confusion aside, and however raised, Plaintiffs' fiduciary-duty claim fails. West Bend was entitled to enforce the Polices. And Plaintiffs do not have a right under the Policies to demand a surplus distribution. *See Miller Brewing Co.*, 789 F.2d at 1279 n.13; *see also Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1025, 905 N.E.2d 920 (3d Dist. 2009) (affirming dismissal of unjust-enrichment claim where the claim was based on the same conduct underlying plaintiff's dismissed ICFA claim).

[27] As the district court recognized, because Plaintiffs' individual claims fail on the pleadings, Plaintiffs obviously cannot pursue their claims as a class action. *See Collins v. Vill. of Palatine, Ill.*, 875 F.3d 839, 846 (7th Cir. 2017).

Dated this 2nd day of June, 2021.

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 13,582 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 12-point Century Schoolbook font.

Dated this 2nd day of June, 2021.

/s *Jason R. Fathallah*
Jason R. Fathallah

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2021, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated this 2nd day of June, 2021.

/s *Jason R. Fathallah*
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