UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

AU HEALTH SYSTEM, INC., et al.,

Plaintiffs,

v.

AFFILIATED FM INS. CO.,

Defendant.

Case No. 1:21-cv-00019-JRH-BKE

PLAINTIFFS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

COME NOW Plaintiffs AU Health System, Inc., AU Medical Center, Inc., and AU Medical Associates, Inc. (collectively, the "AU Insureds") and, pursuant to Fed. R. Civ. P. 12(c), hereby move this Court for partial judgment on the pleadings. The AU Insureds request that this Court enter an order that, as a matter of law:

(1) SARS-COV-2 ("COVID-19") is a "communicable disease," as that term is defined under the governing insurance policy (the "Policy");

(2) COVID-19 was "actually present" at the AU Insureds "described locations," as those terms are used in the Policy and as set forth in the Complaint (Doc 1), Paragraph 31, subparts i through xvii, xx through xxiii, xviii, and xxiv;

(3) A decision of an officer of the AU Insureds limited, restricted, or prohibited access to the AU Insureds' "described locations," as those terms are used in the Policy; and

(4) Such decision was "a result of" the presence of COVID-19, as those terms are used in the Policy.

Further, the AU Insureds request that the Court enter an Order deeming as admissions the following of Affiliated FM Insurance Company's denials for alleged lack of knowledge, as set forth in its Answer (Doc 6):

(1) Paragraphs 23, 30-31, and 47-49, at least as to the allegation that COVID-19 was actually present at the AU Insureds' insured location;

(2) Paragraphs 51-58, at least to the allegation that the AU Insureds' officers issued decisions limiting, restricting, or prohibiting access to described locations; and

(3) Paragraphs 51-58, at least to the allegation that such decisions were made "as a result of" the presence of COVID-19.

The points and authorities in support of this Motion are set forth in the accompanying brief in support.

WHEREFORE, the AU Insureds requests that this Court GRANT their Motion for Partial Judgment on the Pleadings.

Respectfully submitted this 1st day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day electronically filed the foregoing **PLAINTIFFS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** with the Clerk of Court by using the CM/ECF system which will automatically send e-mail notification to all counsel of record.

/s/ Robert C. Threlkeld
Robert C. Threlkeld

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

AU HEALTH SYSTEM, INC., et al., Plaintiffs, v. AFFILIATED FM INS. CO., Defendant.	Case No. 1:21-cv-00019-JRH-BKE

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Plaintiffs AU Health System, Inc., AU Medical Center, Inc., and AU Medical Associates, Inc. (collectively, the "AU Insureds") hereby file this Brief in Support of their Motion for Partial Judgment on the Pleadings, showing the Court as follows:

I. INTRODUCTION

This Court should grant partial judgment on the pleadings to the AU Insureds because they have established the elements of coverage under the Communicable Disease provisions of the governing insurance policy (the "Policy"). This is an insurance coverage dispute between the AU Insureds – who provide or support the provision of healthcare and hospitalization services in Augusta, Georgia and surrounding communities – and Affiliated FM Ins. Co. ("AFM") as to whether the Policy covers loss arising from SARS-COV-2 ("COVID-19").

Under the Policy's Communicable Disease coverage parts for Property Damage and Business Interruption,[1] the AU Insureds must prove (1) a "communicable disease" (2) was actually

[1] The AU Insureds are entitled to coverage under additional coverage parts of the Policy as well, but those coverage parts are not addressed in this motion.

present at a "described location," and (3) a decision of an officer limited, restricted, or prohibited access to an insured location (4) as a result of such presence of communicable disease.

To element (1), AFM admits that COVID-19 is a communicable disease.

For elements (2)-(4), AFM denied the AU Insureds' allegations set forth in their Complaint on the grounds that AFM supposedly lacks knowledge to respond to them. However, under established law, a defendant may not assert a denial for lack of knowledge if the necessary facts are within its knowledge or easily obtainable, a matter of general knowledge in the community, or a matter of public record. Denials in such circumstances are deemed admissions. Here, indisputably, the AU Insureds provided AFM in Supplements to a Sworn Statement of Loss the information it needed to admit allegations sustaining elements (2)-(4), and much or all of the information AFM needs is in the public record. The documents are attached to the Complaint at Docs 1-3 and 1-4, and this Court can consider them because they are essential to the AU Insureds' claim and AFM does not dispute their authenticity.

To element (2), as a matter of law, COVID-19 was actually present at the AU Insureds' location. The AU Insureds provide healthcare and hospitalization services in Richmond County, where Georgia Department of Health public records show thousands of hospitalizations for COVID-19. Governor Kemp ordered the AU Insureds to provide COVID-19 screening and testing. In a Supplement to its Sworn Statement of Loss, the AU Insureds provided AFM documents showing that, as early as May 31, 2020, they had already tested 14,524 patients, with 754 positive tests at their locations, and they had treated 129 positive patients as in-hospital admissions at their locations. In a Second Supplement, the AU Insureds provided documents showing that as of July 15, 2020, they had tested almost 29,000 patients, with 2,150 positive tests, and provided a census of COVID-19 positive patients at insured locations. They further attached

a log showing 55 positive tests of staff members for March-June, 2020. AFM admits it received this information in the Supplement and Second Supplement to the Sworn Statement of Loss and that these documents are attached to the Complaint. AFM simply cannot deny that COVID-19 is actually present at the AU Insureds' locations.

To element (3), as a matter of law, AU's officers decided to limit, restrict, or prohibit access to insured locations. As set forth herein, beginning in March 2020, AU's officers issued orders requiring screening of patients prior to entry, requiring physical isolation or denying admittance altogether for patients who showed certain symptoms of COVID-19, limiting the number of family and guests who could enter the building, prohibiting family and guests altogether for COVID-19 patients, closing family waiting areas and canceling visitation hours, canceling elective procedures, and prohibiting access to staff with certain symptoms of COVID-19. Each of these orders curtailed patient and staff access to the AU Insureds' locations, whether in the quantity or scope of access or by encumbering access. AFM does not dispute that the AU Insureds provided copies of these orders to AFM, that the orders are attached to the Complaint at Doc 1-3, or that the orders are authentic.

To element (4), as a matter of law, the officer decisions were issued "as a result of" the presence of COVID-19. All of the orders were issued to prevent the transmission of COVID-19. Obviously, orders limiting access to insured locations for staff and patients exhibiting certain symptoms of COVID-19 were issued as a result of COVID-19. And, for the avoidance of any doubt, several of the orders state on their face that their purpose was to limit the transmission of COVID-19 at insured locations.

For these reasons, AFM has either admitted the facts necessary to establish the elements of Communicable Disease coverage for Property Damage and Business Interruption or its denials of

those facts for alleged lack of information should be deemed admissions. Accordingly, the AU Insureds' Motion for Partial Judgment on the Pleadings should be GRANTED.

II. BACKGROUND

(A) AFM Issued the Policy to the AU Insureds Covering Loss for Communicable Disease.

The parties agree that AFM issued the Policy to the AU Insureds. See Doc 1 (Complaint), ¶ 11; Doc 6 (Answer), ¶ 11. There is no dispute that an accurate copy of the Policy is attached as Exhibit 1 to the Complaint. Id. The Policy was issued for the policy period of July 1, 2019 through July 1, 2020 and renewed for July 1, 2020 through July 1, 2021. See Doc 1, ¶ 12; Doc 6, ¶ 12. It covers the AU Insureds' real property and certain personal property. See Doc 1-2, p. 17. The Policy covers multiple locations of the AU Insureds, including the main hospital campus, various outpatient locations, and an outpatient surgery center. See Doc 1, ¶ 15; Doc 6, ¶ 15.

The Policy contains coverage parts specific to loss arising from Communicable Disease, including without limitation:

- Communicable Disease – Property Coverage. Under the Policy's Communicable Disease – Property Coverage ("Communicable Disease PD") coverage part:

> If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:
>
> a) An order of an authorized governmental agency regulating or as result of such presence of communicable disease; or
>
> b) A decision of an Officer of the Insured as a result of such presence of communicable disease,
>
> This Policy covers the reasonable and necessary costs incurred by the Insured at such described location for the:
>
> a) Cleanup, removal and disposal of such presence of communicable disease from insured property; and

> b) Actual costs or fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from such presence of communicable disease on insured property."

Doc 1-2, p. 23. See also Doc 1, ¶ 14; Doc 6, ¶ 14.

- Communicable Disease – Business Interruption. Under the Policy's Communicable Disease – Business Interruption ("Communicable Disease BI")[2] coverage extension:

> If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:
>
> a) An order of an authorized governmental agency regulating such presence of communicable disease; or
>
> b) A decision of an Officer of the Insured as a result of such presence of communicable disease,
>
> This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability at such described location with such presence of communicable disease.

Doc 1-2, p. 41. See also Doc 1, ¶ 21; Doc 6, ¶ 21.

(B) Since March 2020, this Court has Noted COVID-19 is Actually Present in Richmond County and the Southern District of Georgia; Governor Kemp Ordered the AU Insureds to Provide COVID-19 Testing; and the AU Insured's Submitted a Sworn Proof of Loss to AFM Indicating COVID-19 was Present at Insured Locations.

As this Court is aware and has noted in numerous orders, beginning in February and March 2020, in Georgia and around the world, COVID-19 erupted into a global pandemic. "[T]he President of the United States has declared a National Emergency throughout the nation in response to the spread of the coronavirus; the Governor of the State of Georgia has declared a public health emergency throughout the state in response to the spread of the coronavirus; the World Health Organization has declared coronavirus a pandemic; and the Center for Disease

[2] Collectively, the Communicable Disease PD and Communicable Disease BI coverages referred to as the "Communicable Disease Coverages."

Control and Prevention and other public health authorities have advised the taking of precautions to reduce the possibility of exposure to the virus and slow the spread of the disease." S.D.Ga. Standing Order MC 120-4, p. 1.[3] Specifically, as this Court has noted, "the COVID-19 coronavirus remains a serious health crisis in the Southern District of Georgia." S.D.Ga. Standing Order MC 121-10, p. 2.[4] Indeed, official data from the Georgia Department of Health shows to date nearly 20,000 confirmed cases of COVID-19 in Richmond County with more than 1,200 hospitalizations. See Georgia Department of Public Health Daily Status Report.[5]

The AU Insureds are non-profit organizations that provide or support the provision of healthcare and hospitalization services in Augusta, Georgia and surrounding areas. See e.g. Doc 1, ¶¶ 3-6; Doc 6, ¶¶ 3-6. The AU Insureds have played a critical role in addressing the COVID-19 pandemic. Indeed, as part of Georgia's response to the pandemic, Governor Kemp issued an Executive Order categorizing the AU Insureds as "agents of the State" and ordering them "to provide COVID-19 screening and testing services for residents and visitors of the State of Georgia." Exec. Order, Apr. 20, 2020, Doc 1-3, pp. 38-39.[6]

In the midst of screening, testing, and treating COVID-19 patients as ordered by the Governor, in April 2020, the AU Insureds sent AFM a Sworn Statement in Proof of Loss. Doc 1, ¶ 2; Doc 6, ¶ 2; Doc 1-2, p. 2. That statement – made under oath – indicates that the presence of COVID-19 caused the AU Insureds to incur property damage and business interruption loss. Doc 1-3, p. 2. On June 9, 2020, the AU Insureds submitted to AFM a Supplement to the Sworn Statement of Loss, which provided a narrative description concerning the AU Insureds, the insured location, the loss, and more. See generally Doc 1-3. On June 24, 2020, AFM unequivocally

[3] available at https://www.gasd.uscourts.gov/sites/gasd/files/MC120-004.pdf.
[4] available at https://www.gasd.uscourts.gov/sites/gasd/files/121mc10.pdf.
[5] available at https://dph.georgia.gov/covid-19-daily-status-report.
[6] available at https://gov.georgia.gov/document/2020-executive-order/04202001/download.

rejected the claim and Proof of Loss. Doc 1-6, p. 2 ("we are rejecting and returning the Sworn Statement in Proof of Loss"). It did so on the grounds that no coverage exists under the Policy. Then, AFM turned around and demanded the identity of patients and employees afflicted with COVID-19. The AU Insureds provided a Second Supplement on July 20, 2020. See generally Doc 1-4. AFM admits that it received the Supplement and Second Supplement and that Docs 1-3 and 1-4 are those documents, respectively. Doc 1, ¶ 2; Doc 6, ¶ 2.

Specifically, the AU Insureds' Supplement to the Sworn Statement in Proof of Loss explained to AFM that COVID-19 was actually present at the AU Insureds' insured locations. See Doc 1, ¶ 30; Doc 6, ¶ 30. As the AU Insureds informed AFM therein:

> All the Insureds' locations described in this Supplement experienced **the actual presence of COVID-19**, as evidenced by the Daily Dashboard set forth on Exhibit B. Specifically, patients exhibiting symptoms of COVID-19 began to present for treatment at AUMC and AUMA locations as of approximately March 13, 2020. As a major healthcare network serving east central Georgia and west central South Carolina, the Insureds were on the forefront of battling COVID-19 and treating patients infected with the virus. This was particularly true for the Property locations owned by the Insureds in Georgia, where AUHS was the only healthcare provider appointed by Executive Order to screen and treat COVID-19 patients. During the Period of Liability, **the Insureds tested 14,524 patients for COVID-19 and treated 129 confirmed COVID-19 patients as inpatient and observation cases**. As set forth herein at p. 17, this had an immediate and devastating impact upon the Property and business operations of Insured.

Doc 1-3, p. 12 (emphasis added). The AU Insureds also attached a Daily Dashboard showing test results of 14,524 patients tested with **754 positive tests** (Doc 1-3, p. 29) and showing **129 positive patients** hospitalized at the AU Insured's locations. Id., p. 30. The AU Insureds identified specific insured locations with actual presence of COVID-19. See id., p. 8.

In the Second Supplement to the Sworn Statement of Loss, the AU Insureds noted the spiraling numbers of COVID-19 cases in Richmond and Columbia Counties and reminded AFM that "[a]s a leading healthcare provider in the greater Augusta area and surrounding areas, including South Carolina, the Insureds had a responsibility to see and treat patients infected with

COVID-19. This responsibility became heightened when AUHS was appointed as the lead healthcare provider to screen and treat patients. By virtue of that appointment, COVID-19 patients were instructed to seek treatment from the Insureds, which caused the actual presence of the virus at the Property on an ongoing basis throughout the Period of Liability." Doc 1-4, p. 8.

In the Second Supplement, the AU Insureds provided documentation that, as of July 15, 2020, they had tested almost 29,000 patients for COVID-19 with **2,150 positive tests**. Doc 1-4, p. 36. They also attached a census of COVID-19 positive patients at insured locations, showing presence of COVID-19 at various locations on the hospital's campus, the Medical Intensive Care Unit ("MICU"), Surgical Intensive Care Unit ("SICU"), 5 West ("5W"), Pediatric Intensive Care Unit ("PICU"), 4 Children's ("4C"), 5 Children's ("5C"), 7 West ("7W/7L"), 7 North Transplant ("7NT"), Neonatal Intensive Care Unit ("NICU"), and Emergency Department ("ED"). Id., p. 39. They further attached a log of **positive** staff member COVID-19 tests, showing a total of **55 positive tests** in March-June, 2020. Id., p. 41. The AU Insureds also provided documentation from its Chief Nursing Officer showing that it had activated an Emergency Staffing Plan to support staffing in the emergency department and intensive care unit "[d]ue to sustained high COVID and Non-COVID patient volumes and an increased positive COVID rate amongst our staff…." Doc 1-4, p. 34.

(C) The AU Insureds' Officers Issued Orders Limiting, Restricting, or Prohibiting Access to Insured Locations.

Officers of the AU Insureds issued numerous orders limiting access to the AU Insureds' locations as a result of COVID-19:

- Effective March 9, 2020, the AU Insureds required that all patients must be asked certain intake questions to determine if they are high risk for COVID-19. Id., p. 167 ("These are

mandatory intake questions…."). Patients who showed symptoms of COVID-19 were required to be physically isolated. Id., p. 172.

- Effective March 18, 2020, Phillip Coule, the Vice President and Chief Medical Officer of AU Health System "cancelled" "all elective procedures" at "All AU Health Locations." Id., p. 178. "These cancellations [were] intended to reduce the potential for exposure to COVID-19…." Id.

- On March 19, 2020, Dr. Coule issued an order, effective March 20, 2020, requiring that "all persons" entering Augusta University Medical Center "will undergo a screening process to include a contactless temperature check" and any person found to have a fever "will be denied entry to the facility." Doc 1-3, p. 158. This order was issued "to keep our patients and [employees] safe from COVID-19." Id.

- Effective March 23, 2020, the order was expanded. At all times, only "ONE guest may be with a patient." Id., p. 163. Visitation hours were canceled. Id. "All family areas are closed." Id. Except for minors and laboring mothers, "[f]or patients diagnosed with COVID or to rule out COVID, no individual may be with adult patient…." Id.

- Effective March 31, 2020, Dr. Coule extended the order canceling elective procedures. Id., p. 180.

- Effective April 3, 2020, for all adult patients, no family or guests were allowed "in any adult patient care area (medical, surgical, or ICUs)." Id., p. 165. And, any family or guest granted access for minors or laboring mothers were required to wear a surgical or cone mask. Id.

- Effective April 6, 2020, all patients were required to be "tested for COVID-19 on admission." Id., p. 182. The order also extended prior orders cancelling elective procedures. Id.,

p. 183. The order again clarified that "[t]hese cancellations are intended to reduce the potential for exposure to COVID-19…." Id.

- Symptomatic staff with a fever of 100.4 "requires that you can no longer work" and such staff "are required to isolate until he/she has confirmed test results." Id., p. 194.

The AU Insureds also provided a lengthy narrative for AFM, describing the officer orders and explaining how they limited, restricted, or prohibited access to the insured locations. Doc 1-3, pp. 11-15. That narrative covers five pages of single spaced text, walks AFM through the orders discussed above, and attaches the orders as exhibits. Id.

When the AU Insureds submitted the Supplement and Second Supplement to the Sworn Statement in Proof of Loss on June 9, 2020, these orders were attached. Doc 1, ¶ 2; Doc 6, ¶ 2 ("AFM admits that AUHS submitted a document to AFM titled "Supplement to Sworn Statement in Proof of Loss" on or about June 9, 2020. … AFM admits that AUHS provided a document titled "Second Supplement to Sworn Statement in Proof of Loss," on or about July 20, 2020. … AFM states that the terms of those various documents are contained therein.").

(D) Despite Overwhelming, Uncontested Evidence of the Actual Presence of COVID-19 at Insured Locations and Officer Orders Limiting, Restricting, or Prohibiting Access, AFM States it is "Without Knowledge" to Admit Same.

In the Complaint, the AU Insureds allege that COVID-19 was present at their insured locations. In response, despite being in possession of overwhelming evidence indicating that the AU Insureds tested and treated COVID-19 positive patients, AFM stubbornly and without basis professes a lack of knowledge as to whether COVID-19 was present. By way of example, see the AU Insureds' Complaint at Paragraph 23 and AFM's response thereto:

Complaint (Doc 1):

> 23. During the Period of Liability (as defined by the Policy) COVID-19 was present at Plaintiffs' locations insured by the Policy.

Answer (Doc 6):

> 23. AFM is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 23, and therefore, denies same.

See also Doc 1, ¶¶ 30-31, 47-49 (alleging actual presence of COVID-19 at insured locations); Doc 6, ¶¶ 30-31, 47-49 (denying same for alleged lack of knowledge).

Further, in the Complaint, the AU Insureds allege that their officers issued orders limiting, restricting, or prohibiting access to the insured locations. Again, AFM stubbornly and without basis professes a lack of knowledge to same. By way of example, see the AU Insureds' Complaint at Paragraph 51 and AFM's response thereto:

Complaint (Doc 1):

> 51. Officers of AUHS, AUMC and AUMA issued multiple orders and policies related to COVID-19 because of the actual presence of COVID-19 at Property of Plaintiffs that AFM agreed to insure.

Answer (Doc 6):

> 51. AFM is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 51, and therefore, denies same.

See also Doc 1, ¶¶ 52-58 (alleging the AU Insureds' officers decided to limit, restrict, or prohibit access to insured locations as a result of COVID-19); Doc 6, ¶¶ 52-58 (denying same for alleged lack of knowledge).

AFM does **not** lack knowledge as to whether COVID-19 was present at the AU Insured's insured locations or whether the AU Insureds' officers issued orders limiting, restricting, or prohibiting access to the insured locations. Indisputably, the AU Insureds provided that information to AFM in April, June, and July 2020. Further, much of the information is in public records, such as Governor Kemp's Executive Order and publicly available COVID-19 data from the Georgia Department of Health. Thus, there can be no dispute that, as a matter of law, the

Policy's Communicable Disease Coverages cover the AU Insureds' loss. Accordingly, the AU Insureds bring this motion.

III. ARGUMENT AND CITATION TO AUTHORITY

"After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is appropriate when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." Slagle v. ITT Hartford, 102 F.3d 494, 497 (11th Cir. 1996). See also Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998) (same). "The court applies the same standard to a motion for judgment on the pleadings brought under Rule 12 (c) as it does to a motion to dismiss for failure to state a claim brought under Rule 12(b)(6)." U.S. v. Morgan, No. CV 407-125, 2010 WL 11537561, at *2 (S.D. Ga. Mar. 30, 2010).

"Where the plaintiff moves for judgment on the pleadings, the fact allegations of the answer are taken to be true, but those of the complaint are taken as true only where and to the extent that they do not conflict with those of the answer." WC Oil & Gas LLC v. Alpine Dev., LLC, No. 4:19-CV-00117-SCJ, 2020 WL 4747619, at *2 (N.D. Ga. June 30, 2020). See also Bass v. Hoagland, 172 F.2d 205, 207 (5th Cir. 1949). Importantly, "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment." Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997).

Georgia courts grant judgment on the pleadings to plaintiffs where the pleadings demonstrate judgment as a matter of law is warranted. See e.g. WC Oil & Gas LLC v. Alpine

Dev., LLC, No. 4:19-CV-00117-SCJ, 2020 WL 4747619, at *2 (N.D. Ga. June 30, 2020) (granting judgment on pleadings where "Upon review of the facts alleged in the Complaint, which have been admitted by [defendants], the Court finds that Plaintiffs have established each element of their breach of contract claim"); Ortez v. S. Asset Recovery, Inc., No. 1:12-CV-04296-AT-JFK, 2013 WL 12382888, at *9 (N.D. Ga. May 24, 2013), report and recommendation adopted, 2013 WL 12382886 (N.D. Ga. June 27, 2013) (granting judgment on the pleadings to Plaintiff on certain counts of the complaint); F.D.I.C. v. Jackson, No. 1:11-CV-2134-RWS, 2012 WL 568226, at *2 (N.D. Ga. Feb. 17, 2012) (granting judgment on the pleadings to Plaintiff).

Here, the Court should grant Plaintiffs judgment on the pleadings on: (A) the AU Insureds' interpretation of the Communicable Disease Coverages; and (B) under those coverages, COVID-19 is a communicable disease, the AU Insureds had actual presence of COVID-19, a decision of an officer limited, restricted, or prohibited access to insured locations, and the decision was issued "as a result of" the presence of communicable disease.

(A) The AU Insureds are Entitled to Judgment on the Pleadings on their Interpretation of the Communicable Disease Coverages.

"Construction and interpretation of an insurance contract are matters of law for the court." Landmark Am. Ins. Co. v. Khan, 307 Ga. App. 609, 612 (2011). See also Evanston Ins. Co. v. Xytex Tissue Servs., LLC, 378 F. Supp. 3d 1267, 1284 (S.D. Ga. 2019) (same). "Words used in the policy are given their 'usual and common' meaning, see OCGA § 13–2–2(2), and the policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney." Ga. Farm Bureau Mut. Ins. Co. v. Smith, 298 Ga. 716, 719 (2016). "[A]ny ambiguities in the contract are strictly construed against the insurer as drafter of the document." Landmark Am. Ins. Co. v. Khan, 307 Ga. App. 609, 612 (2011).

Here, the AU Insureds are entitled to judgment on the pleadings regarding their interpretation of the elements that trigger coverage under the Communicable Disease Coverages. The Communicable Disease Coverages require AFM to cover certain property damage loss and business interruption loss if certain elements are established:

> "If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:
>
> …
>
> b) A decision of an Officer of the Insured as a result of such presence of communicable disease,"

then certain coverage applies. Doc 1-2, p. 23.[7] This language is quoted from the Communicable Disease PD language, but there are no material differences between this coverage language and the coverage language that triggers coverage under the Communicable Disease BI coverage. Compare Doc 1-2, p. 23 (Communicable Disease PD) to Doc 1-2, p. 41 (Communicable Disease BI). See also supra, § II(A) (setting forth coverages).

Based on this language, the AU Insureds interpret the Communicable Disease Coverages as providing coverage if the insured establishes:

(1) a "communicable disease"

(2) was actually present at a "described location," and

(3) a decision of an officer limited, restricted, or prohibited access to an insured location

(4) as a result of such presence of communicable disease.

As regards the second element, to show "actual presence" of COVID-19, the AU Insureds must show it "existed" at insured locations. The words "actual… presence" are not defined in the

[7] Under the Communicable Disease Coverages, coverage may also be triggered by "[a]n order of an authorized governmental agency regulating or as result of such presence of communicable disease." See Doc 1-2, pp. 23, 41. Such orders were issued here, but for the purposes of this Motion, the AU Insureds focus on orders issued by officers.

Policy. Thus, they should be "given their 'usual and common' meaning." Ga. Farm Bureau, 298 Ga. at 719. "Actual" is defined as "existing in fact or reality." Merriam-Webster Dictionary, "Actual" (accessed March 21, 2021).[8] "Presence" is defined as "being present" and "present" is defined as "being, existing, or occurring at this time or now." Dictionary.com, "Presence" and "Present" (accessed March 21, 2021).[9]

To sustain the third element, the AU Insureds must show a representative of an insured decided to curtail in quantity or extent access to insured locations. Although it is capitalized in the Communicable Disease Coverages, the word "officer" is also not defined in the Policy. It means "a person appointed or elected to some position of responsibility or authority in the government, a corporation, a society, etc." Random House Unabridged Dictionary, "Officer" (accessed March 21, 2021).[10] "Limit" and "restrict" are not defined in the Policy, but both generally mean "to curtail or reduce in quantity or extent." Merriam-Webster, "Limit" (accessed March 21, 2021.[11] See also Dictionary.com, "Restrict" ("to confine or keep within limits, as of space, action, choice, intensity, or quantity") (accessed March 21, 2021).[12] Here, consistent with the unambiguous language of the Policy, orders issued by the Chief Medical Officer of AU Insureds fall squarely within that definition.

Finally, as regards the fourth element, to show a decision was made "as a result of" the presence of communicable disease, the AU Insureds must show the decision was a consequence of it. The words "as a result of" are not defined in the Policy, but they mean "something that happens as a consequence; outcome." Dictionary.com, "Result" (accessed March 21, 2021).[13]

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[8] Available at https://www.merriam-webster.com/dictionary/actual.
[9] Available at https://www.merriam-webster.com/dictionary/presence and https://www.merriam-webster.com/dictionary/present.
[10] Available at https://www.dictionary.com/browse/officer?s=t.
[11] Available at https://www.merriam-webster.com/dictionary/limit.
[12] Available at https://www.dictionary.com/browse/restrict?s=t.
[13] Available at https://www.dictionary.com/browse/result#.

If the AU Insureds prove these elements, they are entitled to coverage under the Communicable Disease Coverages and any further coverages thereby triggered under the Policy.

(B) The AU Insureds are Entitled to Judgment on the Pleadings that COVID-19 is a "Communicable Disease," COVID-19 was "Actually Present" at Described Locations, and a "Decision of an Officer" "Limited, Restricted, or Prohibited Access" to Described Locations.

Under Fed. R. Civ. P. 8(b)(1), a defendant must either "admit or deny" allegations asserted against it. The AU Insureds are, of course, entitled to judgment on the pleadings for allegations AFM admits.

Separately, "[a] party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial." Fed. R. Civ. P. 8(b)(5). On the other hand,

> a party may **not** assert a lack of knowledge or information if the necessary facts or data involved are within his knowledge or easily brought within his knowledge, a matter of general knowledge in the community, or a matter of public record. A denial of knowledge or information in this context casts doubt on the good faith of the pleader. Furthermore, a federal court often will impute knowledge of certain matters to a party, such as charging a corporation with the knowledge of the acts of its agents, or will impose a reasonable burden of investigation upon the pleader.

Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1262 (3d Ed) (2020) (emphasis added). See also Bank of Am., N.A. v. Malibu Canyon Invs., LLC, No. 2:10-CV-00396-KJD, 2012 WL 115577, at *2 (D. Nev. Jan. 13, 2012) (denials of allegations "clearly within Defendants' personal knowledge or in the public record… are not credible and violate their obligations under Rule 8(b)."); Djourabchi v. Self, 240 F.R.D. 5, 12 (D.D.C. 2006) ("An averment will be deemed admitted when the matter is obviously one as to which a defendant has knowledge or information."); Greenbaum v. U.S., 360 F. Supp. 784, 787–88 (E.D. Pa. 1973) ("defendant failed to examine available, highly relevant Government documents which would have given a basis" to respond); U.S. v. Bartholomew, 137 F. Supp. 700, 705 (W.D. Ark. 1956) (alleged lack of knowledge "is not

sufficient to constitute a denial because information as to the allegations in that particular numbered paragraph was reflected by public record, and the defendants could have obtained definite information as to the truth of the allegations in that paragraph.").

Prior to denying an allegation for lack of knowledge, a defendant has a "duty to exert reasonable effort to obtain knowledge of a fact." Greenbaum, 360 F. Supp. at 787. See also Exch. Nat. Bank of Chicago v. Brown, No. 84 C 10801, 1985 WL 2274, at *2 (N.D. Ill. Aug. 9, 1985) (defendant "must perform a reasonable investigation to obtain the knowledge of such fact" prior to denying it). For example, a defendant may not "fail[] to undertake even a minimal examination of their files to determine" the truth of an allegation. Soto v. Lord, 693 F. Supp. 8, 23 & n.28 (S.D.N.Y. 1988).

Relying on these principles, courts around the country have rejected denials for lack of knowledge where the defendant obviously had knowledge or easily could have obtained knowledge of the allegation. See Malibu Canyon, 2012 WL 115577, at *2 (denial of facts in a "state court's order granting summary judgment in the underlying judicial foreclosure action" is improper); Wachovia Bank, N.A. v. Chaparral Contracting, Inc., No. 2:09-CV-00164, 2010 WL 2803016, at *1 (D. Nev. July 12, 2010) (defendant improperly denied numerous facts, including that a note and guarantee were executed and defendant "failed to comply with the terms of the Guarantee by not making payments"); In re TCW, 2004 WL 1151562, at *5 ("defendant must have had the knowledge and information to either deny or admit various other allegations … [such as] the 'Terms of Reference' of the arbitration, the dates for the arbitration hearing, or the arbitral tribunals final award"); Fid. & Guar. Ins. Co. v. Keystone Contractors, Inc., No. CIV.A. 02-CV-1328, 2002 WL 1870476, at *3 (E.D. Pa. Aug. 14, 2002) (defendant cannot deny sufficient knowledge that "executed the GAI, despite their notarized signatures on the document"); Exch.

Nat. Bank, 1985 WL 2274, at *2 (defendant's denial of the "amount of the indebtedness" improper because "[t]he prime rates used… are easily obtainable through listings in daily newspapers, by a telephone request to the Bank, or by simply deposing the Bank, none of which [defendants] bothered to do.").[14]

Where a defendant improperly denies an allegation for want of knowledge, such "allegation will be ***deemed admitted***." In re TCW, 2004 WL 1151562, at *5 (emphasis added). See also Santander Bank, N.A. v. Branch Banking & Tr. Co., No. 1:17-CV-01669, 2020 WL 42724, at *2 & n.3 (M.D. Pa. Jan. 3, 2020) ("[Plaintiff's] allegations in paragraph 22 are therefore deemed admitted."); Chaparral Contracting, 2010 WL 2803016, at *2 ("averments in the complaint that Defendants simply allege as lacking knowledge and information to admit or deny that they should have known are as follows and are deemed admitted"); Madjar v. State of N.J.-Dep't of Corr., No. CIV. 92-5265 (CSF), 1993 WL 152066, at *6 (D.N.J. Apr. 5, 1993) ("County defendants' response to this paragraph is stricken and the allegations contained in this paragraph are deemed admitted"); Ins. Co. of N. Am. v. M.B. Assocs., No. 89 CIV. 7042 (CSH), 1992 WL 395571, at *4 (S.D.N.Y. Dec. 10, 1992) ("An averment will be deemed admitted when the matter is obviously one as to which the defendant has knowledge or information.").

Here, based on the allegations AFM has admitted or improperly denied, the AU Insureds are entitled to judgment on the pleadings as follows:

(1) COVID-19 is a "communicable disease."

AFM admits that COVID-19 is a "communicable disease" under the Policy. See Doc 1, ¶ 24 ("COVID-19 is a 'communicable disease' under the Policy"); Doc 6, ¶ 24 ("AFM admits the

[14] This is also the law in Georgia state courts. See N. Georgia Prod. Credit Ass'n v. Vandergrift, 239 Ga. 755, 764-65 (1977) (quoting Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1262) ("a party may not assert a lack of knowledge or information if the necessary facts or data involved are within his knowledge or easily brought within his knowledge, a matter of general knowledge within the community, or a matter of public record.").

allegations in Paragraph 24."). Accordingly, the AU Insureds are entitled to judgment on the pleadings on this element of the Communicable Disease Coverages.

(2) COVID-19 was "actually present" at "described locations."

As noted above, to satisfy this element of coverage, the AU Insureds need only prove that COVID-19 "existed" at insured locations. Indeed, COVID-19 did exist at the AU Insureds' locations, and AFM's denial for want of knowledge AFM is improper because "the necessary facts or data involved are within [its] knowledge or easily brought within his knowledge, a matter of general knowledge in the community, or a matter of public record." Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1262 (3d Ed) (2020).

- AFM does not dispute that the AU Insureds provide or support the provision of healthcare and hospitalization services. See e.g. Doc 1, ¶¶ 3-6; Doc 6, ¶¶ 3-6. As this Court has noted, COVID-19 is "**in the Southern District of Georgia**." Standing Order MC 121-10, p. 2 (emphasis added). And, official data from the Georgia Department of Health shows to date nearly 20,000 confirmed cases of COVID-19 **in Richmond County** with more than 1,200 hospitalizations. See Georgia Department of Public Health Daily Status Report, available at https://dph.georgia.gov/covid-19-daily-status-report. As the AU Insureds expressly told AFM, they are the "leading healthcare provider in the greater Augusta area and surrounding areas" and "had a responsibility to see and treat patients infected with COVID-19." Doc 1-4, p. 8. AFM cannot admit that the AU Insureds provide hospitalization services for Richmond County, where public data shows 1,200 hospitalizations for COVID-19, but also profess ignorance as to whether COVID-19 is present at the AU Insureds' locations. See Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1262 (defendant cannot deny allegation within the "general knowledge in the community" or a "matter of public record."); Malibu Canyon, 2012 WL 115577, at *2 (defendant cannot deny allegations "clearly within Defendants' personal knowledge or in the public record").

- AFM admits that the AU Insureds provided AFM with Governor Kemp's Executive Order requiring that the AU Insureds "provide COVID-19 screening and testing services for residents and visitors of the State of Georgia." Doc 1-3, pp. 38-39; Doc 1, ¶¶ 2, 30; Doc 6, ¶¶ 2, 30. See also Malibu Canyon, 2012 WL 115577, at *2 (defendant cannot deny for lack of knowledge allegations "clearly within… the public record"); Greenbaum, 360 F. Supp. at 787-88 ("defendant failed to examine available, highly relevant Government documents which would have given a basis" to respond). It is "obvious" that testing and treating COVID-19 positive patients means that COVID-19 "existed" at the AU Insureds' insured locations.

- AFM admits that it received the June 9, 2020 Supplement to a Sworn Statement of Loss which provided a narrative statement that "**All** the Insureds' locations described in this Supplement experienced **the actual presence of COVID-19**" and attached documentary evidence as proof of same. Doc 1-3, p. 12 (emphasis added); Doc 1, ¶¶ 2, 30; Doc 6, ¶¶ 2, 30. Because AFM had a "duty" to examine this evidence, it cannot reasonably deny the actual presence of COVID-19. Greenbaum, 360 F. Supp. at 787; Brown, 1985 WL 2274, at *2; Soto, 693 F. Supp. 8, 23 & n.28 (defendant may not "fail[] to undertake even a minimal examination of their files to determine" the truth of an allegation).

- AFM admits that it received the AU Insureds' documentation – provided in a Supplement to a Sworn Statement of Loss – showing the AU Insureds tested 14,524 patients with 754 **positive** tests (Doc 1-3, p. 29) and 129 **positive** patients hospitalized. Id., p. 30. See also Doc 1, ¶¶ 2, 30; Doc 6, ¶¶ 2, 30. Obviously, the AU Insureds could not be testing or treating positive patients without COVID-19 existing at the AU Insureds' locations. AFM's attempt to pretend that it did not have knowledge – by requesting patients and employee records, was a dilatory, bad faith attempt to disregard the plain, unambiguous evidence AU Insureds presented to AFM.

- AFM admits it received the Second Supplement to the Sworn Statement of Loss, wherein the AU Insureds provided documentation that, as of July 15, 2020, they had tested almost 29,000 patients for COVID-19 with 2,150 **positive** tests. Doc 1, ¶ 2; Doc 6, ¶ 2; Doc 1-4, p. 36. They also attached a census of COVID-19 positive patients at insured locations, showing presence of COVID-19 at the MICU, SICU, 5W, PICU, 4C, 5C, 7W/7L, 7NT, NICU, and ED. Doc 1-4, p. 39. They further attached a log of **positive** staff member COVID-19 tests, showing a total of 55 **positive** tests in March-June, 2020. Id., p. 41. The AU Insureds also provided documentation from its Chief Nursing Officer showing activating an Emergency Staffing Plan "[d]ue to sustained high COVID and Non-COVID patient volumes and an increased positive COVID rate amongst our staff…." Doc 1-4, p. 34. Obviously, with 2,150 positive tests of patients and 55 positive tests of employees, COVID-19 existed at the AU Insureds' locations.

Further, AFM admits that numerous locations identified in the Complaint are "described locations" under the Policy. See Doc 6, ¶ 31 ("AFM admits that the locations [identified in Paragraph 31 of the Complaint] in subparts i through xvii and xx through xxiii **were insured locations** under the Policy" and that locations xviii and xxiv were added as insured locations during the Policy period.) (emphasis added).

For these reasons, AFM's denials for want of knowledge to Paragraphs 23, 30-31, and 47-49 of the Complaint should be deemed admissions and the AU Insureds are entitled to judgment on the pleadings that COVID-19 was actually present at their insured locations.

(3) A decision of an officer limited, restricted, or prohibited access to insured locations.

As noted above, to satisfy this element of coverage, the AU Insureds must show a representative of an insured decided to curtail – in quantity or extent – access to insured locations. Notwithstanding AFM's purported denials, AFM indisputably had knowledge that that happened here.

Dr. Phillip Coule is a representative of an insured; he is Vice President and Chief Medical Officer of Named Insured AU Health System. Doc 1-3, p. 158. Indisputably, Dr. Coule and other representatives decided to curtail access to insured locations:

- Effective March 9, 2020, the AU Insureds required all patients to answer questions concerning COVID-19 risk prior to "intake." Id., p. 167. Patients who showed symptoms of COVID-19 were required to be physically isolated. Id., p. 172. Thus, patients' access to the insured locations was limited in extent because, whereas patients were once free to enter insured locations unencumbered, they now had to submit to certain questioning first. Patients who were symptomatic were physically isolated, curtailing their freedom of access to insured property.

- Effective March 18, 2020, Dr. Coule "cancelled" "all elective procedures" at "All AU Health Locations." Id., p. 178. Patients could not access insured locations for such services.

- On March 19, 2020, Dr. Coule issued an order requiring that "all persons" entering the Medical Center "will undergo a screening process to include a contactless temperature check" and any person with a fever "will be denied entry to the facility." Doc 1-3, p. 158. Thus, all persons' access – which had once been free – was now limited by mandatory screening, and all persons who had certain symptoms (fever) were prohibited from access altogether.

- Effective March 23, 2020, only "ONE guest may be with a patient." Id., p. 163. Visitation hours were canceled. Id. "All family areas are closed." Id. Except for minors and laboring mothers, "[f]or patients diagnosed with COVID or to rule out COVID, no individual may be with adult patient…." Id. Thus, access was curtailed on quantity of guests, prohibited to family areas, and prohibited for guests of patients diagnosed with COVID-19.

- Effective March 31, 2020, Dr. Coule extended his order concerning elective surgery. Id., p. 180.

- Effective April 3, 2020, for all adult patients, no family or guests were allowed "in any adult patient care area (medical, surgical, or ICUs)." Id., p. 165. Thus, family and guests had their access curtailed or prohibited.

- Effective April 6, 2020, all patients were required to be tested for COVID-19. Id., p. 182. This again limited patients' access.

- Symptomatic staff with a fever of 100.4 "requires that you can no longer work" and such staff "are required to isolate until he/she has confirmed test results." Id., p. 194. This order curtailed or prohibited staff access to insured locations.

Indisputably, the AU Insureds provided these officer orders to AFM in June 2020. Doc 1, ¶ 2; Doc 6, ¶ 2. And, the AU Insureds provided a lengthy narrative for AFM describing the officer decisions and explaining how they limited, restricted, or prohibited access to the insured locations. Id., pp. 11-15.

For these reasons, AFM's denials for want of knowledge to Paragraphs 51-58 of the Complaint should be deemed admissions and the AU Insureds are entitled to judgment on the pleadings that their officers issued decisions limiting, restricting, or prohibiting access to insured locations.

(4) The decisions came "as a result of" such presence of communicable disease.

As noted above, to satisfy this element of coverage, the AU Insureds must show the officer decisions were made as a consequence of the presence of communicable disease. Indisputably, that is the case here:

- Obviously, officer orders to screen for COVID-19, require physical isolation of patients showing certain symptoms of COVID-19, to deny access altogether for persons showing certain symptoms of COVID-19, and to require that staff not attend work if showing

certain symptoms of COVID-19 were made as a consequence of the presence of COVID-19. Doc 1-3, pp. 158, 167, 172.

- Obviously, officer orders requiring prohibiting access for guests or family members of "patients diagnosed with COVID" were issued as a consequence of the presence of COVID-19. Id., p. 163.

- Several officer orders state on their face that they are made as a result of the presence of COVID-19:

  - Dr. Coule's March 18, 2020 decision cancelling all elective procedures states the "cancellations [were] intended to reduce the potential for exposure to COVID-19…." Id., p. 178.

  - Dr. Coule's March 19, 2020 decision that patients undergo a temperature check and prohibiting access for persons with a fever states its purpose was "to keep our patients and [employees] safe from COVID-19." Id., p. 158.

  - The April 3, 2020 order barring family and guests is a "NOTICE" for "COVID-19" stating it is designed "[t]o protect our patients and staff." Id., p. 165.

  - Dr. Coule's April 6, 2020 decision that all admissions must be tested for COVID-19 on admission and extending prior orders cancelling elective procedures states "the cancellations are intended to reduce the potential for exposure to COVID-19…." Id.

As noted above, AFM admits the AU Insureds provided these officer decisions to AFM in June 2020 and provided a narrative describing the officer decisions. Doc 1, ¶ 2; Doc 6, ¶ 2; Doc 1-3, pp. 11-15.

For these reasons, AFM's denials for want of knowledge to Paragraphs 51-58 of the Complaint should be deemed admissions and the AU Insureds are entitled to judgment on the

pleadings that their officers' decisions limiting, restricting, or prohibiting access to insured locations were made "as a result of" the presence of communicable disease.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should GRANT the AU Insureds' Motion for Judgment on the Pleadings.

Respectfully submitted this 1st day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day electronically filed the foregoing **PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** with the Clerk of Court by using the CM/ECF system which will automatically send e-mail notification to counsel of record, including AFM counsel James V. Chin (jchin@zelle.com), Kristian N. Smith (ksmith@zelle.com), and Nick A. Dolejsi (ndolejsi@zelle.com).

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