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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OUT WEST RESTAURANT GROUP, INC.; CERCA TROVA RESTAURANT GROUP, INC.; CERCA TROVA STEAKHOUSE, L.P.; and CERCA TROVA SOUTHWEST RESTAURANT GROUP, LLC,

Plaintiffs,

v.

AFFILIATED FM INSURANCE COMPANY,

Defendant.

Case No.: 3:20-CV-06786-TSH

OPPOSITION TO DEFENDANT AFFILIATED FM INSURANCE COMPANY'S MOTION TO DISMISS AND MOTION TO STRIKE

Date: December 3, 2020
Time: 10:00 a.m.
Judge: Hon. Thomas S. Hixson

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TABLE OF CONTENTS

Hunton Andrews Kurth LLP
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TABLE OF AUTHORITIES

Cases **Page(s)**

Hunton Andrews Kurth LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

Hunton Andrews Kurth LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

Statutes

Other Authorities

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Plaintiffs (also referred to as "Out West") file this Opposition to AFFILIATED FM INSURANCE COMPANY's ("AFM") Motion to Dismiss and Motion to Strike.

I. INTRODUCTION

Policyholders have brought more than 1000 lawsuits against insurers around the country seeking insurance coverage for business interruption losses associated with COVID-19 and governmental stay-in-place orders. The insurance policies, called All Risk Property policies, cover all risks except those expressly excluded. The core issue being litigated is whether these policies cover loss of or damage to property that insureds have sustained and are continuing to sustain as a result of COVID-19, resulting in devastating financial losses.

AFM knows all of this – they or their parent company are a defendant in over 30 of these cases. They have answered the vast majority, if not all, of them outright. Yet the very first motion they file in this case feigns ignorance. AFM seeks dismissal of Out West's Complaint on many divergent, but non-substantive, bases, arguing *inter alia* it does not say enough, it says too much, they do not understand what is being said, and it would be unduly burdensome to respond. These varying and inconsistent positions misstate the word and purpose of the Federal Rules, and they mischaracterize the Complaint.

Given AFM's arguments, the logical starting point is the Complaint itself (Dkt. No. 1). Contrary to AFM's assertions, the Complaint provides a logically organized, appropriate, and relevant presentation of Out West's claim.

- Pages 2-3: Provides a brief introduction and overview of the insurance claim and includes a "short and plain statement of the claim showing that the pleader is entitled to relief" in compliance with Rule 8(a)(2).
- Pages 3-4: Identifies the parties and the basis for this Court's jurisdiction.
- Page 5: Describes Out West's normal business operations as factual support and context for its claim for business interruption losses, including the impact that government mandated dining room and bar closures had on a nationally-known business – a business famous for its dining room and bar experience, catering to

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group in-restaurant dining.

- Pages 5-6: Identifies and describes the cause of loss: COVID-19.
- Pages 6-11: Identifies and quotes general Policy provisions and describes the factual history of AFM's issuance of the Policy in mid-February 2020 without a COVID-19, pandemic, or virus exclusion (after the novel coronavirus began spreading in states where Out West operates).
- Pages 11-14: Describes how COVID-19 and/or the governmental orders cause physical loss and/or damage to property sufficient to trigger insurance coverage (among other things, that COVID-19 damages the Insured Property and/or makes it unusable for its intended purpose, threshold issues being litigated in COVID-19 insurance coverage cases around the country).
- Pages 15-17: Describes how COVID-19 and/or the governmental orders caused physical loss and/or damage to Out West's property at issue here (explaining how Out West actually suffered this loss and/or damage, a related issue being litigated around the country with respect to other insureds).
- Pages 17-24: Identifies the nine relevant coverage parts in the Policy (out of the Policy's approximately fifty different coverage parts, the rest of which Out West is not seeking coverage under) and, for each, provides factual support for why and how that coverage part is triggered here.
- Pages 25-26: Identifies exclusions, which AFM relied on in its denial letters, and describes Out West's position why those exclusions do not apply.
- Pages 26-29: Describes how and when AFM breached its duty of good faith and fair dealing.
- Pages 29-31: Identifies and quotes the statutes and orders that AFM has violated.
- Pages 31-35: Out West's three causes of action and prayer for relief.

This detail should be sufficient in and of itself to dispense with AFM's motion.

Beyond this, AFM's core arguments are simply wrong for at least three reasons.

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First, AFM asserts Out West has not sufficiently pled its claims to put AFM on notice of what is in dispute as required under Rule 8. But, AFM has repeatedly acknowledged it understands exactly what is in dispute with respect to Out West's business interruption claim, whether it be in its talking points instructing AFM claims adjusters to routinely deny COVID-19 business interruption coverage claims (including Out West's claim) (Dkt. No. 1-2), in its denial letter explaining why AFM claims it has no coverage for Out West's claim (Dkt. No. 1-3), or in its actual motion which, in itself, actually describes Out West's claim. While AFM alleges that complaints may "contain only a 'short and plain statement' of the claims for relief," that is not what Rule 8 states; nor is it how courts interpret the Rule.[1] The Supreme Court of the United States, circuit courts of appeal, and countless district courts have made clear Rule 8 sets forth the minimum threshold for pleading, **not** the ceiling. In fact, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Out West's Complaint appropriately sets forth its claims in an organized, clear, and detailed fashion so as to sufficiently apprise AFM of the claims against it. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As compared to the cases cited by AFM – which involved several-hundred-page rambling complaints or incomprehensible allegations in multi-defendant cases that fail to set forth which defendant is responsible for what – Out West's Complaint clearly meets Rule 8's threshold requirements without running afoul of applicable rules or case law.

Second, AFM has failed to meet its high burden of demonstrating the Complaint should be stricken under Rule 12(f). *See, e.g.*, *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) (a motion to strike on grounds that allegations are impertinent or immaterial "will be denied, unless it can be shown that *no evidence in support of the allegation would be admissible.*").[2] AFM has failed to demonstrate that allegations are "redundant, immaterial, or impertinent" and has similarly failed to demonstrate that no evidence in support of the

[1] As discussed *infra*, AFM has had no difficulty answering similar complaints.

[2] All emphasis added unless otherwise stated.

allegations would be admissible. *Id.*

Third, AFM has failed to demonstrate the Complaint is "so vague or ambiguous that [AFM] cannot reasonably prepare a response" so as to warrant a more definite statement under Rule 12(e). Motions for a more definite statement "are viewed with disfavor," *Austin v. Cty. of Alameda*, No. C-15-0942 EMC, 2015 WL 3833239, at *4 (N.D. Cal. June 19, 2015) (quoting *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1077 (C.D. Cal. 1994). AFM has failed to prove it is unable to respond to the allegations set forth in Out West's Complaint. Nor could it prove that. AFM has answered in other COVID-19 insurance cases with similar allegations and – notwithstanding their representations of extensive effort to study and answer these allegations in good faith – their actual practice is to blithely sidestep the allegations by denial, denial on information and belief, or a statement that the document speaks for itself.

Plaintiffs have substantial latitude in how they frame their complaint. Out West's Complaint satisfies the Federal Rules of Civil Procedure, and AFM does not come anywhere close to carrying the heavy burden imposed on it to support dismissal or striking. Out West respectfully requests that the Court deny the motion and require AFM to answer within 10 days of the Court's ruling.

II. STATEMENT OF THE ISSUES TO BE DECIDED

1. Given that plaintiffs have a right to plead their complaint as they see fit within reason, and dismissal is an extreme sanction that is disfavored, did AFM meet its burden of demonstrating that Out West engaged in some sort of willful misconduct sufficient to warrant dismissal under Rule 41(b)?
2. Did AFM meet its extremely high burden of demonstrating that "no evidence in support of the allegation[s] [in the Complaint] would be admissible" so as to support a motion to strike under Rule 12(f) on grounds that the allegations in Out West's Complaint are impertinent or immaterial?
3. Because motions for a more definite statement are disfavored, did AFM prove that the Complaint is "so vague or ambiguous that [AFM] cannot reasonably prepare a response" sufficient to support a motion for a more definite statement

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Los Angeles, California 90071-2627

under Rule 12(e)?

The answer to each is "no." AFM has failed to meet its burden on any of these grounds and, as a result, its motion must be denied.

III. RELEVANT FACTUAL BACKGROUND[3]

AFM issued an 84-page all risks property and business interruption insurance policy (the "Policy") to Out West during the first few months of the COVID-19 pandemic. The Policy contains numerous relevant coverage parts – many of which are subject to different sublimits, triggers, and deductibles than others; numerous exclusions; and numerous conditions and provisions detailing the parties' obligations. The Policy does not contain a virus exclusion. Several months after its issuance, Out West made a claim under the Policy for its covered COVID-19 related losses. AFM denied coverage, relying on Talking Points it drafted before the Policy was issued that instructed all AFM personnel to deny COVID-19 coverage for all insureds, no matter the specific facts or circumstances relevant to each insured and each claim.

AFM now complains that Out West's 36-page Complaint (including caption and signature pages), which distills the relevant policy provisions and coverage dispute over Out West's multi-million dollar COVID-19 losses at nearly 100 insured locations, is so "patently unfair and unduly burdensome" because of its length that it must be dismissed or stricken.[4] AFM's arguments are without merit and not supported by the Federal Rules, applicable law, or the circumstances of this case.

IV. ARGUMENT

A. AFM Has Waived Arguments Concerning Rule 8(d) and the Existence of Any "Scandalous" Allegations under Rule 12(f)

[3] The following factual background is pulled from the Complaint (Dkt. No. 1) and the motion and brief filed by AFM (Dkt. No. 13).

[4] As Out West asserts in the Complaint, AFM has engaged in an orchestrated campaign throughout the country of making burdensome and unnecessary information requests to AFM policyholders, with the objective of dissuading them from pursuing covered insurance claims. (Dkt. No. 1 at p. 27). It is interesting that, here, when Out West pleads the exact information requested from AFM in its burdensome information requests, AFM now asserts the time it needs to respond to the information provided by Out West would be too "unfair," "prejudicial" and "burdensome" to allow the Complaint to stand.

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Los Angeles, California 90071-2627

At the outset, AFM has waived arguments concerning Rule 8(d) and any argument there are "scandalous" allegations under Rule 12(f). A party must present argument to support its position. Failure to do so waives the argument. *See, e.g., F.D.I.C. v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997) (holding an argument waived where the party provided "no case law or argument in support of [its] claim").

AFM asserts the Complaint runs afoul of Rule 8(d), which provides that "Each allegation must be simple, concise and direct." AFM provides neither argument nor example as to how the allegations are anything other than "simple, concise and direct" and AFM's lack of argument concedes the point. (Even if made, any such argument would be readily refuted by the Complaint.)

They broadly argue that the Complaint runs afoul of Rule 12(f), which authorizes the Court to "strike from a pleading … any redundant, immaterial, impertinent or scandalous matter." (Dkt. No. 13 at 4:1-5:2). While they do make conclusory arguments with respect to the first three items (and we respond to these *infra*), they make no reference to any supposedly "scandalous" matter, effectively conceding the argument.

We turn to the Rules for which AFM does make arguments.

B. Out West's Complaint Satisfies Rule 8(a)(2) and Rule 12(f)

AFM argues that Out West's Complaint does not meet the requirements of Rules 8(a)(2) and 12(f). In support, AFM cites some of the most egregious cases in the last 50 years. But, as innumerable decisions make clear, including many of which AFM itself cites, the overarching objective of the Rules is to ensure the defendant understands the nature of the claims against it so it has a "fair opportunity to frame a responsive pleading." AFM's own submissions acknowledge Out West's Complaint achieves this goal.

1. Out West's Complaint Contains a Short and Plain Statement of the Case and Satisfies Rule 8(a)(2)

Rule 8(a)(2) requires "a short and plain statement of the claim showing the pleader is entitled to relief." On the one hand, AFM seems to be arguing the Complaint is insufficient because it fails to meet that standard. On the other, it apparently argues the Complaint meets

this standard and then some, arguing for dismissal or striking of allegations because the Complaint is too long and detailed. These contradictory assertions underpin and undercut AFM's motion.

Rule 8(a)(2) establishes the floor for what the Plaintiff must plead. A complaint must plead facts that are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. The Complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. Indeed, the purpose of the pleading is to "meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." *Brazil v. U.S. Dept. of Navy*, 66 F.3d 193, 199 (9th Cir. 1995) (*pro se* plaintiff failed to make a claim for retaliatory discharge where he failed to even mention or discuss his final termination).

Out West's Complaint obviously satisfies these requirements, providing a substantial evidentiary basis which goes far beyond the speculative. Out West provided an outline of the logically organized, appropriate, and relevant statement of its claim in the Introduction. Out West respectfully submits this statement, in and of itself, is sufficient to dispense with AFM's arguments.

AFM cannot honestly say it does not understand the Complaint or that Out West has not shown why it is entitled to relief. Putting the clarity of the Complaint to one side, these sorts of claims are being litigated in 1000+ cases around the country and AFM is a defendant in many of them.[5] AFM knew enough about the issues to issue a series of talking points to its

[5] *See, e.g., Islands Rests., LP, et al. v. Affiliated FM Ins. Co., et al.*, 3:20-cv-02013 (S.D. Cal. Sept. 15, 2020); *Herald Towers LLC v. Affiliated FM Ins. Co.*, 1:20-cv-08327 (S.D.N.Y. Oct. 6, 2020); *East Bank Club Venture LLC v. Affiliated FM Ins. Co.*, 2020CH05619 (Ill. Cir. Aug. 28, 2020); *Clutch City Sports & Entm't, et al. v. Affiliated FM Ins. Co.*, PC-2020-05137 (R.I. Super. July 15, 2020); *Aspen Lodging Group LLC v. Affiliated FM Ins. Co.*, 2:20-cv-01038 (W.D. Wash. July 2, 2020); *Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co.*, 8:20-cv-00701 (N.D.N.Y. June 23, 2020); *Vancouver Clinic Inc. PS v. Affiliated FM Ins. Co.*, 3:20-c v-05605 (W.D. Wash. June 23, 2020); Q*uapaw Nation v. Affiliated FM Ins. Co.*, CJ-20-82 (Okla. Super. June 9, 2020); *Treasure Island, LLC v. Affiliated FM Ins. Co.*, 2:20-cv-00965-JCM-EJY (D. Nev. May 28, 2020); *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, 1:20-cv-01470 (D. Co. May 22, 2020); *The Cordish Cos., Inc. v. Affiliated FM Ins. Co.*, 1:20-cv-02419 (D. Md. Aug. 21, 2020); *Hotel McInnis Marin LLC, et al. v. Affiliated FM Ins. Co.*, PC-2020-06168 (R.I. Super. Aug. 31, 2020); *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*,

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550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

adjusters in February 2020, just as the Pandemic was developing, instructing them to deny these claims out of hand. (Dkt. No. 1-2.) It knew enough about the issues to issue a denial letter (which obviously would not have been issued if AFM needed more clarity.) (Dkt. No. 1-3.) And since there is only one defendant, AFM cannot say it does not know which claims applies to it – the rationale most commonly cited for dismissal in the cases AFM cites.

No doubt recognizing as much, AFM quickly slides from challenging whether there is enough detail in Out West's Complaint to claiming instead there is too much detail – that a wealth of detail obscures the narrative statement. But, the narrative statement is plain – it is clear, and it has not been obscured.

2. The Cases Cited by AFM Are Extreme and Have No Bearing Here Where Out West Provides a Logically Organized, Appropriate and Relevant Statement of Its Claim

While Rule 8(a) states a complaint "*must contain* … a short and plain statement of the claim showing that the pleader is entitled to relief," AFM interprets the rule as meaning a complaint *must not contain more than* … a short and plain statement of the claim." AFM is wrong.

For example, AFM curiously cites to *Hearns v. San Bernardino Police Dep't,* 530 F.3d 1124, 1132-33 (9th Cir. 2008), where the Ninth Circuit vacated the trial court's dismissal order, holding the plaintiffs' complaints were "long but intelligible and allege viable, coherent claims." Further, the court stated, in distinguishing an earlier case, *Agnew v. Moody,* 330 F.2d 868, 870-71 (9th Cir. 1964):

> *Agnew* cannot fairly be read as holding that excessive length, by itself, is a sufficient basis for finding a violation of Rule 8(a). Two Ninth Circuit cases decided shortly after *Agnew* characterize the holding of *Agnew* as being limited to a complaint that is "so verbose, confused and redundant that its true substance, if any, is well

2:20-cv-10167 (D. N.J. Aug. 7, 2020); *Rockhurst Univ., et al. v. Factory Mut. Ins. Co.*, 4:20-cv-00581 (W.D. Mo. July 23, 2020); *Thor Equities, LLC v. Factory Mut. Ins. Co.*, 1:20-cv-03380 (S.D.N.Y. Apr. 30, 2020); *Zebra Tech. Corp. v. Factory Mut. Ins. Co.*, 1:20-cv-05147 (N.D. Ill. Sept. 1, 2020); *St. George Hotel Assoc., LLC, et al. v. Affiliated FM Ins. Co.*, 1:20-cv-5097 (E.D.N.Y. Oct. 22, 2020); *MGA Entm't, Inc. v. Affiliated FM Ins. Co*., 20STCV39805 (Cal. Super., Los Angeles Cty. Oct. 16, 2020); and *Lettuce Entertain You Enters., Inc., et al. v. Affiliated FM Ins. Co., et al.*, 1:20-cv-5140 (N.D. Ill. Sept. 1, 2020).

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> disguised." *Gillibeau*, 417 F.2d at 431; *Corcoran*, 347 F.2d at 223. *Agnew* has never been cited by this court as standing for the proposition that a complaint may be found to be in violation of Rule 8(a) solely based on excessive length, nor does any other Ninth Circuit case contain such a holding.

Id. at 1131.

Searching for anything remotely related to the subject, AFM cites to cases dealing with truly extreme, and completely distinguishable, situations (Dkt. No. 13 at 8-11). For example, AFM cites *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1059 (9th Cir. 2011) (Dkt. No. 13 at 10). However, there, the Ninth Circuit reviewed a 733-page amended complaint – a stark contrast from the 36-page Complaint here – and found that despite 733 pages, the purported False Claims Act complaint failed to allege a single false claim and failed to plead particular circumstances of any discrete fraudulent statement as is required under Rule 9(b). As that court observed:

> While "the proper length and level of clarity for a pleading cannot be defined with any great precision," Rule 8(a) has "been held to be violated by a pleading that was needlessly long, or a complaint that was highly repetitious, or confused, or consisted of incomprehensible rambling." 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1217 (3d ed.2010). Our district courts are busy enough without having to penetrate a tome approaching the magnitude of War and Peace to discern a plaintiff's claims and allegations.

The case is distinguishable for several reasons, including the size of the pleading, the "highly repetitious, or confused, or consisted of incomprehensible rambling," and Cafasso's failure to plead in compliance with Rule 9(b), while Rule 9 is not implicated here. Further, that court found the proposed amended complaint violated a prior court order limiting plaintiff's qui tam claim to certain originally pled allegations concerning a limited number of inventions. There is no such order or similar issue here.

Similarly, in *Whitsitt v. Indus. Employer Distrib. Ass'n*, No. C 13-00396 SBA, 2014 WL 3615352, at *5 (N.D. Cal. July 22, 2014) which AFM cites (Dkt. No. 13 at 10), the fourth amended complaint consisted of "exceedingly lengthy and seemingly incoherent discussions regarding matters that are impertinent to his core claim for the denial of benefits." Neither is the situation here. Out West's 36-page Complaint distills the relevant coverages of an 84-page

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insurance policy, the factual support for losses spanning nine Policy coverage parts at nearly 100 insured locations, and the facts to support Out West's claim that, contrary to AFM's denial of coverage, COVID-19 and/or governmental orders can and did cause physical loss and/or damage to Out West's insured locations. Out West's allegations are clear, organized (by both heading and subheading), and complete.

Other cases AFM cites (Dkt. No. 13 at 8, 10) are similarly distinguishable. In *McHenry v. Renne*, 84 F.3d 1172, 1177-80 (9th Cir. 1996), plaintiff sued multiple defendants, the complaint was "argumentative, prolix, replete with redundancy, and largely irrelevant," and it was impossible to figure out which claims were being asserted against which defendants. In *Hatch v. Reliance Ins. Co.,* 758 F.2d 409, 415 (9th Cir. 1985), the complaints "were confusing and contradictory." The same was true in *Nevijel v. N. Coast Life Ins*. Co, 651 F.2d 671 (9th Cir. 1981) where the complaint was "verbose, confusing and almost entirely conclusory" and, quoting from *Schmidt v. Hermann*, 614 F.2d 1221 (9th Cir. 1980), "[f]rom a practical viewpoint, it is impossible to designate the cause or causes of action attempted to be alleged in the complaint." In *Mann v. Boatwright*, 477 F.3d 1140, 1148 (10th Cir. 2007), notwithstanding "463 paragraphs spanning 83 pages, [the complaint] neither identifies a concrete legal theory nor targets a particular defendant," and "not even the most attentive of readers could figure out who did what to whom."[6] And, *Karabajakyan v. Schwarzenegger*, No. CV06-0541-ODW (SSX), 2007 WL 9706273, at *3 (C.D. Cal. June 1, 2007), *aff'd*, 377 F. App'x 647 (9th Cir. 2010), the court stated with respect to the plaintiff's 139-page complaint and over 2,300 pages of attached exhibits that attempting to discern the plaintiff's allegations and to which defendants they were attributed was "an exhausting, if not almost impossible, exercise."

Here, there is only one defendant, and everything is being pled against that defendant:

[6] Further distinguishing *Mann* from the present case is its observation that, there, it was impossible to "separate the wheat from the chaff" in the complaint, a very different situation than we have here. *See also Wynder v. McMahon*, 360 F.3d 73, 80 (2d Cir. 2004) (district court erred in dismissing on Rule 8 grounds when the complaint, though long, was not "so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised" (internal quotation omitted)).

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Los Angeles, California 90071-2627

AFM.[7]

Distilling all of this, the issue is, as AFM quotes from *McHenry*, whether the defendant has "a fair opportunity to frame a responsive pleading." (Dkt. No. 13 at 8:17-19). Here, AFM certainly does. Unlike the cases AFM cites, there can be no legitimate argument that Out West has failed to comply with Federal Rule 8(a) or that AFM is unaware of the claims it is facing.

3. AFM's Fixation on Numbers and Proposed Draconian Limitations – What Are the Facts?

AFM repeatedly talks in terms of numbers – whether it be with regard to the number of pages or paragraphs in the Complaint, the number of exhibits, or the number of footnotes.

AFM complains about the length of the complaint (36 pages) and the number of paragraphs (194). However, the Complaint seeks coverage for nearly 100 insured locations under 9 of the 50 coverage parts. Rather than make "an unadorned, the-defendant-unlawfully-harmed-me accusation" of the type criticized in *Iqbal*, Out West provides factual and scientific evidence showing how COVID-19 can cause loss or damage and how and why Out West actually sustained it here. And, rather than ignore the exclusions AFM raised in their denial letter, Out West clearly and concisely explains why they do not apply. None of this should come as news to a party which is litigating these issues in cases around the country, and requiring an answer would not present an undue burden or hardship.

Among their most egregious positions, and one which vividly demonstrates their bad faith, AFM complains about the number of pages of exhibits (124 pages), professing that reviewing these would present a horrific hardship. They conveniently fail to mention that AFM wrote 112 of those 124 pages itself – it presumably should be able to confirm what it wrote. This is not *ipse dixit* on our part – the 112 pages include:

- The Policy AFM drafted, and which Out West sues on is 83 of those pages (*see*

[7] AFM also cites a 2013 ruling in *Todd v. Ellis*, 2:13-CV-1016 TLN KJN, 2013 WL 3242229, at *1 (E.D. Cal. June 25, 2013), on a Motion to Dismiss (Dkt. No. 13 at 15:15), which dismissed the complaint, but permitted leave to amend, for the proposition that lengthy preambles and the like are inappropriate. That case, concerning a pro se plaintiff's 256-page complaint and 1,122 pages of exhibits is clearly not applicable here.

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550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

Policy provided at Dkt. No. 1-1). (Contracts are routinely appended to complaints and failure to do so can elicit its own motion to dismiss.)

- The AFM Talking Points Memo AFM drafted for its adjusters is 2 pages instructing them to deny all COVID-19 claims (*see* Dkt. No. 1-2). (This is evidence that their protestations to one side, they know full well what the issues are.)
- AFM's denial letter to Out West is 7 pages (Dkt. No. 1-3). Same here.
- The relevant portions of AFM's 200+ page regulatory filing included in the exhibit consist of 20 pages (see Dkt. No. 1-6).

Since AFM created these documents, they necessarily are familiar with them and cannot present any burden.[8]

AFM complains about the number of footnotes, and citations to representative sources of the factual allegations set forth in the Complaint. Out West provides this information consistent with the *Iqbal* obligation to provide "sufficient factual matter" (see *supra*) so that AFM would know the source of those allegations (or at least not credibly disavow knowledge), and enable the parties to avoid motion practice concerning the basis for various assertions. The cited sources are relevant to the issues in this case. And they are not controversial – they include, for example,

- References to CDC and WHO publications explaining what COVID-19 is (fns. 4-5, 14);
- News articles evidencing the presence of COVID-19 in the vicinity of insured locations at the time AFM issued the Policy without a virus or pandemic exclusion (fns. 6-7, 9-13, 16-18);
- AFM's own published admissions about coverage (fns. 8, 15, 19-20, 38-39);

[8] The other two exhibits consist of (1) a 9-page chart that lists a sampling of the relevant portions of certain civil authority orders that Out West contends trigger the Policy's Civil Authority coverage grant; and (2) the California Insurance Commissioner's April 14, 2020, 3-page Notice to all admitted and non-admitted insurance companies concerning the fair investigation of business interruption claims caused by the COVID-19 pandemic.

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Los Angeles, California 90071-2627

- Scientific journals and articles concerning how COVID-19 spreads and how it impacts property (fns. 22-28); and
- Local government websites and articles detailing the presence of COVID-19 on-site at "attraction properties" so as to meet the requirements of the Policy's coverage for "attraction properties" (a property like Disneyland that "attracts business to" and is within one mile from an Insured Location, but that suffers loss or damage to property so as to impact the Insured Location) (fns. 29-37).

4. AFM Has Answered Similar Allegations in Other Cases

While AFM represents it would be burdensome to review these and other sources for accuracy, their actual practice belies their representation. In other COVID-19 insurance cases, rather than move to dismiss claiming burden, AFM has answered numerous complaints presenting many of the same allegations, routinely denying them or stating that the documents speak for themselves.

One example is Treasure Island's complaint against AFM (DeVries Decl. Ex. 1) which makes similar allegations as to COVID-19 and its impact on property, including citation to some of the same sources cited in the Out West Complaint. AFM did not move to dismiss. Instead, its counsel – the same counsel representing AFM in this case – filed an answer responding to each of the paragraphs and asserted 12 affirmative defenses. (DeVries Decl. Ex. 2).

Out West respectfully requests the Court take judicial notice of both filings (DeVries Decl. Exs. 1 and 2). Fed. R. Evid. 201(b)(2) permits the Court to take judicial notice of certain facts, including court records in other cases. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases").[9] Here, Out West does not seek judicial notice of

[9] *See also Reyn's Pasta Bella, LLC v. Visa USA, Inc.,* 442 F.3d 741, 746 n. 6 (9th Cir. 2006) (granting judicial notice of several pleadings, memoranda, and expert reports filed in a separate case in the Eastern District of New York); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank,* 136 F.3d 1360, 1364 (9th Cir. 1998) (same); *Petrovich v. Ocwen Loan Servicing, LLC*, 15-CV-00033-EMC, 2016 WL 555959, at *4 (N.D. Cal. Feb. 12, 2016), *aff'd*, 716 Fed. App'x 614 (9th Cir. 2017) (granting plaintiffs' request for judicial notice of a declaration filed in a separate case in federal

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the truth facts alleged, but rather requests the Court take judicial notice that (1) the Treasure Island complaint made similar or the same allegations as Out West did here, as further discussed below; and (2) AFM answered those allegations as set forth below.

The following illustrative examples of their positions vividly demonstrate how AFM's own practice eviscerates their claims of burden here:

- AFM complains it would be burdensome to answer Out West's allegations regarding how COVID-19 spreads by air, which cite to reputable news sources and the CDC (Dkt. No. 13 at 12:17-24). But, when Treasure Island made similar allegations in its complaint (*compare* Dkt. 1 at ¶¶ 71, 73, 74 *and* Ex. 1 at ¶¶ 19, 20), AFM answered that these allegations "purport to characterize the content of a document that speaks for itself," and "[t]o the extent a response is required, AFM is informed and believes that based on current science the allegations . . . are true" (Ex. 2 at ¶¶ 19, 20).
- AFM complains it would be burdensome to answer Out West's allegations, and its citation to the World Health Organization ("WHO"), that COVID-19 can spread through surface- or object-to-person transmission (Dkt. No. 13 at 13:4-13). But when Treasure Island made virtually identical allegations citing the same sources (*compare* Dkt. 1 at ¶¶ 76, 79 *and* Ex. 1 at ¶¶ 19, 22), AFM answered that such allegations "purport to characterize the content of a document that speaks for itself," and that, "[t]o the extent a response is required, AFM is informed and believes that based on current science the allegations . . . are true" (Ex. 2 at ¶¶ 19, 22).
- AFM complains it would be burdensome to answer Out West's allegations based on a WHO report that COVID-19 spreads through pre-symptomatic individuals (Dkt. No. 13 at 13:19-14:2). But when Treasure Island made the same allegation, based on the same WHO report (*compare* Dkt. 1 at ¶¶ 87, 88 *and* Ex. 1 at ¶¶ 18,

bankruptcy court in Louisiana, explaining the declaration "is judicially noticeable because a court may take judicial notice of court records in another case.").

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22), AFM answered that these allegations "purport to characterize the content of a document that speaks for itself," and that, "[t]o the extent a response is required, AFM is informed and believes that based on current science the allegations . . . are true" (Ex. 2 at ¶¶ 18, 22).

- AFM disputes Out West's allegations that COVID-19 causes physical loss or damage to property – one of the core issues of this dispute (Dkt. No. 13 at 12:17-19). But when Treasure Island made virtually the same allegations (Dkt. 1 at ¶¶ 3, 57, 70-79, 81, 86-91, 94 *and* Ex. 1 at ¶¶ 45, 51, 58, 60, 68, 132, 142, 152), AFM simply denied the allegations (Ex. 2 at ¶¶ 45, 51, 58, 60, 68, 132, 142, 152).

AFM fails to offer any reason (nor can it) why, despite AFM's ability to understand and answer similar allegations in Treasure Island's complaint and in other actions, Out West's Complaint is somehow uniquely difficult to answer.[10]

5. AFM Fails to Meet its Burden to Strike under Rule 12(f)

AFM asserts various allegations are redundant, immaterial or impertinent, providing a few examples and general categories with some weaving back and forth and overlapping. (Dkt. No. 13 at 11:14-15:13).

But their assertions notwithstanding, the referenced allegations in the Complaint very much bear on the claims asserted. For example:

- AFM asserts some allegations concerning Out West's operations, reputation and mode of doing business are irrelevant. (Dkt. No. 13 at 11:23-12:3, 14:10-13.)
  - But COVID-19 and/or the ensuing governmental orders have deprived Out West of the ability to serve "high quality delicious food" in "a warm,

[10] Further, AFM disputes allegations characterizing Out West's business reputation and operations (Dkt. No. 13 at 11-12). But, Treasure Island made similar allegations describing its business, and AFM simply answered it lacked information and belief (Ex. 1 at ¶ 8; Ex. 2 at ¶ 8). And, while AFM disputes Out West's allegations that the Policy does not contain a communicable disease exclusion (Dkt. No. 13 at 15:1-3), it simply denied the same allegations by Treasure Island (*compare* Dkt. 1 at ¶¶ 46, 55, 129, 147, 163(2), 169 *and* Ex. 1 at ¶¶ 68, 73-75, 128(b), 133, 143, 153 *with* Ex. 2 at ¶¶ 68, 73-75, 128(b), 133, 143, 153).

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welcoming environment," which has damaged Out West's entire business, causing it to suffer substantial losses.[11]

- AFM complains about paragraphs addressing COVID-19, and about Out West providing its legal position regarding the scope of coverage for, and actual existence of, covered "loss or damage" (Dkt. No. 13 at 12:4-14:2, 14:13-19, 15:1-7).
  - But, like many cases being litigated throughout the country, the core issue in this case involves whether, under a reasonable construction of the Policy, Out West's loss and/or damage is covered.
- AFM complains about Out West's pleading as respects AFM's Policy exclusions. (Dkt. No. 13 at 15:1-3, 7-8.)
  - However, AFM's denial letter states it is denying coverage on the basis of various exclusions.
- AFM complains that the inclusion of AFM's own regulatory filings, Insurance Code 790.03(h), various California Insurance regulations, and a Notice from the California Insurance Commissioner constitute "improper legal arguments." (Dkt. No. 13 at 15:4-11.)
  - These allegations are not "arguments" – they are factual allegations of the laws at issue, which are commonly the subject of judicial notice under Federal Rule of Evidence 201.[12] We trust the concept that it would be burdensome for AFM to understand its legal obligations or what it has

[11] In fact, AFM insured (and collected premiums from) Out West based on the nature of its entire business, including in-restaurant dining and in-restaurant bars, much of which it obviously cannot use.

[12] Also, the Unfair Competition Law (Cal. Bus. & Prof. Code, §§ 17200, *et seq*.) (the "UCL") requires the plaintiff to plead a number of the allegations that Out West has made in its Complaint: (1) a predicate violation, and (2) an accompanying economic injury caused by the violation. *Shelton v. Ocwen Loan Servicing, LLC*, No. 18-CV-02467-AJB-WVG, 2019 WL 4747669, at *10 (S.D. Cal. Sept. 30, 2019). This is because the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Alvarez v. Chevron Corp*., 656 F.3d 925, 933 n.8 (9th Cir. 2011) (citation omitted).

told regulators requires no comment.

- AFM complains about reference to Disneyland and several other sites discussed in Para. 115. (Dkt. No. 13 at 14:3-6.)
  - But, what AFM does not say is that one of the coverage parts in the Policy is for "attraction properties" (see explanation of this coverage *supra* at p. 12). Out West is seeking coverage under this coverage part and we cite examples of those locations which trigger this coverage; and, in the associated footnotes, we provide explanatory detail about what occurred at these properties so as to trigger coverage.
- AFM attacks certain allegations that demonstrate its knowledge of COVID-19 when it sold the Policy to Out West, a policy which did not include any pandemic or COVID-19 exclusion. (Dkt. No. 13 at 12:12-16, 15:2-8.)
  - These allegations are material to show that Out West reasonably did not expect that AFM would deny coverage for Out West's COVID-19 related losses when it purchased the Policy from AFM.

A number of the challenged allegations concern the reasonable construction of the Policy terms at issue (Dkt. No. 13 at 15:1-7), the significance of the absence of a standard form Virus Exclusion – especially in a policy issued after awareness of COVID-19 (Dkt. No. 13 at 12:4-16), how acceptance by other courts of policyholder's construction of the salient policy language renders that construction reasonable *per se* (Dkt. No. 13 at 11:14-22), all of which are relevant here. In particular, AFM attacks certain allegations that demonstrate its knowledge of COVID-19 when it sold the Policy to Out West, a policy which did not include any pandemic or COVID-19 exclusion. (Dkt. No. 13 at 12:12-16, 15:2-8.) These allegations are material to show that Out West reasonably did not expect that AFM would deny coverage for Out West's COVID-19 related losses when it purchased the Policy from AFM.

At its crux, AFM is making an argument at the pleading stage that is rarely heard – that it knows too much about Out West's claim. While their position should facilitate the Court setting an expedited discovery schedule and trial date, it is not a legitimate basis for seeking

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dismissal and/or striking of a coherent, clear and well-organized complaint, which fully places AFM on notice of the claims against it.

C. AFM's Requested Relief is Unwarranted

1. The "Extreme Sanction" of Dismissal under Rule 41(b) Would Be Wholly Unwarranted

Involuntary dismissal under Rule 41(b) for failure to comply with the Federal Rules of Civil Procedure or court orders "is an extreme sanction which is appropriate only in cases of willful misconduct." *Mobley v. McCormick*, 160 F.R.D. 599, 601 (D. Colo.), *aff'd*, 69 F.3d 548 (10th Cir. 1995). The issue of whether involuntary dismissal is appropriate should be based on a number of factors, such as, "delay to the proceedings caused by the plaintiff, whether the plaintiff was on notice that the case would be involuntarily dismissed for failure to comply with procedural rules or a court order, prejudice caused to the defendant, judicial economy, and whether any less extreme measure may effect compliance." *Hopkins v. JP Morgan Chase Bank, N.A.*, No. 6:12-CV-1743-ORL-40KRS, 2014 WL 3747314, at *2 (M.D. Fla. July 29, 2014), *aff'd sub nom. Hopkins v. JPMorgan Chase & Co.*, 620 F. App'x 880 (11th Cir. 2015).

Out West has not failed to comply, much less done so willfully and repeatedly, with the pleading standards required under the Federal Rules or any order of this Court. *See Hearns*, 530 F.3d at 1132-33. AFM's request for the extreme sanction of involuntary dismissal of the Complaint under Rule 41(b) is wholly unwarranted.

2. Out West's Allegations Are Appropriate and Should Not Be Stricken under Rule 12(f)

Similarly, AFM has failed to meet its high burden of demonstrating that the Complaint should be stricken under Rule 12(f). *See, e.g.*, *Lipsky*, 551 F.2d at 893 (a motion to strike on grounds that allegations are impertinent or immaterial "will be denied, unless it can be shown that *no evidence in support of the allegation would be admissible.*"). Indeed, in this Circuit, "motions to strike are generally disfavored." *Peralta v. Countrywide Home Loans, Inc.*, No. C 09-3288 PJH, 2009 WL 3837235, at *2 (N.D. Cal. Nov. 16, 2009) (collecting authority).

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As the Second Circuit explained in *Lipsky*, 551 F.2d at 893:

> The Federal Rules of Civil Procedure have long departed from the era when lawyers were bedeviled by intricate pleading rules and when lawsuits were won or lost on the pleadings alone. Thus the courts should not tamper with the pleadings unless there is a strong reason for so doing.
>
> Evidentiary questions, such as the one present in this case, should especially be avoided at such a preliminary stage of the proceedings. Usually the questions of relevancy and admissibility in general require the context of an ongoing and unfolding trial in which to be properly decided. And ordinarily neither a district court nor an appellate court should decide to strike a portion of the complaint on the grounds that the material could not possibly be relevant on the sterile field of the pleadings alone.

District courts in California follow the *Lipsky* rationale. For example, citing to *Lipsky*, the court in *Levine v. Diamanthuset, Inc*., No. C-87-5663 MHP, 1989 WL 384853, at *6 (N.D. Cal. Oct. 23, 1989), stated that "*Rule 12(f) must be construed strictly against striking portions of a complaint*." *See also Tidwell v. Cty. of Kern*, No. 1:16-CV-01697 JLT, 2017 WL 68146, at *1 (E.D. Cal. Jan. 5, 2017) ("To evaluate whether material should be stricken as impertinent and immaterial, the Court must consider whether there is 'no evidence in support of the allegation would be admissible.'"); *Bassiri v. Xerox Corp.,* 292 F. Supp. 2d 1212, 1220 (C.D. Cal. 2003) (courts must view the pleading under attack in the light most favorable to the pleader); *Thornton v. SolutionOne Cleaning Concepts*, CIV F 06-1455 AWI SMS (2007) (cited by AFM at Dkt. No. 13 at 9-10) ("Motions to strike are generally viewed with disfavor and are not frequently granted.") As is apparent, none of the bases for AFM's motion to strike – all of which are evidentiary objections (*see, e.g., Sidney-Vinstein v. A.H. Robins Co*., 697 F.2d 880 (9th Cir. 1983), which AFM cites at Dkt. No. 13 at 9) – are proper grounds for granting AFM's motion.

AFM's motion is grounded on the misguided notion it should be able to dictate what a plaintiff does and does not say in its complaint. This simply is not the case. As the court made clear in *Barnes v. A. Sind & Associates,* 32 F.R.D. 39, 40 (D. Md. 1963):

> [S]hort of abuse or practical impropriety, a reasonable latitude should

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> be allowed to a pleader in the statement of his claim or defense; and that not every dubious or errant phrase in a pleading should be eradicated from it to suit the taste of a critical adversary. In practice, what matters is not alone whether the phrase is immaterial, but whether its presence, if it be immaterial, is calculated to be harmful.(internal citations omitted).

AFM cannot come close to satisfying its heavy burden on this or any of the issues discussed herein and its motion should be denied.

D. Out West Has Provided a Sufficiently Definite Statement,

Finally, AFM argues in the alternative that it needs a more definite statement of the case (Dkt. No. 13 at 16), ostensibly because it does not understand what the case is about. To warrant a more definite statement, the Complaint must be "so vague or ambiguous that [AFM] cannot reasonably prepare a response." Rule 12(e). Motions for a more definite statement "are viewed with disfavor." *Austin*, 2015 WL 3833239, at *4 (quoting *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1077 (C.D. Cal. 1994)).

AFM's assertion that the Complaint is so vague or ambiguous to warrant a more definite statement is belied by AFM's contention that this coverage dispute is "relatively straightforward and could reasonably be described in less than 40 paragraphs." (Dkt. No. 13 at 2:15-16.) And as explained above, AFM is well familiar with the issues that this dispute concerns. Even if one ignored the fact that AFM is contesting its coverage obligations in a large number of cases around the country, before Out West filed the Complaint, AFM had the benefit of an exchange of detailed coverage letters with Out West, in which Out West presented the issues that are alleged in the Complaint and requested AFM honor its coverage obligations under the Policy. And, even before that exchange of correspondence, AFM had developed talking points for denying policyholder claims for insurance coverage relating to COVID-19. (*See* Dkt. No. 1-2).

V. CONCLUSION

AFM is fully aware of the claims being made against it in this case. It knows this from the Complaint, which fairly apprises AFM of the claims against it. And, it knows this from the litigation playing out around the country where it is fighting off claims of a

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multitude of other policyholders. Out West respectfully requests that the Court deny the Motion and require AFM to answer consistent with its obligations under the Federal Rules and representations to this Court, so that the Court and counsel can get down to business.

Dated: October 30, 2020

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