

1 Steven D. Turner, (State Bar No.: 172852)
sturner@jonesturner.com
2 Mariyetta A. Meyers-Lopez (State Bar No. 244352)
JONES TURNER, LLP
3 2 Venture, Suite 220
Irvine, California 92618
4 Tel: 949-435-4100
Fax: 949-435-4105
5

6 Attorneys for Defendant
AFFILIATED FM INSURANCE COMPANY

7 Joyce C. Wang
jwang@ccplaw.com
8 CARLSON, CALLADINE & PETERSON, LLP
353 Sacramento Street, 16th Floor
9 San Francisco, CA 94111
Tel: 415-391-3911
10 Fax: 415-391-3898
Attorneys for Defendant
11 AFFILIATED FM INSURANCE COMPANY

12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15

16 OUT WEST RESTAURANT GROUP,
INC; CERCA TROVA RESTAURANT
17 GROUP, INC.; CERCA TROVA
STEAKHOUSE, L.P.; AND CERCA
18 TROVA SOUTHWEST RESTAURANT
GROUP, LLC

19 Plaintiffs,

20 v.

21 AFFILIATED FM INSURANCE
22 COMPANY,

23 Defendant,
24

CASE NO. 3:20-cv-06786-TXH

Hearing Date: December 3, 2020
Hearing Time: 10:00 am

**DEFENDANT AFFILIATED FM
INSURANCE COMPANY NOTICE
OF MOTION AND MOTION TO
DISMISS AND MOTION TO
STRIKE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION TO
DISMISS AND/OR MOTION TO
STRIKE**

25 **PLEASE TAKE NOTICE** that on Thursday December 3, 2020, at 10:00
26 a.m. or as soon as thereafter as the matter may be heard before the Honorable Judge
27 Thomas S. Hixson in Courtroom G of the United States District Courthouse for the
28 Northern District of California, 450 Golden State Avenue, 15th Floor, San Francisco,

1 California 94102, Defendant Affiliated FM Insurance Company (“Affiliated FM”)
2 will and hereby does move the Court for an order dismissing in its entirety
3 Plaintiffs’ Complaint (ECF No. 1) without prejudice under Rule 41 of the Federal
4 Rules of Civil Procedure for failure to plead a “short and plain statement” of the
5 claims for relief and failure to make each allegation “simple, concise, and direct,” as
6 required under Rule 8 of the Federal Rules of Civil Procedure.

7 In the alternative, Affiliated FM will and hereby does move the Court for an
8 order striking the Complaint pursuant to Federal Rule of Civil Procedure 12(f) due
9 to the pleading containing excessive “redundant, immaterial, [or] impertinent”
10 matter.

11 In the alternative, Affiliated FM will and hereby does move the Court for an
12 order requiring Plaintiffs to submit a more definite statement pursuant to Rule 12(e)
13 of the Federal Rules of Civil Procedure and to specifically limit Plaintiffs to a
14 certain number of pages in any amended complaint.

15 The parties’ coverage dispute is relatively straightforward and could
16 reasonably be described in less than 40 paragraphs. Unfortunately, the complaint
17 contains more than 194 individually numbered paragraphs (excluding sub-
18 paragraphs and the prayer for relief) spanning 36 pages with an addition 124 pages
19 of exhibits. The allegations to which Affiliated FM must respond include claims
20 about the “beloved” and “famous” nature of Outback Steakhouse’s Bloomin’
21 Onion®” and the “warm welcoming environment” of Outback Steakhouse’s
22 restaurants – none of which is relevant to the parties’ insurance coverage dispute.

23 More troubling is the fact that the complaint includes improper citations to
24 case law, legal argument, and 39 separate footnotes that incorporate 38 website
25 addresses with links to 34 different third-party news articles, papers and treatises
26 ranging from ever-changing CDC statistics to stories about coronavirus patients
27 being released from the hospital in good condition to speculation about the U.S.
28 government airlifting citizens from China to whether certain Disney employees have

1 tested positive for COVID-19. The vast majority of the allegations are irrelevant
2 and redundant.

3 This is an insurance coverage case. The complaint is prolix, cumbersome,
4 unwieldy, repetitive, unclear as to what *facts* Plaintiffs rely on, and, ultimately,
5 vague. The pleading demonstrably violates Federal Rules of Civil Procedure, Rule
6 8's requirement that a complaint contain only a "short and plain statement" of the
7 claims for relief such that each allegation is "simple, concise, and direct." It would
8 therefore be unreasonable and prejudicial to require Affiliated FM to incur the
9 substantial time and expense associated with admitting or denying each of the
10 complaint's 194 paragraphs of mostly irrelevant allegations, improper citations to
11 law and third-party internet stories and to require Affiliated FM to conduct
12 unnecessary and burdensome discovery to determine which of the far-flung
13 allegations Plaintiffs believe are actually material to their claims.

14 In light of the foregoing, the complaint should be dismissed under FRCP 41,
15 stricken under FRCP 12(f) or ordered to be made more clear under FRCP Rule
16 12(e).

17 This motion is based on this Notice of Motion and Motion, the accompanying
18 Memorandum of Points and Authorities, the pleadings on file with this Court, and
19 such arguments and authorities as may be presented at or before the hearing.

20 Counsel for the parties met and conferred on the issues presented via Zoom
21 on October 13, 2020 and in subsequent emails, but were unable to resolve their
22 differences.

23 DATED: October 15, 2020

JONES TURNER, LLP

24 By /s/ Steven D. Turner

25 Steven D. Turner
26 Mariyetta A. Meyers-Lopez
27 Attorneys for Defendant
28 AFFILIATED FM
INSURANCE COMPANY

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Out West Restaurant Group, Inc., Cerca Trova Restaurant Group,
4 Inc., Cerca Trova Steakhouse, L.P., and Cerca Trova Southwest Restaurant Group,
5 LL (collectively “Plaintiffs”) have asserted declaratory judgment, breach of contract
6 and bad faith claims against defendant Affiliated FM Insurance Company
7 (“Affiliated FM”) on the theory that Affiliated FM has wrongfully failed to pay
8 policy benefits for reported losses arising from the SARS-CoV-2 pandemic.

9 The parties’ coverage dispute is relatively straightforward and could
10 reasonably be described in less than 40 paragraphs. Unfortunately, the complaint
11 contains more than 194 individually numbered paragraphs (excluding sub-
12 paragraphs and the prayer for relief) spanning 36 pages with an addition 124 pages
13 of exhibits. The allegations to which Affiliated FM must respond include claims
14 about the “beloved” and “famous” nature of Outback Steakhouse’s Bloomin’
15 Onion®” and the “warm welcoming environment” of Outback Steakhouse’s
16 restaurants – none of which is relevant to the parties’ insurance coverage dispute.

17 More troubling is the fact that the complaint includes improper citations to
18 case law, legal argument, and 39 *separate* footnotes that incorporate 38 website
19 addresses with links to 34 different third-party news articles, papers and treatises
20 ranging from ever-changing CDC statistics to stories about coronavirus patients
21 being released from the hospital in good condition to speculation about the U.S.
22 government airlifting citizens from China to whether certain Disney employees have
23 tested positive for COVID-19. The vast majority of the allegations are irrelevant
24 and redundant. The pleading reads more like a self-indulgent press release than a
25 short, plain statement of the claim showing that the pleader is entitled to relief.

26 The bottom line is that the complaint demonstrably violates Federal Rules of
27 Civil Procedure, Rule 8’s requirement that a complaint contain only a “short and
28 plain statement” of the claims for relief such that each allegation is “simple, concise,

1 and direct.” It would therefore be unreasonable and prejudicial to require Affiliated
2 FM to incur the substantial time and expense associated with admitting or denying
3 each of the complaint’s 194 paragraphs of mostly irrelevant allegations, improper
4 citations to law and third-party internet stories – many of the latter having been
5 changed or updated since Plaintiffs’ filing. It would likewise be prejudicial and
6 unduly costly and burdensome to force Affiliated FM to conduct discovery on this
7 unnecessary morass of information to determine which allegations the Plaintiffs
8 actually believe are material to their claims.

9 In light of the foregoing, the complaint should be dismissed under FRCP 41,
10 stricken under FRCP 12(f) or ordered to be made more clear under FRCP Rule
11 12(e).

12 **II. FACTUAL BACKGROUND**

13 Plaintiff Out West Restaurant Group, Inc. is a restaurant management
14 company. It is the exclusive franchisee of Outback Steakhouse restaurants in
15 Arizona, Colorado, Nevada, and New Mexico and the predominate franchisee in
16 California. (Complaint, ¶ 9). Plaintiff Cerca Trova Steakhouse, L.P. is an entity that
17 holds leases for all California restaurants and Plaintiff Cerca Trova Southwest
18 Restaurant Group, LLC is an entity that holds all of the leases for the non-California
19 restaurants. (*Id.*, ¶¶ 10-11). Plaintiff Cerca Trova Restaurant Group, Inc. “is the
20 ultimate parent of the Out West entities.” (*Id.*, ¶ 12). Affiliated FM is an insurance
21 company.

22 Plaintiffs allege that they are each named insureds under a policy issued by
23 Affiliated FM with effective dates from February 15, 2020 to December 1, 2020 (the
24 “Policy”). (*Id.*, ¶¶ 27, 33-34). Plaintiffs further allege that the Policy covers them for
25 “‘all risks of physical loss or damage,’ except as excluded, to property, as described
26 in the Policy.” (*Id.*, ¶ 31.) Plaintiffs claim entitlement to benefits under various
27 coverages in the Policy and assert causes of action for declaratory judgment, breach
28 of contract and bad faith.

1 **III. LEGAL STANDARDS**

2 **a. Rule 8 Requires Simple, Concise and Direct Allegations**

3 **Comprising a Short and Plain Statement of the Claims.**

4 Federal Rule of Civil Procedure (“FRCP”), Rule 8, confirms that a complaint
5 “must contain ... a short and plain statement of the claim showing that the pleader is
6 entitled to relief.” FRCP 8(a)(2). It also requires that “[e]ach allegation must be
7 simple, concise, and direct” FRCP 8(d). A complaint which fails to comply with
8 Rule 8 “may be dismissed with prejudice pursuant to [R]ule 41(b).” *Nevijel v. North*
9 *Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981) (dismissing complaint that was 23
10 pages long with 24 pages of addenda). The rule requiring each averment to be
11 simple, concise, and direct applies equally to good claims as well as bad. *McHenry*
12 *v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996) (“The propriety of dismissal for
13 failure to comply with Rule 8 does not depend on whether the complaint is wholly
14 without merit”).

15 Where a complaint is “argumentative, prolix, replete with redundancy, and
16 largely irrelevant,” “consists largely of immaterial background information,” and
17 “seems designed to provide quotations for newspaper stories,” it fails to satisfy Rule
18 8 and fails to give a defendant “a fair opportunity to frame a responsive pleading.”
19 *Id.* at 1174, 1178-79.

20 “Even if the factual elements of the cause of action are present, but are
21 scattered throughout the complaint and are not organized into a ‘short and plain
22 statement of the claim,’ dismissal for failure to satisfy Rule 8(a)(2) is proper.”
23 *Karabajakyan v. Schwarzenegger*, No. CV 06-0541-ODW, 2007 WL 9706273, at
24 *2 (C.D. Cal. June 1, 2007); see also *Mann v. Boatright*, 477 F.3d 1140 (10th Cir.
25 2007) (“In its sheer length, [plaintiff] has made her complaint unintelligible by
26 scattering and concealing in a morass of irrelevancies the few allegations that
27 matter.”)

28

1 **b. Rule 12(f) Allows the Court to Strike from a Pleading Any**
 2 **Redundant, Immaterial, Impertinent, or Scandalous Matter.**

3 Under FRCP 12(f), “the court may strike from any pleading . . . any
 4 redundant, immaterial, impertinent, or scandalous matter.” FRCP 12(f); *Hearns v.*
 5 *San Bernardino Police Dep’t*, 530 F.3d 1124, 1132 (9th Cir. 2008) (“[t]he district
 6 court also has ample remedial authority to relieve a defendant of the burden of
 7 responding to a complaint with excessive factual detail. One option would have
 8 been to simply strike the surplusage” from the complaint).

9 The “function of a 12(f) motion to strike is to avoid the expenditure of time
 10 and money that must arise from litigating spurious issues by dispensing with those
 11 issues prior to trial...” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th
 12 Cir. 1983). The District Court in *Thornton v. Solutionone Cleaning Concepts, Inc.*,
 13 No. CIVF061455AWISMS, 2007 WL 210586 (E.D. Cal. Jan. 26, 2007) explains:

14 Immaterial matter is defined as matter that “has no essential or
 15 important relationship to the claim for relief or the defenses being
 16 pleaded.” *Fantasy[, Inc. v. Fogerty]*, 984 F.2d [1524] at 1527 [(9th Cir.
 17 1993), *rev’d on other grounds*, 510 U.S. 517 (1994)]. Impertinent
 18 matter is defined as “statements that do not pertain, and are not
 19 necessary, to the issues in question.” *Fantasy*, 984 F.2d at 1527.
 20 Scandalous matter is defined as allegations “that unnecessarily reflects
 21 on the moral character of an individual or states anything in repulsive
 22 language that detracts from the dignity of the court,” *Cobell v.*
 23 *Norton*, 224 F.R.D. 1, 5 (D.D.C.2004), and “includes allegations that
 24 cast a cruelly derogatory light on a party or other person.” *In re*
 25 *2TheMart.com Secs. Litig.*, 114 F.Supp.2d 955, 965 (C.D.Cal.2000).
 26 Redundant matter is defined as allegations that “constitute a needless
 27 repetition of other averments or are foreign to the issue.” *Wilkerson v.*
 28 *Butler*, 229 F.R.D. 166, 170 (E.D.Cal.2005). *Thornton*, at *1.

25 “Granting a motion to strike may be proper if it will make the trial less
 26 complicated or if allegations being challenged are so unrelated to plaintiff’s claims
 27 as to be unworthy of any consideration as a defense and that their presence in the
 28

1 pleading will be prejudicial to the moving party.” *Thornton, supra*, at *1,
 2 citing *Fantasy, supra*, 984 F.2d at 1527-28).

3 **c. Rule 41(b) Allows the Court to Dismiss for Failure to Comply with**
 4 **the Federal Rules of Civil Procedure**

5 FRCP 41 states that “[i]f the plaintiff fails . . . to comply with these rules or a
 6 court order, a defendant may move to dismiss the action or any claim against it. . .
 7 Unless the dismissal states otherwise, a dismissal under this section (b) and any
 8 dismissal not under this rule – except one for lack of jurisdiction, improper venue, or
 9 failure to join a party under Rule 19 – operates as an adjudication on the merits.”

10 **IV. ARGUMENT**

11 **a. The Complaint Is So Prolix That Affiliated FM Cannot Fairly Be**
 12 **Required To Respond; The Complaint Should Be Dismissed Under Rule 41.**

13 “Something labeled a complaint but written more as a press release, prolix in
 14 evidentiary detail, yet without simplicity, conciseness and clarity as to whom
 15 plaintiffs are suing for what wrongs, fails to perform the essential functions of a
 16 complaint.” *McHenry, supra*, 84 F.3d at 1180; see also *Cafasso, U.S. ex rel. v.*
 17 *General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1059 (9th Cir. 2011) (“While ‘the
 18 proper length and level of clarity for a pleading cannot be defined with any great
 19 precision,’ Rule 8(a) has ‘been held to be violated by a pleading that was needlessly
 20 long, or a complaint that was highly repetitious. . .’; Our district courts are busy
 21 enough without having to penetrate a tome approaching the magnitude of War and
 22 Peace to discern a plaintiff’s claims and allegations”); *Hatch v. Reliance Ins. Co.*,
 23 758 F.2d 409, 415 (9th Cir. 1985) (upholding a dismissal of a complaint that
 24 “including attachments, exceeded 70 pages in length, [and was] confusing and
 25 conclusory”); *Whitsitt v. Industrial Empl. Dist. Ass’n*, No. C 13-00396 SBA, 2014
 26 WL 3615352, at *5 (N.D. Cal. July 22, 2014) (finding that plaintiff’s 37 page
 27 complaint “is precisely the type of prolix, argumentative, unintelligible and
 28 redundant pleading which the Ninth Circuit has held is subject to dismissal under

1 Rule 8”); *Mendez v. Draham*, 182 F. Supp. 2d 430, 433 (D.N.J. 2002) (“Only
2 through superhuman patience, effort, and insight, could any attorney review the
3 allegations of the Complaint and make paragraph-by-paragraph responses.”)

4 The complaint at issue here violates FRCP Rule 8’s requirement that a
5 complaint “contain ... a short and plain statement of the claim showing that the
6 pleader is entitled to relief.” FRCP 8(a)(2). In particular, the complaint
7 impermissibly contains numerous examples of immaterial, impertinent, and
8 redundant matters, repetitive allegations, improper litany of legal arguments and
9 purported “expert” opinions and needless citations to “evidence” in 39 separate
10 Footnotes – very little of which appears directed to the merits of the claims.

11 While it would be difficult to compile a list each of the complaint’s
12 immaterial and impertinent matters or factual allegations, some examples include
13 the following:

- 14 • the citation to caselaw in paragraph 7, starting at line 2 on page 2: “The
15 fact that decisions by federal judges in *Studio 471, Inc., et al v. The*
16 *Cincinnati Insurance Co.*, No 20-cv-03127-SRB (W.D. Mo. Aug. 12,
17 2020) and in *Urogyceecology Specialist of Florida LLC v. Sentinel*
18 *Insurance Co.*, No. 6:20-cv-1174 (M.D. Fla. Sept. 24, 2020), and by a
19 New Jersey state court judge in *Optical Services USA/CI v. Franklin*
20 *Mutual Insurance Co.*, No. BER-L-3681-20 (N.J. Super. Ct. Aug. 13,
21 2020) accepted the Policyholder’s construction makes this construction
22 *per se* reasonable. (Complaint, ¶ 7);
- 23 • the allegation that “Outback Steakhouse is a chain of Australian-inspired
24 steakhouse restaurants that is beloved worldwide for its steak cuts,
25 chicken, ribs, seafood, pasta, and the famous Bloomin’ Onion®.” (*Id.*, ¶
26 17).
- 27 • the allegations that “Outback Steakhouse distinguishes itself by
28 emphasizing consistently high quality delicious food delivering a warm,

1 welcoming environment” and that [i]n addition, its excellent customer
2 service and friendly and welcoming atmosphere at its physical locations is
3 critical to its business operations, reputation, and brand.” (*Id.*, ¶¶ 18-19).

- 4 • the allegation that “[t]hat same week, the United States government
5 evacuated several planes full of Americans from China to military bases in
6 Riverside (within 60 miles of 13 insured locations), Fairfield (within 60
7 miles of 9 insured locations), and San Diego, California (within 60 miles
8 of 8 insured locations) for quarantine” followed by citations to the Orange
9 County Register website; a Press Release from the California Department
10 of Public Health office of Public Affairs, and the New York Times website
11 (*Id.*, ¶ 40).
- 12 • the allegation that “[w]hile the Insurance Services Office (“ISO”), an
13 entity charged with drafting standard form policy language for use by the
14 insurance industry, developed a standard form and broadly worded ‘virus
15 exclusion,’ numbered CP 01 40 0706 and titled ‘loss due to Virus or
16 Bacteria’ in 2006, AFM did not include that exclusion here.” (*Id.*, ¶ 47).
- 17 • the allegation that “[s]ome studies find that COVID-19 present in the air
18 causes physical loss and/or damage to property,” referencing a USA Today
19 article in footnote 21 that is no longer available to view (*Id.*, ¶ 71).
- 20 • the allegation that “[t]he CDC published a study in July 2020 concluding
21 that ‘droplet transmission was prompted by air-conditioned ventilation’
22 that caused an outbreak among people who dined in the same air-
23 conditioned restaurant” followed by a citation to the CDC website; that
24 link does not link to any article or study. (*Id.*, ¶ 73).
- 25 • the allegation that: “[t]he CDC notes that more studies are required to
26 understand COVID-19 transmission, but the uncertainty has serious
27 implications for food services safety. Indeed, the CDC’s risk assessment
28 graphic for the restaurant industry demonstrates that restaurants and bars

1 that provide outdoor or indoor seating with no spacing restrictions create
2 the highest risk for the spread of COVID-19,” followed by a citation to the
3 CDC website. (*Id.*, ¶74).

- 4 • the allegation that “COVID-19 can also spread through surface- or object-
5 to-person transmission after an infected person has touched a surface”
6 followed with a citation to the World Health Organization website. (*Id.*, ¶
7 76).
- 8 • the allegation that “[t]he existence of COVID-19 on surfaces renders that
9 property unsafe or unusable,” followed by a citation to a CDC website,
10 and the article therein entitled “Public Health Responses to COVID-19
11 Outbreaks on Cruise Ships – Worldwide, February – March 2020.” (*Id.*, ¶
12 79). This allegation cites to footnote 26; that link does not link to any
13 article.
- 14 • the allegation that “[t]he CDC estimates that infection rates for COVID-19
15 likely are at least ten times higher than reported, meaning that COVID-19
16 is omnipresent, particularly in Arizona and California – states where 70%
17 of Out West’s restaurants are located,” followed by a citation to NBC
18 News. (*Id.*, ¶ 80).
- 19 • the allegation that “[t]here may be instances where COVID-19 was present
20 onsite at an insured location, including with respect to a customer, but the
21 individual was pre-symptomatic, such that Out West was not aware of the
22 presence of the virus.” (*Id.*, ¶ 87).
- 23 • the allegation that “[d]uring the incubation period, or ‘pre-symptomatic’
24 period, infected persons can be contagious, and disease transmission can
25 occur before the infected person shows any symptoms or has any reason to
26 believe he or she has become infected,” with a citation to the WHO
27 website. (*Id.*, ¶ 87).

28

- 1 • the allegation that “COVID-19 can be onsite at an insured location even if
- 2 the infected person is not showing symptoms of infection.” (*Ibid.*)
- 3 • the allegation that “Disney theme park . . . reportedly continues to find
- 4 employees testing positive for COVID-19” followed by a citation to a web
- 5 site called “ScreenRant” (*id.*, ¶ 115(a)) and similar allegations in
- 6 paragraphs 115(a)-(g) with numerous citations.

7 Under FRCP Rule 8(b), Affiliated FM is required to respond to every single
8 one of Plaintiffs’ allegations, which presumably includes the myriad third-party
9 internet stories that have nothing to do with the claims and are likely outdated (or
10 updated). Under the circumstances, the Rule would also force Affiliated FM to
11 respond to allegations that vary from the “beloved” and “famous” nature of Outback
12 Steakhouse’s Bloomin’ Onion®” and the “warm welcoming environment” of
13 Outback Steakhouse’s restaurants, to Plaintiffs’ interpretation of CDC’s
14 interpretation of studies on SARS-CoV-2, to a coverage analysis of claimed
15 differences between ISO forms and Affiliated FM’s Policy, to fact checking articles
16 regarding whether Disney employees have tested positive for COVID-19 or
17 whether, and when, the US government was airlifting Americans from China, to
18 whether certain coronavirus patients were released from hospitals “in good
19 condition.” Requiring Affiliated FM to spend hours reviewing all of that irrelevant
20 information – including fact checking third party websites to respond to allegations
21 that add no material value to the complaint under Rule 8’s short and plain statement
22 requirements – is patently unfair and unduly burdensome. Equally burdensome and
23 prejudicial would be the amount of time and money required for Affiliated FM to
24 conduct discovery as to why Plaintiffs believe these far-flung allegations are
25 material to their insurance claims.

26 It is also unfair to require Affiliated FM to respond to redundant
27 allegations and legal arguments simply because Plaintiffs have chosen to
28

1 ignore the requirements of Rule 8(a). For example, the complaint has many
2 immaterial, impertinent, *and* redundant allegations. See, e.g. ¶¶ 46, 55, 129, 147,
3 163(2), 169 (regarding exclusions), ¶¶ 3, 57, 70-79, 81, 86-91, 94 (regarding
4 COVID-19). The complaint also contains multiple paragraphs of improper legal
5 arguments, which are also immaterial, impertinent, *and* redundant. See ¶¶ 3, 59 to
6 66 (legal arguments about property damage), ¶ 64 (apparently quoting regulatory
7 filings), ¶¶ 67-69 (legal arguments about loss), ¶¶ 46-47, 55, 129-139, 142, 147
8 (legal arguments about policy exclusions); ¶ 155 (apparently spending an entire
9 page quoting from Ins. Code, 790.03(h); ¶ 156 (apparently quoting regulations); ¶¶
10 157-158 (apparently attaching but also quoting from a California Insurance
11 Commissioner notice), among many others. The complaint also repeats various
12 hearsay statements. See, e.g. ¶¶ 71-74 and ¶¶ 76-79 (discussing various hearsay
13 statements by various persons or entities).

14 The complaint in its current form thus indisputably violates the federal
15 pleading requirements. *Todd v. Ellis*, 2013 WL 3242229, at *2 (E.D. Cal. June 25,
16 2013) (“A complaint must not contain lengthy preambles, introductions, argument,
17 speeches, explanations, stories, griping, evidence, attempts to negate possible
18 defenses, summaries, and the like”) (citing *McHenry, supra*, 84 F.3d at 1176–78).

19 In sum, the complaint is “written more as a press release, prolix in evidentiary
20 detail, yet without simplicity, conciseness and clarity as to whom plaintiff [is] suing
21 for what wrongs, [and] fails to perform the essential functions of a complaint.”
22 *McHenry, supra*, 84 F.3d at 1180. The complaint should therefore be dismissed.

23 **b. In the Alternative, the Court Should Strike the Complaint.**

24 “The court may strike from a pleading ... any redundant, immaterial,
25 impertinent, or scandalous matter.” FRCP 12(f). For the reasons enumerated in the
26 previous section, the allegations and footnotes identified above should be stricken.

27 ///

28 ///

1 **c. As a Further Alternative, the Court Should Order Plaintiff to**
2 **Submit a More Definite Statement.**

3 FRCP Rule 12(e) provides that a party “may move for a more definite
4 statement of a pleading to which a responsive pleading is allowed but which is so
5 vague or ambiguous that the party cannot reasonably prepare a response. The
6 motion . . . must point out the defects complained of and the details desired. If the
7 court orders a more definite statement and the order is not obeyed within 14 days
8 after notice of the order or within the time the court sets, the court may strike the
9 pleading or issue any other appropriate order.”

10 “The court [and defendants] should be able to read and understand plaintiff’s
11 pleading within minutes.” *Todd, supra*, 2013 WL 3242229, at *2 (citing *McHenry,*
12 *supra*, 84 F.3d at 1177). That is not possible here.

13 For example, Plaintiffs’ materially *factual* allegations – which are relatively
14 few and sprinkled throughout the complaint – are difficult to follow and vague. If
15 the Court declines to dismiss or to strike the complaint, Affiliated FM respectfully
16 request the Court to require Plaintiffs to submit a more definite statement of their
17 pleading regarding the specific bases *of each Plaintiff’s* claims, including which
18 Plaintiffs are making which claims.

19 Affiliated FM also specifically requests that any such order be made with
20 strict guidelines regarding length and substance (for example, limiting the number of
21 pages as attachments and prohibiting or limiting citation to outside “evidence”). See,
22 e.g., *Todd, supra*, 2013 WL 3242229, at *2 (requiring that amended complaint “be
23 limited to 20 pages total (including any exhibits or attachments)”)

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1 **V. THE PARTIES HAVE MET AND CONFERRED**

2 Counsel for the parties met and conferred on the issues presented via Zoom
3 on October 13, 2020 and in subsequent emails, but were unable to resolve their
4 differences.

5 **VI. CONCLUSION**

6 For the foregoing reasons, Affiliated FM respectfully request that the Court
7 dismiss the complaint under FRCP 41, or alternatively, to strike the complaint under
8 FRCP 12(f). As a further alternative, Affiliated FM respectfully requests that
9 Plaintiff be ordered to submit a more definite statement pursuant to FRCP 12(e).

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11 DATED: October 16, 2020

JONES TURNER, LLP

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By /s/ Steven D. Turner

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Steven D. Turner

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Mariyetta A. Meyers-Lopez

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Attorneys for Defendant

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AFFILIATED FM INSURANCE
COMPANY

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