**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**FORT PIERCE DIVISION**

ASPEN SPECIALITY INSURANCE COMPANY,

*Plaintiff,*

vs. Case No.: 2:20-cv-14212-KMM

THOMAS C. LACKEY, an individual, and FLORIDA SURGICAL LAKES, PLLC, Florida Professional Limited Liability Company, and MARIA BRENES, an individual

*Defendants*.

_____/

**DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT**

Defendants, Dr. Thomas Lackey, DO ("Dr. Lackey") and Florida Surgical Lakes, PLLC ("Surgical Lakes") (Dr. Lackey and Surgical Lakes, collectively, "Insureds") pursuant to Federal Rule of Civil Procedure 12(b)(6), 8(a), and 9(b) move this Court for entry of an order dismissing or abating Aspen Specialty Insurance Company's ("Aspen") Complaint for Declaratory Judgment [D.E. 1], and state:

## INTRODUCTION AND RELEVANT BACKGROUND

Dr. Lackey and Surgical Lakes were insureds under a valid and enforceable Health Care Facilities Professional Liability policy ("Policy") underwritten by Aspen Specialty Insurance Company and bearing effective dates May 11, 2019 to May 11, 2020. [D.E. 1 Ex. B at 1]. Dr. Lackey treated Maria Brenes in 2017. [D.E. 1 Ex A. ¶ 9]. She allegedly experienced complications following a procedure and, through her attorney, addressed to Dr. Lackey a letter explaining her conditions dated February 12, 2019. *Id.* The letter was delivered to an individual named Mary Thornton at Surgical Lakes. [DE 1, Ex. D, at 1]. The letter was never received by the Insureds and on June 24, 2019, within the effective period of the Aspen Policy, Ms. Brenes filed suit in the Tenth Judicial Circuit for Highlands County, Florida, alleging negligence against Dr. Lackey and vicarious liability against Surgical Lakes. [DE 1, Ex. A] ("Underlying Litigation").

All of the allegations of the Brenes complaint fall indisputably within the coverage provisions of the Policy. Despite Aspen's clear defense obligation, the carrier breached its duty to defend and, in contravention of Florida's Claims Administration Statute ("FCAS") codified at Fla. Stat. §627.426, denied the Insureds' claim by letter dated August 15, 2019 without reservation of its rights. Following written demand Aspen retreated from its denial, issued two subsequent reservation of rights letters raising a litany of waived coverage defenses, and finally tendered its Insureds' legal defense in the Underlying Litigation some six months after its denial.

In attempting to salvage its quick-draw denial and also affirmatively assert the coverage defenses that it waived by violating the FCAS, Aspen brings this Declaratory Judgment action too soon, with too little investigation, and before the Underlying Litigation has sufficiently developed. Its prayers for declarations of non-coverage rely on confusing and vague allegations that conflate the identities of its Insureds and the Insureds' employees. The entwined identities and allegations do not amount to claims. Aspen's Complaint should be dismissed or abated as set forth below.

## MEMORANDUM OF LAW

## I. LEGAL STANDARD[1]

### *A. 28 USC § 2201*

The Declaratory Judgment Act is "an enabling Act, which confers a discretion on courts rather than an absolute right upon the litigant." *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005). "It only gives the federal courts competence to make a declaration of rights; it does not impose a duty to do so." *Id.* The Supreme Court has warned that "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Id*. (citing *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942)). District courts thus have "substantial latitude in deciding whether to stay or dismiss a declaratory judgment suit in light of pending state proceedings." *Ameritas*, 411 F.3d at 133 (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995)).

### *B. Federal Rule of Civil Procedure 12(b)(6)*

In a motion to dismiss, the plaintiff's factual allegations are accepted as true. *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182 , 1188 (11th Cir. 2002). Dismissal of a complaint, under Rule 12(b)(6) is appropriate "when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. Unwarranted deductions of fact in a complaint cannot be admitted as true for the purposes of testing the sufficiency of the

[1] Aspen's Declaratory Judgment Action alleges jurisdiction pursuant to 28 U.S.C. § 2201 as well as 28 U.S.C. § 1332. "Because the Court's jurisdiction over this suit is based upon diversity of citizenship, 28 U.S.C. § 1332, Florida law applies to substantive issues . . . However, the operation of the Declaratory Judgment Act is procedural only and thus federal law applies." *Amerisure Ins. Co. v. R.L. Lantana Boatyard, Ltd.*, No. 10-80429, 2010 WL 4628231, at *2 (S.D. Fla. Nov. 8, 2010) (internal quotations and citations omitted).

allegations. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (citing *So. Fla. Water Dist. Mgmt. Dist. v. Montalvo,* 84 F.3d 402, 408 n. 10 (11th Cir.1996) (stating in dicta)). "Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal" *Id.* "When the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Industries, Inc. v. Irvin,* 496 F.3d 1189, 1206 (11th Cir.2007).

Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. Rule 9(b). "Rule 9(b) is satisfied if the complaint sets forth '(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.' " *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194, 1202 (11th Cir.2001) (quoting *Brooks v. Blue Cross and Blue Shield of Florida, Inc.,* 116 F.3d 1364, 1371 (11th Cir.1997)). "A sufficient level of …detail means the who, what, when, where, and how: the first paragraph of any newspaper story.' " *Gross v. Medaphis Corp.,* 977 F.Supp. 1463, 1470 (N.D.Ga.1997)(quoting *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir.1990)).

## II. ASPEN'S DECLARATORY JUDGMENT ACTION IS PREMATURE AND SHOULD BE DISMISSED

In all cases arising under the Declaratory Judgment Act, the threshold question is whether a justiciable controversy exists. *Maryland Cas. Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 272(1941); *U.S. Fire Ins. Co. v. Caulkins Indiantown Citrus,* 931 F.2d 744, 747 (11th Cir.

1991).The facts alleged must show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.,* 68 F.3d 409, 414 (11th Cir. 1995). "Absent a redressable injury a judicial determination of plaintiff's claim would amount to an advisory opinion prohibited by Article III's case and controversy requirement." *Glen v. Club Mediterranee, S.A.,* 365 F. Supp. 2d 1263, 1272 (S.D. Fla. 2005) (citing *Church v. City of Huntsville,* 30 F.3d 1332, 1335 (11th Cir. 1994)).

***A. Aspen Has a Duty to Defend***

When a Florida court makes a determination as to whether an insurer's duty to defend the insured exists, it must look to the allegations contained within the four corners of the complaint in the underlying action against the insured. *See, e.g., Lawyers Title Ins. Corp. v. JDC (America) Corp.,* 52 F.3d 1575, 1580 (11th Cir. 1995). An insurer's duty to defend is distinct from, and broader than, the duty to indemnify. *Lime Tree Vill. Cmty. Club Ass'n, Inc. v. State Farm Gen. Ins. Co.,* 980 F.2d 1402, 1405 (11th Cir. 1993) (citing *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.,* 470 So.2d 810, 813-14 (Fla. 1st DCA 1985)). A fair and reasonable doubt about whether an insurer is under the duty to defend is resolved in favor of the insured. *Jones v. Florida Ins. Guar. Ass'n.,* 908 So. 2d 435, 443 (Fla. 2005). An insurer must defend a claim even if the insurer lacks certainty whether the policy provides coverage. *Mid–Continent Cas. Co. v. Am. Pride Bldg. Co., LLC*, 601 F. 3d 1143, 1149 (11th Cir. 2010). Where the complaint against the insured alleges any facts which actually, or even potentially, fall within the scope of coverage under the policy, the insurer is obligated to defend the entire suit. *See Kopelowitz v. Home Ins. Co.,* 977 F. Supp. 1179, 1185 (S.D. Fla. 1997) (*citing MCO Envtl.,* 689 So. 2d at 1115 (Fla. 3d DCA 1997); *see also Jones v. Fla. Ins. Guar. Ass'n, Inc.,* 908 So. 2d 435, 442-43 (Fla. 2005).

The allegations in the Underlying Complaint fall within the coverage provisions of the Policy. In support of her medical negligence count, Ms. Brenes alleges that "Dr. Lackey negligently breached his duty and deviated from the acceptable standard of care...." [ D.E. 1, Ex. A, pg. 7, ¶ 21 ("Underlying Complaint")]. Ms. Brenes further alleges that Florida Surgical Lakes, the additional insured, is "liable for the damages suffered by Ms. Brenes…." *Id*. at page 7 ¶ 25.

The negligence allegations against Dr. Lackey require Aspen to fulfill its duty to defend Dr. Lackey against the entire suit. *Kopelowitz*, 977 F. Supp. at 1188. Because Aspen has waived all of its coverage defenses through its improper August 15, 2019 denial of Dr. Lackey's claim and consequent non-compliance with the FCAS, the only coverage issue legally remaining is application of the Policy's exclusions. The court will require actual facts to determine whether any exclusions work to relieve Aspen from its duty to defend on the identified exclusion. Because the actual facts are not available, application of the exclusion is an academic exercise applying a hypothetical set of facts to the Policy's terms. Because the controversy between Aspen and Dr. Lackey is presently hypothetical and abstract rather than concrete, Aspen's Declaratory Judgment Action is premature and seeks an advisory opinion from this Court. *See Home Ins. Co. v. Gephart*, 639 So.2d 179, 180 (Fla. 4th DCA 1994) (affirming dismissal without prejudice but remanding with direction to refile the action upon the issue of the duty to indemnify at the conclusion of the underlying action against appellees/insureds by a third party.)

In order for this Court to obtain the necessary facts, the Declaratory Judgment Action must invade the province of the Underlying Litigation by requiring the discovery and development of facts including an examination of the timeline of Ms. Brenes' treatments under the care of the Insureds and subsequent physicians, Ms. Brenes' communications with Dr. Lackey and Surgical Lakes relating to any complications or concerns she was having related to her procedures, and establishing the timing of when operative events occurred. The witnesses required to answer these

questions will be substantially similar, if not identical, to those being addressed in the Underlying Litigation. This forces Dr. Lackey to engage in the inefficient – and potentially needless – exercise of litigating development of the same factual information in two separate lawsuits. Dismissal or abatement is in accord not only with Florida law but also favors the interest of "conserving judicial resources and [avoiding] duplication of efforts between the federal and state court systems." *Atain Specialty Ins. Co. v. Miami Drywall & Stucco, Inc.*, No. 12-21370-CIV, 2012 WL 3043002, at *2 (S.D. Fla. July 25, 2012).

***B. Aspen's Duty to Indemnify is not Ripe for Determination***

Florida courts have repeatedly recognized that "an insurer's duty to indemnify is not ripe for adjudication in a declaratory judgment action until the insured is in fact held liable in the underlying suit." *Miami Drywall & Stucco, Inc.*, 2012 WL 3043002 at *2; *Westport Ins. Corp. v. VN Grp.*, LLC, 761 F. Supp. 2d 1337, 1348 (M.D. Fla. Dec. 9, 2010); *State National Ins. Co. v. City of Miami*, No. 09-23273-CIV, 2010 WL 3745005, at *6 (S.D. Fla. Sept. 21, 2010); *Am. Nat'l Fire Ins. Co. v. M/V Seaboard Victory*, No. 08-21811-CIV, 2009 WL 812024, at *1 (S.D. Fla. Mar. 17, 2009); *Smithers Constr., Inc. v. Bituminous Cas. Corp.*, 563 F. Supp. 2d 1345, 1349 (S.D. Fla. 2008). "Because an insurer's duty to indemnify is dependent on the outcome of a case, any declaration as to the duty to indemnify is premature unless there has been a resolution of the underlying claim." *M/V Seaboard Victory*, 2009 WL 812024 at *1. Where "factual questions as to the specific liability of the parties must be answered before deciding the issues presented in the instant case, this Court should not exercise jurisdiction and rule on those issues until the underlying factual questions are resolved." *Miami Drywall & Stucco, Inc.*, 2012 WL 3043002 at *2 (citing *Triple R Paving, Inc. v. Liberty Mut. Ins. Co.*, 510 F. Supp. 2d 1090, 1093 (S.D. Fla. 2007) (emphasis added)).

An insurer's duty to indemnify is narrower than its duty to defend and must be determined by analyzing the policy coverages in light of the actual facts adduced in the underlying case. *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072, 1077 n. 3 (Fla. 1998) (citing *Hagen v. Aetna Cas. & Sur. Co.,* 675 So. 2d 963, 965 (Fla. 5th DCA 1996)); *see also, e.g., Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.,* 227 F. Supp. 2d 1248, 1258 (M.D. Fla. 2002). In construing insurance policies, courts should read the policy as a whole endeavoring to give every provision its full meaning and operative effect. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871, 877 (Fla. 2007). Exclusionary clauses are typically read strictly and in a manner that affords the insured the broadest possible coverage. *Indian Harbor Ins. Co. v. Williams,* 998 So. 2d 677, 678 (Fla. 4th DCA 2009). Dismissal or a stay is particularly appropriate where adjudication of the declaratory judgment action would include many of the same arguments and witnesses as the state court action. *Great Lakes Reinsurance PLC v. Leon*, 480 F. Supp. 2d 1306, 1308-09 (S.D. Fla. 2007).

A determination of Aspen's duty to indemnify is premature at this time, will encroach upon the state court action and likely move ahead in the discovery and development of facts relevant to the Underlying Litigation. The Underlying Litigation is ongoing but there have been no findings of fact or entry of a judgment. Adjudicating Aspen's Declaratory Judgment Action at this time promises to partially duplicate the efforts made in the Underlying Action. In addition to duplication of effort, it is very likely that this secondary litigation will take the lead in developing facts relevant to the Underlying Litigation potentially causing inconsistencies or affecting the outcome of the case below. Aspen's premature Declaratory Judgment Action should be abated or dismissed pending further development of the Underlying Action.

## III. COUNT I MUST BE DISMISSED BECAUSE ASPEN DOES NOT PLEAD A COGNIZABLE CLAIM FOR MISREPRESENTATION

Aspen seeks a declaration of no coverage on Count I of its complaint alleging that Dr. Lackey "knew and should have known" about the Brenes incident at the time he completed his application for Aspen insurance. [D.E. 1, ¶¶ 23-29]. Aspen's conclusory and general allegations relative to Dr. Lackey's knowledge of the existence of Ms. Brenes' notice of incident are undermined by the facts contained in conflicting exhibits attached to its Complaint. *See* [D.E. 1, Ex. D]. Aspen alleges that Mary Thornton received the Brenes claim, but then pleads that Dr. Lackey made misrepresentations based on her knowledge. Its allegations do not state a legally cognizable theory of misrepresentation under any pleading standard but certainly fail to satisfy the particularity standard of Rule 9(b) . [D.E. 1 at 8].

Aspen alleges in Count I fraud or misrepresentation and must satisfy the heightened pleading standard prescribed by Rule 9(b), Federal Rules of Civil Procedure. *See American Dental Ass'n v. Cigna Corp.* 605 F.3d 1283, 1291 (11th Cir. 2010) ("[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.") *See Pruco Life Ins. Co. v. Brasner*, No. 10–80804–CIV, 2011 WL 2669651 at 3 (S.D. Fla. 2011) (applying rule 9(b) heightened pleading standard for negligent misrepresentation counterclaim because such claims "sound in fraud rather than negligence."); *Advisors Capital Investments, Inc. v. Cumberland Cas. and Sur. Co*. No 8:05-cv-404-T-23MAP 2006 WL 1428490 at 3 (M.D. Fla. 2006) citing *Souran v. Travelers Ins. Co*., 982 F.2d 1497 (11th Cir. 1993) (stating that an action for misrepresentation sounds in fraud rather than negligence.). It is the law in this Circuit that "when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Industries, Inc. v. Irvin,* 496 F.3d 1189, 1206 (11th Cir.2007) ("It is the law in this Circuit that

"when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."); *see Simmons v. Peavy–Welsh Lumber Co.,* 113 F.2d 812, 813 (5th Cir.1940) ( "Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.").*See Crenshaw v. Lister*, 556 F.3d 1283, 1293 (11th Cir. 2009).

Aspen alleges much about its application for insurance, the terms and conditions of its Policy, and the Brenes notice, but no fact that Dr. Lackey actually received the Brenes notice, any fact reflecting that Dr. Lackey was actually aware of the Brenes notice, or facts that he knew or should have known about the letter. *See* DE 1, ¶¶ 1-29.[2] On the contrary, Aspen only alleges the ultimate fact that Mary Thornton "acknowledged" (*i.e.*, received) the Brenes letter. [DE 1, Ex. D]. Having alleged only that Mary Thornton had knowledge of a letter addressed to Dr. Lackey, Aspen then leaps to the conclusory and general allegation that Dr. Lackey knew of and should have known of the Brenes incident. [D.E. 1, ¶ 11, 27, 28]. Aspen without explicitly stating such alleges in Count I that Mary Thompson's personal knowledge was imputed to Dr. Lackey. *Id.* Florida law does not impose a reporting requirement of imputed knowledge and Count I fails as a matter of law.[3] *Kopelowitz v. Home Ins. Co.*, 977 F. Supp. 1179, 1190 (S.D. Fla. 1997) (ruling that insurance carrier's theory that Florida law requires a reporting imputed knowledge, "meritless"); s*ee also Bagley v. Western Cas. & Sur. Co.*, 505 So.2d 678 (Fla. 1st DCA 1987) (holding that notice to the

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[2] Aspen intermittently conflates the identities of Dr. Lackey with Surgical Lakes and Mary Thornton in its allegations making them confusing and vague. For example, ¶10 of Aspen's complaint states "Notice was acknowledged by Lackey by a receipt signed by a member of his office staff…." The staff member is Mary Thornton.

[3] If Mary Thornton was acting within the course and scope of her duties as an employee of Surgical Lakes—she was not-- then knowledge may be imputed to the entity but the entity is not identified in Aspen's allegations on this Count and the entity did not complete the application for insurance. *Computel, Inc. v. Emery Freight Air Corp.* 919 F.2d 678, 685 (11th Cir. 1990) citing *Anderson v. Walthal*, 468 So.2d 291 (Fla. 1st DCA 1985) ("… stating that notice to an agent or employee is imputed to the principal when it is received by the employee within the scope of her employment, and when it is in reference to matters over which the employee's authority extends.").

corporation and other employees does not impute that notice to an individual employee as an officer or person associated with the corporation.).

In *Kopelowitz v. Home Ins. Co.*, 977 F.Supp. 1179, 1190 (S.D. Fla. 1997), this Court rejected the insurance carrier's argument that knowledge of a pre-existing claim be imputed from one partner in a law firm to another partner, reasoning, "…the Court cannot foresee how an insured is required to disclose knowledge of acts he only has through the fiction of imputation. Therefore, the mere fact that *Breitner* may have known of the pending claim cannot void the policy." *Id.* The court reached this conclusion even after acknowledging that the law frequently imputes knowledges among partners at law firms, and despite Florida Statute § 620.615[4] which provided statutory unity of knowledge among limited partners. *Id.* at 1190-91.

The *Kopelowitz* court also disposed of the Home Insurance's material misrepresentation claim under Florida Statute § 627.409 that relied on its theory that one partner must disclose knowledge imputed to him by operation of law.[5] Partner, Shapiro, applying for insurance did not disclose a prior claim that was known to partner, Breitner. *Id.* at 1190. The insurer argued that Shapiro must have known about the claim because the knowledge was imputed to him through operation of law. *Id.* The court rejected the argument, reasoning, "the Court finds it [reporting requirement for imputed knowledge] without merit." *Id.* The court permitted the misrepresentation claim to proceed on the insurer's *actual* knowledge theory of the claim. *Id.* Aspen attempts here to allege the same theory of reporting imputed knowledge that was foreclosed by *Kopelowitz* and its claim must be dismissed.

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[4] Fla. Stat. § 620.615 was repealed by Laws 1995, c. 95-242, § 25, eff. Jan. 1, 1998; Laws 1999, c. 99-4, § 24, eff. June 29, 1999

[5] Aspen does not plead Florida Statute § 627.409.

Taking Rule 9(b) together with *Kopelowitz*, Aspen must plead with particularity the "who, what, when, where, and how" of Dr. Lackey's misrepresentation based on his actual knowledge of the Brenes incident. *Gross v. Medaphis Corp.,* 977 F. Supp. 1463, 1470 (N.D.Ga.1997) (quoting *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir.1990)). Aspen's allegations do not meet this standard. One cannot deduce from Aspen's allegations who is supposed to know about the Brenes notice, how they know about the notice, or the extent of what the unspecified actors are supposed to know. What Aspen alleges is that Mary Thompson received a letter. From there, Aspen's allegations require impermissible conjecture and speculation, in combination with a theory of knowledge and reporting foreclosed by *Kopelowitz.* Aspen has not pled a claim for misrepresentation and this count should be dismissed.

## IV. COUNT III SHOULD BE DISMISSED BECAUSE ASPEN FAILS TO PLEAD THE EXISTENCE OF A PRIOR CLAIM

In Count III of its Complaint, Aspen seeks a declaration of non-coverage alleging that Ms. Brenes' notice of incident satisfies the definition of Claim within its Policy and that the Claim was made prior to its Policy effective period. [D.E. ¶¶ 36 – 43]. Under the plain and unambiguous terms and conditions of the Policy, the Brenes notice does not satisfy the definition of Claim. Aspen's Count III should be dismissed.

"The interpretation of insurance policies, like the interpretation of all contracts, is generally a question of law," and therefore appropriate for consideration on motion to dismiss. *Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 143 F.supp.3d 1283, 1292 (S.D. Fla. 2015) quoting *Lawyers Title Ins. Corp. v. JDC (Am.) Corp.,* 52 F.3d 1575, 1580 (11th Cir.1995). When interpreting an insurance policy, Florida courts "start with the plain language of the policy, as bargained for by the parties." *State Farm Fire & Cas. Co. v. Steinberg,* 393 F.3d 1226, 1230 (11th Cir.2004)(quoting *Auto–Owners Ins. Co. v. Anderson,* 756 So.2d 29, 34

(Fla.2000)). The "Florida Supreme Court has made clear that the language of the policy is the most important factor. Under Florida law, insurance contracts are construed according to their plain meaning." *James River Ins. Co. v. Ground Down Eng'g, Inc.,* 540 F.3d 1270, 1274–75 (11th Cir.2008) (internal citations and quotations omitted) (quoting *Taurus Holdings, Inc. v. United States Fid. and Guar. Co.,* 913 So.2d 528, 537 (Fla.2005)). Thus, the Court interprets the policy language according to its " 'everyday meaning' as it is 'understandable to the layperson.' " *Ohio Cas. Ins. Co. v. Cont'l Cas. Co.,* 279 F.Supp.2d 1281, 1283 (S.D.Fla.2003) (quoting *Hrynkiw v. Allstate Floridian Ins. Co.,* 844 So.2d 739, 741 (Fla.Dist.Ct.App.2003)). If "the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as written." *Travelers Indem. Co. v. PCR Inc.,*889 So.2d 779, 785 (Fla.2004); *see also Steinberg,* 393 F.3d at 1230 (explaining that the court must read the policy as a whole and give every provision its full meaning and operative effect). Coverage clauses in insurance policies, including definitions, are interpreted in the broadest possible manner to effect the greatest amount of coverage. *See Adolfo House Distr. Co. v. Travelers Prop. & Cas. Inc. Co.*, 165 F. Supp.2d 1332, 1339 (S.D. Fla. 2001) (applying rule of insurance policy construction to policy's definition of "advertising injury"); *see also Fabricant v. Kemper Independence Insurance Company*, 474 F.Supp.2d 1328, 1331 (S.D. Fla. 2007) citing *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 179 (Fla. 5th DCA 1997).

*A.* ***The Brenes Letter was a Notice of Incident and not a Claim***

Aspen alleges that the February 12, 2019 letter ("Brenes Letter") addressed to Dr. Lackey is a "Notice," and that the "Notice is a 'claim' under the Policy." [DE 1, ¶¶ 38-39]. The Brenes Letter is a Notice of Incident under the clear and unambiguous definitions in the insurance contract. A notice of incident is not a Claim and that there is no reporting requirement for such a notice.[6] Aspen accordingly fails to state a claim and Count III should be dismissed.

The Aspen policy of insurance provides the following definitions:

> D. **Claim** means a written demand for money or services received by **you** alleging an injury caused by an **incident** to which this insurance applies. Claim does not include a demand for non-monetary or injunctive relief or any criminal proceeding. Claims can only arise from professional services within your profession as described on the Declarations.
>
> [D.E. 1, Ex. B, p. 6].
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> * * *
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> J. **Incident** means any act, error, or omission, or misstatement or misleading statement by You in the rendering of or failure to render professional services. All such acts, errors, or omissions causally related to the rendering of or failure to render professional services shall be considered one incident. An incident shall be deemed to have occurred at the time of the earliest act, error, or omission comprising that incident. An incident shall not be deemed a claim **unless you receive a written demand for money or services or a Notice of Incident Endorsement is attached to this policy**.
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> [DE 1, Ex. B, p. 7] [emphasis supplied].
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> * * *
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> T. **Suit** means a civil proceeding that seeks damages which, if awarded, would be covered by this policy. Suit includes: an arbitration proceeding, any alternative dispute resolution proceeding, or a pre-suit, screening panel, or similar proceeding mandated by law.

[D.E. 1, Ex. B, p. 8]. The second condition in the Policy's definition of *Claim* requires the writing to "demand money or services." [D.E. 1, Ex. B, p. 6]. The Brenes letter does neither. [D.E. 1, Ex. C]. Rather, the Brenes Letter purports to identify an incident, requests medical records, and

[6] Aspen otherwise alleges that Ms. Brenes made her claim or filed suit within the policy period on June 20, 2019. [D.E. 1, ¶ 18].

demands that Dr. Lackey respond in one of the following ways: 1) reject its factual assertions, 2) make an offer for Ms. Brenes' consideration, or 3) admit to the factual assertions contained in the notice of incident. [D.E. 1, Ex. C, pp 2-3]. Because the notice does not demand money or services, it is not a Claim within the terms of the Policy. The definition of *Incident* further provides that a *Notice of Incident* will only be a *Claim* if "a Notice of Incident Endorsement is attached to this policy." [D.E. 1, Ex. B, p. 7]. There is no Notice of Incident Endorsement attached to the Policy. The Brenes Notice of Incident does not satisfy the definition of Claim, eviscerating Aspen's allegations at Complaint paragraphs 38 and 39. Because Aspen failed to allege a prior claim, it has not stated a claim for relief and this Count should be dismissed.

### *B. Aspen Fails to Allege that the Brenes Notice of Incident was Received*

The second condition to the Policy's definition of *Claim* requires that the Brenes Letter be "received." [D.E. 1, Ex. B, p. 6]. Although Aspen generally alleges that either "[Dr.] Lackey or Surgical Lakes received the [Brenes Letter]", its more specific allegation and incorporated exhibit conflict with its general allegations revealing that the Brenes letter was addressed to Dr. Lackey, individually, but received by Mary Thornton. [D.E. 1, ¶ 11 and Ex. D].

"It is the law in this [Eleventh] Circuit that 'when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.'" *Griffin Industries, Inc. v. Irvin,* 496 F.3d 1189, 1206 (11th Cir.2007); *Kondell v. Blue Cross and Blue Shield of Florida, Inc.*, 187 F.Supp.3d 1348, n.7 (S.D. Fla. 2016) ("When the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."); *see Esys Latin America, Inc. v. Intel Corp.*, 925. F.Supp.2d 1306, 1313 (S.D. Fla. 2013); and *see Simmons v. Peavy–Welsh Lumber Co.,* 113 F.2d 812, 813 (5th Cir.1940) ( "Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.").

Aspen generally alleges that Ms. Brenes' "Notice is a Claim" that was received by "Lackey or Surgical Lakes … on February 14, 2019." [DE 1, ¶¶ 38-39]. But at paragraph 11, Aspen more specifically alleges that the Brenes Letter was "acknowledged" (*i.e.*, received) by Mary Thornton.[7] Aspen in support incorporates Exhibit D that the Brenes Letter was received by Mary Thornton. [D.E. 1, Ex. D]. Applying the rule espoused in *Griffin*, Aspen alleges only that the Brenes Letter was received by Mary Thornton. Aspen does not allege or explain how receipt by Mary Thornton satisfies the definition of "Claim" within the meaning of the Aspen policy. Count III should be dismissed. *See Morgan Stanley Smith Barney, LLC v. Gibraltar Private Bank & Trust Co.* 162 So.3d 1058 (Fla. 3d DCA 2015) (holding that investment firm employee on whom service was made was neither a corporate representative nor business agent, and thus service of process was invalid); *see also Kopelowitz v. Home Ins. Co.*, 977 F. Supp. 1179, 1190 (S.D. Fla. 1997) (rejecting theory of voiding insurance based on imputed knowledge among partners of prior incidents and claims; requiring actual knowledge).

### *C. Aspen Does not Allege that the Brenes Notice of Incident is a Claim as to Dr. Lackey*

Even if the Court finds that Aspen sufficiently alleged a claim within the meaning of its Policy as to its additional insured, Surgical Lakes, Aspen does not allege a claim against Dr. Lackey. Aspen generally alleges that *either* Dr. Lackey *or* Surgical Lakes received the Brenes Letter. Its disjunctive allegation of receipt is insufficient as to both insureds, but particularly as to Dr. Lackey because the Policy's definition of Claim requires that each insured receive notice (*i.e.*,

[7] It is unclear what Aspen intends by conflating the identities of Mary Thornton and Dr. Lackey in paragraph 11 of its Complaint. It is possible that the paragraph contains a scrivener's error and Aspen intended for paragraph 11 to be consistent with Exhibit D and allege that Mary Thornton received the Brenes Letter. It is alternatively possible that Aspen intended to name Surgical Lakes rather than Dr. Lackey.

be aware) of an incident. Although Aspen may have alleged receipt of the notice by Surgical Lakes through Mary Thornton, Aspen alleges no fact that Dr. Lackey received the Brenes notice. *See* DE 1, ¶¶ 1-22; 36-43.

In order for a notice to satisfy the Policy's definition of Claim, it must be "received by you…." The Policy further defines "you" and "your" as, "**any** insured under this Policy." Merriam-Webster defines "any"[8] as, "**one** or some indiscriminately of whatever kind: a) **one** or another taken at random…." The Policy uses *any* to mean *one or another insureds* and therefore individualizes each insured. Accordingly, a notice only becomes a Claim under the Policy with respect to an Insured as each individual Insured becomes aware of the notice. Other provisions of the Policy are consistent with this Construction. For example:

Section IX. Conditions

> **A.** Notice of Claim or Suit. As a condition precedent to coverage under this policy, you must give notice of any claim for an injury first made against you during the policy period immediately, but in no event any later than thirty (30) days after **you first become aware of such claim** or the end of the policy period, whichever is sooner….

[DE 1, Ex. B, p. 8] [emphasis supplied]. The parties agreement on the use of the word *aware* in section IX.A. demonstrates that each insured must have actual knowledge of a notice or incident before it is considered *received* and can satisfy the final condition to be considered a *Claim* under the Policy.

Aspen must allege facts revealing that Dr. Lackey actually received the Brenes notice of incident in order for a Claim to have been made against Dr. Lackey. This construction is consistent

[8] Available at: https://www.merriam-webster.com/dictionary/any (last visited August 13, 2020, 7:54 PM EST).

with this Court's rulings in *Kopelowitz.* Because Aspen attempts to allege a legally invalid theory of receipt that relies on imputation of knowledge, and because it has not alleged Dr. Lackey's actual knowledge of the Brenes Letter, it failed to allege a *Claim* within the meaning of the Policy. Because Aspen has not alleged a claim within the terms of the Policy, Count III should be dismissed.

## CONCLUSION

Aspen's Complaint for Declaratory Relief should be dismissed.

**WHEREFORE,** Defendants Dr. Thomas Lackey and Surgical Lakes, PLLC move the Court for the entry of an order dismissing Plaintiff's Complaint for Declaratory Judgment and for any other relief that this Court deems proper.

Respectfully submitted,

***/s/Anthony S. Hearn***
FBN: 102302

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on on all counsel or parties of record on the Service List below.

**ANTHONY S. HEARN, PA**

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