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16 *Attorneys for Plaintiff and the Putative Class*

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 18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN JOSE DIVISION

21 MARA BERTON, on behalf of herself and
22 all others similarly situated,

23 Plaintiff,

24 v.

25 AETNA INC. and AETNA LIFE
26 INSURANCE COMPANY,

27 Defendants.
28

CASE NO.: 5:23-cv-01849-NC

**NOTICE OF PENDENCY OF OTHER
ACTIONS OR PROCEEDINGS**

Civ. L.R. 3-13

1 Plaintiff Mara Berton hereby submits this Notice of Pendency of Other Actions pursuant
2 to Civil Local Rule 3-13 to give notice of two other actions involving similar subject matter and
3 defendants currently pending in other federal courts: *Goidel et al. v. Aetna Life Insurance*
4 *Company* (“*Goidel*”), Case No. 1:21-cv-07619-VSB-VF, filed on September 13, 2021, in the
5 United States District Court for the Southern District of New York and *Kulwicki v. Aetna Life*
6 *Insurance Company* (“*Kulwicki*”), Case No. 3:22-cv-00229-RNC, filed on February 9, 2022, in
7 the United States District Court for the District of Connecticut.

8 I. THIS ACTION

9 In this case, Plaintiff Berton, who at all times relevant to this action has lived in
10 California, challenges Aetna’s Infertility Policy, alleging that the policy discriminates against
11 individuals who wish to become pregnant but cannot because of their sexual orientation or
12 gender identity or that of their partner, in violation of Section 1557 of the Patient Protection and
13 Affordable Care Act (“ACA”), which prohibits discrimination on the basis of sex in health
14 programs and applies to all Aetna health plans. Plaintiff Berton brings this action on behalf of
15 herself and other similarly-situated members of Aetna’s health plans in California pursuant to
16 F.R.C.P. 23(b)(3) for damages (specifically the out-of-pocket and other compensable damages
17 she and others have suffered as a result of Aetna’s discriminatory policy), and on behalf of
18 herself and others nationwide pursuant to F.R.C.P. 23 (b)(2) for injunctive relief enjoining the
19 discriminatory use of this Policy by Aetna in any of its health plans.

20 II. DESCRIPTION OF THE OTHER ACTIONS

21 There are two other cases in federal courts of which Plaintiff is aware that also involve
22 the Aetna Infertility Policy challenged here.

23 A. *Goidel*, which is pending against Defendant Aetna Life Insurance Company in the
24 United States District Court for the Southern District of New York, is a putative class action on
25 behalf of a class of New York individuals who have suffered discrimination as a result of
26 Aetna’s Infertility Policy, seeking New York-wide injunctive relief and damages on behalf of
27 that class. The *Goidel* plaintiffs allege that Aetna’s policy violates Section 1557 of the ACA as

1 well as N.Y. Exec. Law § 296(2)(a) and N.Y.C. Admin. Code § 8-107(4). Attached as **Exhibit A**
2 is a copy of the operative First Amended Complaint in *Goidel*.

3 *Goidel* was filed on September 13, 2021, and defendant filed an answer on February 11,
4 2022. No pleadings motions were filed, and the case is in discovery. No class has been certified
5 in *Goidel*.

6 With respect to the parties, there is no overlap in plaintiffs between the cases, and there is
7 overlap with respect to Defendant Aetna Life Insurance Company. With respect to the proposed
8 classes, the California and New York damages classes are entirely distinct and have no overlap.
9 There may be overlap with respect to the injunctive classes, as this case seeks a nationwide
10 injunction and *Goidel* seeks a New York-specific injunction, but that overlap may also be
11 avoided at class certification if needed by modifying the scope of the class.

12 Transfer of this action pursuant to 28 U.S.C. § 1407 for Multi District Litigation is
13 neither necessary nor warranted to avoid conflicts, conserve resources or promote an efficient
14 determination of this case, given the differences in plaintiffs, the distinct damages classes, the
15 ability to address any potential overlap in injunctive relief at class certification as needed, and the
16 distinct New York state law claims at issue in *Goidel*. Given the difference in procedural posture,
17 Plaintiff does not believe that other coordination, such as adjustment of scheduling, is necessary
18 at this time.

19 B. *Kulwicki*, filed on February 9, 2022, in the United States District Court for the District
20 of Connecticut, currently involves a claim for declaratory relief and damages, challenging
21 Aetna's Infertility Policy under Section 1557 of the ACA. The plaintiff in *Kulwicki* does not
22 seek any injunctive relief. *See* the Amended Complaint attached as **Exhibit B**.

23 Defendant has filed a Motion to Dismiss under Rule 12(b)(7) and Rule 12(b)(1) raising
24 lack of standing and other plaintiff-specific issues, arguing among other things that the sole
25 plaintiff was allegedly no longer a member of an Aetna plan at the time the complaint was filed.
26 Defendant's motion to dismiss has been fully briefed since July 15, 2022, and is scheduled for
27

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EMMA GOIDEL, ILANA LEE, MADELEINE
LEE, and LESLEY BROWN, on behalf of
themselves and all others similarly situated,

Plaintiffs,

-against-

AETNA INC.;

Defendant.

Case No. 1:21-cv-07619 (VSB)

CLASS ACTION

**FIRST AMENDED
COMPLAINT**

1. Plaintiffs Emma Goidel, Ilana Lee, Madeleine Lee, and Lesley Brown, by and through their attorneys, Emery Celli Brinckerhoff Abady Ward & Maazel LLP and the National Women’s Law Center, on behalf of themselves and others similarly situated, for their First Amended Complaint allege, upon personal knowledge as to themselves and information and belief as to other matters, as follows:

PRELIMINARY STATEMENT

2. This class action challenges Aetna’s discriminatory health insurance policy that, on its face, engages in sex discrimination by denying LGBTQ (lesbian, gay, bisexual, transgender, queer, intersex, or non-binary) individuals equal access to fertility treatment.

3. Plaintiffs, like many LGBTQ individuals, want to have children. And, like many LGBTQ individuals, they cannot conceive through intercourse with their partners and can become pregnant only through fertility treatments such as intrauterine insemination (“IUI”) and in vitro fertilization (“IVF”).

4. Plaintiffs are all enrolled in Aetna insurance plans in New York, each of which provides broad coverage for IUI and IVF.

5. Aetna interprets all of Plaintiffs’ plans by reference to its own internal policy documents, including Clinical Policy Bulletin No. 0327—Infertility (the “CPB”). This CPB provides that infertility treatment shall be covered under Plaintiffs’ plans without any out-of-pocket cost to individuals based on their representation that they have not gotten pregnant after having unprotected sex for 6 or 12 months, depending on their age.

6. But Aetna’s CPB requires individuals who cannot conceive through intercourse due to their sexual orientation or gender identity to pay *out of pocket* for 6 or 12 cycles of IUI *before* Aetna will provide them with coverage for fertility treatments.

7. Aetna relied on this discriminatory CPB to deny coverage for each Plaintiff who sought fertility treatments.

8. Because of Aetna’s discriminatory system, Plaintiffs and all other similarly situated LGBTQ individuals have been forced to pay tens of thousands of dollars out of pocket—in Emma Goidel’s case, for example, nearly \$45,000 for one successful pregnancy—that others are not required to pay in order to become pregnant.

9. Aetna’s CPB language openly discriminates against Plaintiffs and other LGBTQ individuals based on their sexual orientation and gender identity and violates their rights under Section 1557 of the Patient Protection and Affordable Care Act (“ACA”), Section 296(2)(a) of the New York State Human Rights Law (“NYSHRL”), and Section 8-107(4) of the New York City Human Rights Law (“NYCHRL”).

10. Aetna’s discriminatory guidelines exact an illegal tax on LGBTQ individuals and denies them their equal rights to have children.

11. At best, these individuals incur great costs due to Aetna’s discrimination.

12. At worst, these exorbitant costs are prohibitive and entirely prevent people who are unable to shoulder them—disproportionately LGBTQ people of color—from becoming pregnant and starting a family.

13. In addition to financial injury, Aetna’s Policy has caused Plaintiffs and other LGBTQ individuals to suffer significant physical and emotional harm.

14. Aetna’s discrimination is deliberate. It has continued to enforce this discriminatory policy against Plaintiffs and other LGBTQ individuals despite the passage of Section 1557, despite the clear definition of sex discrimination under federal and state law to include LGBTQ individuals, and despite being specifically informed by the New York State agency that regulates Aetna and other health insurance issuers that such health insurance policies constitute illegal discrimination on the basis of gender identity and sexual orientation.

15. Plaintiffs bring this case now, on behalf of themselves and all others who are unable to conceive through intercourse due to their sexual orientation or gender identity, to end Aetna’s willful disregard of federal and state nondiscrimination law by prohibiting Aetna from implementing and enforcing this discriminatory policy in its New York health plans.

JURISDICTION AND VENUE

16. This Court has jurisdiction under 28 U.S.C. § 1331. This action arises under 42 U.S.C. § 18116(a).

17. This Court has supplemental jurisdiction over the pendent state and city law claims under 28 U.S.C. § 1367(a).

18. A substantial part of the acts complained of occurred in the Southern District of New York, and venue is lodged in this Court under 28 U.S.C. § 1391(b).

THE PARTIES

19. Plaintiff **EMMA GOIDEL** is a 31-year-old woman. At all relevant times, Emma has been a resident of New York State, and she has been enrolled in the Columbia University student health plan supplied and administered by Aetna, Inc. (“Aetna”).

20. Plaintiff **ILANA LEE** is a 37-year-old woman and a resident of New York State. Ilana is married to Plaintiff Madeleine Lee.

21. Plaintiff **MADELEINE LEE** is a 30-year-old woman and is a resident of New York State. Madeleine is married to Plaintiff Ilana Lee.

22. At all relevant times, Ilana and Madeleine Lee have been enrolled in an employer fully-insured Aetna health plan.

23. Plaintiff **LESLEY BROWN** is a 32-year-old woman and is a resident of New York State. At all relevant times, Lesley has been enrolled in an employer self-insured health plan administered by Aetna.

24. Defendant **AETNA** is a company incorporated under the laws of the State of Connecticut and whose principal place of business is in Hartford, Connecticut. Aetna is an insurance provider that supplies and administers health insurance plans for educational institutions, employers, and individuals in New York State. Aetna operates its business throughout the United States, including in New York State.

25. Aetna receives federal financial assistance, including through credits, subsidies, and/or contracts of insurance. For example, Aetna provides coverage of medical services in exchange for payments through Medicaid.

26. At all relevant times, Aetna has provided and administered student health plans for all Columbia University students, spouses, and dependents who choose to enroll in health insurance through the university, throughout all Columbia University schools. Aetna also

provides and administers student health plans for numerous other colleges and universities in the State of New York.

27. At all relevant times, Aetna has supplied and administered fully-insured health plans to numerous employers throughout State of New York. Aetna has also administered self-insured health plans for numerous employers throughout the State of New York.

FACTUAL ALLEGATIONS

I. Aetna's Discriminatory Clinical Policy Bulletin

28. Aetna maintains documents called "Clinical Policy Bulletins" on which Aetna bases its coverage decisions, along with benefit plan documents.

29. Aetna maintains a bulletin specifically to govern coverage of individuals' fertility treatments¹: Clinical Policy Bulletin No. 0327—Infertility (the "CPB").²

30. The CPB states:

For purposes of this policy, a member is considered infertile if he or she is unable to conceive or produce conception after 1 year of *frequent, unprotected heterosexual sexual intercourse*, or 6 months of *frequent, unprotected heterosexual sexual intercourse* if the female partner is 35 years of age or older. *Alternately, a woman without a male partner* may be considered infertile if she is unable to conceive or produce conception after *at least 12 cycles of donor insemination* (6 cycles for women 35 years of age or older).

31. This means that, under an Aetna health plan that provides coverage for fertility treatments, there are only two ways to meet Aetna's definition of infertility for those under age 35: engaging in (1) "1 year of frequent, unprotected heterosexual sexual intercourse"

¹ For purposes of this complaint, the terms "fertility" services or treatment and "infertility" services or treatment will be used interchangeably. Plaintiffs seek equal access to services that will enable them to get pregnant, which they will refer to as fertility services or treatments, but those services are defined by Aetna to be "infertility" services or treatments as part of its "infertility program."

² Aetna, Infertility, Clinical Policy Bulletin No. 0327 (last revised Oct. 4, 2021), http://www.aetna.com/cpb/medical/data/300_399/0327.html.

or (2) 12 cycles of “donor insemination” (e.g., intrauterine insemination, or “IUI”³). For those age 35 and over, the same conditions apply, but the number of months or cycles required is reduced to 6.

32. Under the CPB, an individual who has the capacity to become pregnant through sexual intercourse with their partner can demonstrate infertility by simply representing to Aetna that they have had 12 or 6 months, depending on their age, of “frequent, unprotected heterosexual sexual intercourse” without a pregnancy.

33. Aetna imposes no out-of-pocket cost for such individuals to meet Aetna’s definition of infertility.

34. But for Plaintiffs and other LGBTQ individuals, the only way to meet Aetna’s definition of infertility is to pay out-of-pocket for 12 or 6 months of donor insemination.

35. Aetna therefore imposes significant out-of-pocket costs on LGBTQ individuals that it does not impose on others before allowing LGBTQ individuals to qualify for Aetna’s insurance coverage for fertility treatment.

36. Aetna engages in this discriminatory conduct despite longstanding prohibitions against discrimination on the basis of sex in the New York Insurance Law. Under N.Y. Ins. Law § 3243(a)(1), for example, “no insurer shall because of sex . . . make any distinction or discrimination between persons . . . in any [] manner whatever.” And under N.Y. Ins. Law § 3221(k)(6)(C)(viii), “[n]o insurer providing coverage” for IVF as required in large group plans in New York “shall discriminate based on . . . sex, sexual orientation, . . . or gender identity.”

³ Intrauterine insemination (“IUI”) “is a procedure that places sperm past the cervix and in a woman’s uterus around the time of ovulation.” *Intrauterine Insemination (IUI)*, Am. Soc’y for Reprod. Med., <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/intrauterine-insemination-iui/> (last revised 2016).

II. Aetna Discriminates against Plaintiff Emma Goidel

A. Emma is enrolled in Aetna's Columbia Policy

37. Since May of 2019, Emma and her spouse have been enrolled in Aetna's health plan for Columbia University ("Columbia Policy").⁴

38. At all relevant times, Emma's spouse has been a Columbia University student, and Emma has been enrolled under the Columbia Policy as her spouse's dependent.

39. Under the Columbia Policy, Aetna covers "services for the diagnosis and treatment (surgical and medical) of infertility" for enrollees between the ages of 21 and 44 (inclusive).

40. "Infertility" is defined under the Columbia Policy as:

a disease or condition characterized by the incapacity to impregnate another person or to conceive, defined by the failure to establish a clinical pregnancy *after 12 months of regular, unprotected sexual intercourse or therapeutic donor insemination*, or after six (6) months of regular, unprotected sexual intercourse or therapeutic donor insemination for a female 35 years of age or older.

41. The Columbia Policy states further that "[e]arlier evaluation and treatment may be warranted based on a Member's medical history or physical findings."

42. Once a member qualifies for coverage under the Columbia Policy, Aetna covers "basic infertility services," which include fertility testing and evaluation.

⁴ See Aetna, Aetna Student Health Plan Design and Benefits Summary: Columbia University, Policy No. 704502 (Policy Year 2020–2021), <https://www.aetnastudenthealth.com/schools/columbia/pdfs2021.pdf> (last visited Nov. 3, 2021).

43. Under the Columbia Policy, Aetna also covers “comprehensive infertility services,” including artificial insemination,⁵ and “advanced infertility services,” including “[t]hree (3) cycles per lifetime of in vitro fertilization,”⁶ for those who demonstrate “infertility.”

B. As a Same-Sex Couple, Emma and Her Partner Need Fertility Treatments to Become Pregnant and Have Their First Child.

44. Emma and her partner have long planned for a family with a total of four children.

45. Because Emma cannot conceive through sexual intercourse with her partner, she requires fertility treatments, specifically IUI and/or IVF, to get pregnant for all their children.

46. In 2018, Emma and her spouse decided to start their family.

47. Emma and her partner were not covered by Aetna’s Policy at that time.

48. As a result of fertility treatments they obtained, Emma successfully became pregnant and gave birth to their first child in the summer of 2019.

C. Aetna Repeatedly Denies Coverage to Emma for Her Second Pregnancy Based on Its Discriminatory Policy.

49. Since May of 2019, Emma and her partner have been covered by Aetna’s Columbia Policy, and they will remain enrolled in the Columbia Policy until at least December 2022.

50. In 2020, Emma and her spouse decided to start pursuing fertility treatments for Emma to become pregnant again and have their second child.

⁵ “Artificial insemination” includes “intra-uterine insemination [IUI].” Aetna, Infertility, Clinical Policy Bulletin No. 0327 at Sec. IV.A. (last reviewed Oct. 4, 2021), http://www.aetna.com/cpb/medical/data/300_399/0327.html

⁶ In vitro fertilization (“IVF”) is “method of assisted reproduction that involves combining an egg with sperm in a laboratory dish. If the egg fertilizes and begins cell division, the resulting embryo is transferred into the woman’s uterus where it will hopefully implant in the uterine lining and further develop.” *In Vitro Fertilization (IVF)*, Am. Soc’y for Reprod. Med., <https://www.reproductivefacts.org/topics/topics-index/in-vitro-fertilization-ivf/> (last visited Aug. 17, 2021).

51. In September 2020, in advance of attempting any IUI cycles, Emma's doctor submitted a claim to Aetna for preauthorization for six cycles of IUI.

52. A representative from Aetna called Emma to determine her eligibility for enrollment in the infertility program.

53. On September 21, 2020, Aetna formally denied Emma's enrollment in the infertility program and refused to cover her IUIs.

54. Aetna's denial letter stated that its denial decision was based on the CPB: "Based on CPB criteria and the information we have, enrollment in the infertility program is denied" because "[y]ou do not meet any of the following criteria: unable to get pregnant after egg and sperm contact by either: (1) frequent, unprotected sex or (2) *donor insemination if there is no male partner* for at least (a) one year at any age, or (b) six months if older than 35."

55. As a result of Aetna's discriminatory denial of coverage, Emma and her partner had to pay up front and out-of-pocket for fertility treatments.

56. In the fall of 2020, Emma attempted two IUI cycles.

57. Emma paid a total of \$8,939 out of pocket for these two IUI cycles.

58. The costs for IUI treatment include payments for donor sperm, payments to the fertility clinic for IUI treatments, and payments for prescription medications used as part of the IUI process.

59. The first attempt in September was unsuccessful.

60. On the second attempt in October, Emma became pregnant, but she then experienced a miscarriage and lost that pregnancy.

61. Emma took time off to recover physically and emotionally from the miscarriage.

62. In February 2021, Emma attempted her third IUI cycle.

63. Emma paid \$5,169 for this third IUI cycle.

64. Her third IUI attempt was not successful, and she did not become pregnant.

65. In March 2021, Emma appealed Aetna's September 2020 denial of preauthorization for six IUI cycles.

66. In her appeal, Emma explicitly stated that Aetna's denial of coverage discriminated against her on the basis of her sexual orientation. Emma called Aetna's attention to a directive from the state agency that regulates Aetna, the New York Department of Financial Services ("DFS").

67. DFS had just issued a bulletin in February 2021 making explicit that an insurance policy requiring LGBTQ individuals to pay out of pocket as a precondition for fertility treatments constitutes discrimination under N.Y. Ins. Law §§ 3221 and 4303.

68. DFS's directive specifically noted:

It has come to the Department's attention that some issuers may be requiring some individuals to incur costs, due to their sexual orientation or gender identity, that heterosexual individuals do not incur in order to meet the definition of infertility. In particular, some issuers have denied coverage of basic infertility treatments, such as intrauterine insemination procedures, for some individuals who are unable to conceive without such treatment due to their sexual orientation or gender identity. These individuals may incur the high costs of basic infertility treatments for up to 12 months to demonstrate infertility in order to qualify for insurance coverage due to their sexual orientation or gender identity. This results in unfair discrimination for individuals due to their sexual orientation or gender identity, which is

prohibited by Insurance Law §§ 3221(k)(6)(C)(viii) and 4303(s)(3)(H).⁷

69. DFS’s directive ordered that insurance “issuers must provide immediate coverage for basic infertility treatments (e.g., intrauterine insemination procedures) that are provided to individuals covered under an insurance policy or contract who are unable to conceive due to their sexual orientation or gender identity in order to prevent discrimination.”⁸

70. In March 2021, Emma attempted her fourth IUI cycle.

71. Her fourth IUI attempt was unsuccessful, and Emma did not become pregnant.

72. At this point, Emma’s doctor raised the possibility of using IVF instead of IUI because it would have a greater chance of success.

73. Because of Aetna’s discriminatory system, Emma and her partner were faced with a choice: pay the steep out-of-pocket cost for a single cycle of IVF (with an increased chance of success) or continue paying the lower per-cycle out-of-pocket costs for additional rounds of IUI (with a decreasing likelihood of success).

74. At this point, Emma and her spouse decided to try one more round of IUI because IVF was significantly more expensive, and Aetna refused to pay for any of these treatments.

75. In April 2021, Emma attempted her fifth IUI cycle.

76. Her fifth IUI attempt was unsuccessful, and Emma did not become pregnant.

⁷ Lisette Johnson, Ins. Circular Letter No. 3, *Health Insurance Coverage of Infertility Treatments Regardless of Sexual Orientation or Gender Identity*, N.Y. Dep’t of Fin. Servs. (Feb. 23, 2021), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2021_03.

⁸ *Id.*

77. Emma paid a total of \$8,454.98 for her fourth and fifth IUI cycles.

78. On April 19, 2021, Aetna sent Emma a final appeal determination upholding its September 2020 denial. The letter, again relying on the CPB, stated that Emma did not meet the criteria of being “unable to get pregnant after egg and sperm contact by either: (1) frequent, unprotected sex or (2) *donor insemination if there is no male partner* for at least (a) one year at any age, or (b) six months if older than 35.”

79. On April 20, 2021, Aetna sent a separate letter responding to Emma’s allegation of discrimination. The letter did not explain how Aetna’s CPB was not discriminatory and did not address the recent DFS directive. It summarily stated that Aetna was “guided by [its] Clinical Policy Bulletins,” specifically that, “[i]n this situation, Aetna’s review was guided by CPB Number 0327,” and that Aetna was in “compli[ance] with federal civil rights laws.”

80. On April 23, 2021, Aetna sent a separate letter denying coverage for fertility medication prescriptions.

81. After seven months, five cycles of IUI, one miscarriage, significant emotional distress, and over \$20,000 paid out of pocket, Emma and her spouse decided, upon consulting with their doctor about the success rate of IVF versus IUI, to change course and try IVF.

82. In May 2021, Emma’s doctor submitted a claim for coverage of IVF to Aetna.

83. A representative from Aetna again called Emma to determine her eligibility for fertility treatments.

84. On May 14, 2021, Aetna formally denied coverage for Emma’s IVF treatment.

85. Again, Aetna's letter stated that its denial decision was based on the CPB: "Based on CPB criteria and the information we have, we're denying enrollment in the infertility program. The requirement for enrollment for a member under 35 years of age is that the member has been unable to conceive or produce conception after at least one year despite (1) frequent, unprotected *heterosexual sexual intercourse*, or (2) at least 12 cycles of *donor insemination if there is no male partner.*"

86. As a direct result of Aetna's discriminatory denial of coverage Emma had to pay \$20,487.75 out of pocket to undergo IVF treatment.

87. In May 2021, Emma began IVF.

88. The IVF process is physically grueling, involving surgical egg retrieval, months of hormonal treatment via self-administered medication and injections, and frequent medical monitoring.

89. In July 2021, Emma was overjoyed to learn she was pregnant as a result of IVF. But a few days later, she experienced an early miscarriage.

90. Later that month, Emma and her partner decided that, rather than attempt another physically and financially taxing IVF so soon, Emma would attempt her sixth IUI cycle.

91. Emma's sixth IUI cycle was successful; she became pregnant.

92. Emma paid a total of \$1,810 for this IUI cycle.

93. At the time of filing this First Amended Complaint, Emma is fifteen weeks pregnant.

94. At the time of filing this First Amended Complaint, Emma and her partner are paying to store one embryo that remains following Emma's IVF process and one vial of sperm, and they plan to use these in the future to fulfill their plan to have more children.

III. Aetna Discriminates against Plaintiffs Ilana and Madeleine Lee

A. Ilana and Madeleine are enrolled in Aetna’s Justworks Policy

95. Since July of 2019, Ilana and Madeleine have been enrolled in an Aetna employer-sponsored health plan provided by Justworks Employment Group LLC (“Justworks”), a third-party human resources management company contracted by Madeleine’s employer Covera Health (“Justworks Policy”), and they will remain enrolled in Aetna’s Justworks Policy for the foreseeable future.

96. Madeleine is enrolled in the Justworks Policy as an employee, and Ilana is enrolled as Madeleine’s dependent.

97. Under the Justworks Policy, Aetna covers “services for the diagnosis and treatment (surgical and medical) of Infertility”

98. “Infertile/Infertility” is defined under the Justworks Policy as “[a] disease defined by the failure to conceive a pregnancy after 12 months or more of timed intercourse or egg-sperm contact for women under age 35 (or 6 months for women age 35 or older).”

99. A member is “eligible for Infertility services” under the Justworks Policy if the member has “met the requirement for the number of months trying to conceive through egg and sperm contact.”

100. Under the Justworks Policy, Aetna provides “[b]asic Infertility services,” including testing and evaluation, “to a Member who is an appropriate candidate for Infertility treatment.”

101. Under the Justworks Policy, if “basic Infertility services” do not result in increased fertility, Aetna also covers “comprehensive Infertility services,” including artificial insemination, and “advanced Infertility services,” including IVF.

102. The Justworks Policy states further that Aetna’s “clinical policy bulletins explain our policy for specific services” and that Aetna “use[s] these bulletins and other resources to help guide individualized coverage decisions under our plans.” It states specifically that “CPBs guide [Aetna] in deciding whether to approve a coverage request.”

B. Ilana and Madeleine Need Fertility Treatments to Become Pregnant.

103. Ilana and Madeleine want a family with at least two children, and they each want to carry a pregnancy.

104. Because Ilana and Madeleine cannot conceive through sexual intercourse, they both require fertility treatments in order to get pregnant.

C. Aetna Denies Coverage to Ilana Based on Its Discriminatory CPB.

105. In 2020, Ilana and Madeleine decided to start their family, and they began pursuing fertility treatments for Ilana to become pregnant.

106. In August 2020, in advance of attempting any IUI cycles, Ilana’s doctor submitted a claim to Aetna for preauthorization for one cycle of IUI.

107. On September 3, 2020, a representative from Aetna called Ilana to determine her eligibility for enrollment in the infertility program.

108. During the phone call, the Aetna representative asked a number of questions to confirm that Ilana met various eligibility requirements. Ilana, unaware of Aetna’s discriminatory policy, believed the call was going smoothly and that she would meet Aetna’s requirements for coverage of fertility treatments.

109. But then Ilana mentioned her wife, Madeleine. Upon hearing the word “wife” and confirming that Ilana was married to another woman, the Aetna representative’s tone completely changed. The Aetna representative told Ilana that, regardless of her answers to the

previous eligibility questions, because Ilana was in a same-sex marriage, her fertility treatment would not be covered until she had paid out-of-pocket for six cycles of IUI.

110. On September 10, 2020, Aetna formally denied Ilana’s enrollment in the infertility program and refused to pay for her IUI.

111. Aetna’s denial letter stated that it used the CPB to deny Ilana’s request for coverage. Mirroring the language of the CPB, the denial letter stated that Ilana had not met Aetna’s definition of infertility because she had not shown “the inability to get pregnant after egg and sperm contact by either: (1) frequent, unprotected sex or (2) *donor insemination if there is no male partner* for at least (a) one year at any age, or (b) six months if older than 35.”

112. On September 11, 2020, Aetna also formally denied Ilana coverage for a medication that is often used to ensure ovulation at a particular time in order to enhance effectiveness of an IUI procedure (commonly known as a “trigger shot”).

113. Aetna’s denial letter for the trigger shot used language identical to its letter denying coverage of the IUI, stating that Aetna used the CPB in deciding to deny Ilana’s request for coverage and that Ilana had not met its definition of infertility because she had not shown “the inability to get pregnant after egg and sperm contact by either: (1) frequent, unprotected sex or (2) *donor insemination if there is no male partner* for at least (a) one year at any age, or (b) six months if older than 35.”

114. As a result of Aetna’s discriminatory denial of coverage, Ilana and Madeleine had to pay up front and out-of-pocket for Ilana’s fertility treatments.

115. Aetna’s denial was devastating to Ilana and Madeleine. As Ilana was 36 years old and her fertility was decreasing with her age, Ilana and Madeleine worried that it would take many IUI attempts for Ilana to become pregnant. Their fertility clinic projected that each

IUI attempt would cost around \$2,500. This cost, especially when multiplied by the many cycles they anticipated it would take for Ilana to get pregnant, was prohibitive. Ilana and Madeleine feared that they might not be able to afford to become pregnant at all.

116. Ilana and Madeleine’s fertility clinic, however, told them that it was possible to cut costs by foregoing components of IUI treatment recommended by their doctor.

117. Thus, in order to salvage their dream of becoming pregnant, because Aetna was forcing them to pay out-of-pocket, Ilana and Madeleine decided to forego two crucial elements of the IUI treatment plan recommended by their doctor.

118. Normally, an IUI cycle involves the patient coming to their doctor’s fertility clinic multiple times during the first two weeks of their cycle, beginning 1–3 days after they get their period. At these clinic visits, called “monitoring” visits, the fertility doctor monitors the growth of follicles in the patient’s ovaries via transvaginal ultrasound and changes in the patient’s hormone levels via blood draws. These monitoring visits enable the fertility doctor to more accurately predict the patient’s ovulation and to time the IUI procedure to optimize the patient’s chances of becoming pregnant. Fertility doctors also often recommend that patients use a trigger shot to further optimize the chances of a successful IUI.

119. But because Aetna had denied coverage for Ilana’s IUI treatment, in order to reduce their financial burden, Ilana and Madeleine decided to forgo these medically recommended components of IUI treatment—monitoring and trigger shot—which their doctor had specifically recommended for Ilana.

120. To try to mitigate the reduced efficacy that their doctor feared would result from foregoing the monitoring and trigger shot, Ilana decided to use letrozole—a fertility medication that causes ovaries to produce multiple eggs during ovulation instead of the usual one

egg. Letrozole increases the chance of a successful IUI, but it also creates the risk that multiple eggs become fertilized instead of just one. Because of Aetna's discriminatory policy, Ilana and Madeleine assumed the risk of Ilana becoming pregnant with multiples, an outcome which would have created a high-risk and high-cost pregnancy for Ilana.

121. Aetna's denial forced Ilana and Madeleine to decide between chancing a high-risk pregnancy and running out of money before Ilana could become pregnant at all. If Aetna had not denied coverage for Ilana's fertility treatment, Ilana would have obtained in-clinic monitoring and would have used a trigger shot, and she would not have risked a high-risk pregnancy by using letrozole.

122. In late September, October, and November of 2020, Ilana attempted three IUI cycles. Each time she used letrozole.

123. Ilana and Madeleine paid a total of \$4,910 out of pocket for these three IUI cycles.

124. The costs for IUI treatment include payments for donor sperm and payments to the fertility clinic for IUI treatments.

125. The first two attempts were unsuccessful.

126. On the third attempt in November 2020, Ilana became pregnant.

127. In August 2021, Ilana gave birth to her and Madeleine's first child.

D. Madeleine Plans to Become Pregnant While Enrolled in Aetna's Justworks Policy.

128. Ilana and Madeleine intend to start trying to become pregnant again and to have their second child within the next year or two. Madeleine will carry the couple's next pregnancy.

129. As Madeleine has no reason to expect her employment to change during this time, they anticipate that they will still be enrolled in Aetna's Justworks Policy when Madeleine begins fertility treatments to become pregnant.

IV. Aetna Discriminates Against Plaintiff Lesley Brown

A. Lesley Is Enrolled in an Employer Health Plan Administered by Aetna

130. Since March 2021, Lesley and her wife, Areum Kim, have been enrolled in a self-insured employer health plan provided by Areum's employer, ICON Clinical Research LLC, and administered by Aetna ("ICON Policy"). They will remain enrolled in the Aetna-administered ICON Policy for the foreseeable future.

131. Areum is enrolled in the ICON Policy as an employee, and Lesley is enrolled as Areum's dependent.

132. Under the ICON Policy, Aetna administers coverage for "diagnosis and treatment" of infertility.

133. Under the ICON Policy, Aetna administers coverage for "Comprehensive Infertility Services," including "Artificial Insemination and Ovulation Induction," and coverage for "Advanced Reproductive Technology (ART)," including IVF.

B. Aetna Denies Coverage to Lesley Based on Its Discriminatory CPB.

134. Lesley and Areum want a family with three children. Because they cannot conceive through sexual intercourse, they require fertility treatments to become pregnant.

135. In 2021, they decided to start their family, and they began pursuing fertility treatments for Lesley to become pregnant.

136. In August 2021, in advance of attempting any IUI cycles, Lesley's fertility clinic submitted a claim to Aetna for preauthorization for one cycle of IUI.

137. On August 20, 2021, Aetna formally denied Lesley's clinic's request for coverage of IUI.

138. As it had with co-Plaintiffs Emma and Ilana, Aetna's denial letter to Lesley stated that it used the CPB in deciding to deny Lesley's request for coverage. Again mirroring the language of the CPB, the denial letter stated that Lesley had not met Aetna's definition of infertility because she had not shown "the inability to get pregnant after egg and sperm contact by either: (1) frequent, unprotected sex or (2) *donor insemination if there is no male partner* for at least (a) one year at any age, or (b) six months if older than 35."

139. As a result of Aetna's discriminatory denial of coverage, Lesley and Areum had to pay up front and out-of-pocket for Lesley's fertility treatments.

140. In August and September of 2021, Lesley underwent two cycles of IUI.

141. Lesley and Areum paid a total of \$6,160 out-of-pocket for these two IUI cycles.

142. These costs included the costs of IUI treatment and sperm costs.

143. Neither cycle was successful.

144. At the time of filing this First Amended Complaint, Lesley is not pregnant.

145. Lesley plans to undergo another IUI in November 2021. Because of Aetna's discrimination, Lesley will have to pay out-of-pocket yet again.

V. Aetna Has Caused Plaintiffs Emotional Distress and Physical and Financial Injury.

146. Plaintiffs have been injured by Aetna's discriminatory system that requires them and other individuals, based on their sexual orientation or gender identity, to pay out of pocket for fertility treatments as a prerequisite to receiving coverage for such services.

147. Emma has incurred tens of thousands of dollars in medical costs for the six IUI cycles and one IVF cycle that she has undergone due to Aetna's discrimination.

148. Emma will also endure further financial injury by paying recurrent out-of-pocket costs to store embryo and sperm that she intends to use at a later date.

149. Ilana, Madeleine, and Lesley have also incurred thousands of dollars in medical costs for their IUI treatments due to Aetna's discrimination.

150. Lesley is experiencing ongoing injury right now, being forced to pay out-of-pocket for another round of IUI scheduled for November and additional rounds thereafter if the next one is unsuccessful.

151. Plaintiffs have also endured great emotional distress in having to choose a course of treatment based on cost, rather than based on their personal and medical circumstances in consultation with their doctors. Had Aetna covered fertility treatments for Plaintiffs from the start, they each would have been able to choose the best course of treatment for them based on their personal circumstances, in consultation with their doctors. Instead, because of its discriminatory guidelines, Aetna has caused Plaintiffs to undertake immense financial, physical, and emotional costs.

152. For example, Emma delayed trying IVF because of its cost. After her fourth cycle of IUI, her doctor presented IVF as an option based on her medical history and because IVF had a greater likelihood of success than IUI. But due to the immense out-of-pocket costs of IVF, Emma delayed this more effective treatment.

153. Delays in medically recommended treatment have likely resulted in Emma becoming pregnant at a more advanced age than she would have absent Aetna's Policy.

154. The delays caused by Aetna's discriminatory Policy threaten the health of Emma and of her future children, and her ability to get pregnant again in the future. That is because it becomes increasingly difficult to get pregnant with age. Pregnancy also becomes increasingly dangerous to a pregnant person's health, as well as to the health of the fetus, with age.

155. Similarly, because of the cost she was forced to bear as a result of Aetna's discrimination, Ilana made choices about her fertility treatment that decreased the likelihood of her becoming pregnant and risked her health by increasing the likelihood of a high-risk pregnancy if she did become pregnant. She made these choices because of the cost Aetna forced upon her despite the fact that, at 36 years old, her fertility was already decreasing and her risk of a high-risk pregnancy was already increasing with age.

156. Plaintiffs have also endured great emotional distress with each failed attempt to get pregnant.

157. The knowledge that they were being subjected to unequal, discriminatory treatment by having to pay for multiple attempts at pregnancy compounded this emotional distress.

158. Aetna's discrimination is causing Plaintiffs ongoing emotional distress because they know that as they pursue fertility treatments or when they again pursue fertility treatments in the future, they will again have to confront Aetna's discriminatory system and will again be forced to spend thousands of dollars out of pocket to become pregnant.

VI. Class Allegations

159. Plaintiffs seeks prospective injunctive relief and damages on behalf of two classes of similarly situated individuals under Rule 23(b)(2) and (b)(3), respectively, of the Federal Rules of Civil Procedure (“Plaintiff Classes”).

160. The Plaintiff Class under Rule 23(b)(3) comprises all individuals who, while covered by a health plan provided or administered by Aetna in New York, have been denied coverage for fertility treatment by Aetna because the individual, due to their sexual orientation or gender identity, cannot meet Aetna’s prerequisite of showing an inability “to conceive or produce conception after 1 year of frequent, unprotected heterosexual sexual intercourse, or 6 months of frequent, unprotected heterosexual sexual intercourse if the female partner is 35 years of age or older;” or, “[a]lternately,” inability “to conceive or produce conception after at least 12 cycles of donor insemination (6 cycles for women 35 years of age or older).”

161. The Plaintiff Class under Rule 23(b)(2) comprises all individuals who are or will be covered by a health plan provided or administered by Aetna in New York and who will be denied coverage for infertility treatment in the future because the individual, due to their sexual orientation or gender identity, will not be able meet Aetna’s prerequisite of showing an inability “to conceive or produce conception after 1 year of frequent, unprotected heterosexual sexual intercourse, or 6 months of frequent, unprotected heterosexual sexual intercourse if the female partner is 35 years of age or older;” or, “[a]lternately,” inability “to conceive or produce conception after at least 12 cycles of donor insemination (6 cycles for women 35 years of age or older).”

162. Aetna’s CPB language—requiring health plan members who, because of their sexual orientation or gender identity, cannot meet Aetna’s prerequisite and therefore must pay out of pocket for infertility treatments before Aetna covers such treatments under its health plans—poses an immediate threat to the Plaintiff Classes’ rights under Section 1557 of the ACA, Section 296(2)(a) of the NYSHRL, and Section 8-107(4) of the NYCHRL, to be free from discrimination on the basis of sex.

163. The Plaintiff Classes are so numerous that joinder of all individual members would be impracticable.

164. The population of New York State is over 20 million.⁹ Aetna is the largest provider of “preferred provider organization,” or “PPO,” plans in New York State, providing 19% of PPO health plans in the state and 24% of PPO health plans in the New York City metro area.¹⁰ Aetna is the second largest provider of any kind of health insurance plan in the New York City metro area, providing 16% of health insurance plans.¹¹ Approximately 2.7% of the population of New York consists of women between the ages of 18 and 49 who identify as LGBTQ.¹²

165. Additionally, Aetna provides numerous student health plans in New York that are identical to Plaintiff Emma Goidel’s Columbia Policy with regard to infertility treatment. In addition to Columbia University, these include Aetna student health plans for Barnard

⁹ America Counts Staff, *New York State Population Topped 20 Million in 2020*, U.S. Census Bureau (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/new-york-population-change-between-census-decade.html>.

¹⁰ *Table A-2*, Am. Med. Ass’n, *Competition in Health Insurance: A comprehensive study of U.S. markets 30* (2021), <https://www.ama-assn.org/system/files/competition-health-insurance-us-markets.pdf>.

¹¹ *Table A-1*, *id.* at 19.

¹² Calculations are based on the Behavioral Risk Factor Surveillance System Survey (BRFSS), accessed through Centers for Disease Control and Prevention (CDC). *Behavioral Risk Factor Surveillance System Survey Data*. Atlanta, Georgia: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2020.

College,¹³ Brooklyn Law School,¹⁴ Cornell University,¹⁵ the Fashion Institute of Technology,¹⁶ Hofstra University,¹⁷ the Icahn School of Medicine,¹⁸ Manhattanville College,¹⁹ New York Film Academy,²⁰ New York Institute of Technology,²¹ New York Medical College,²² Pratt Institute,²³ Rochester Institute of Technology,²⁴ Syracuse University,²⁵ SUNY Maritime,²⁶ SUNY Purchase,²⁷ Touro Colleges of Dentistry, Osteopathic Medicine, and Pharmacy,²⁸ and the

¹³ Student Health Insurance Policy, Aetna Life Ins. Co. at 44 (eff. Aug. 22, 2020), <https://www.aetnastudenthealth.com/schools/barnardcollege/masterpolicy2021.pdf>.

¹⁴ Student Health Insurance Policy, Aetna Life Ins. Co. at 37 (eff. Aug. 10, 2020), <https://www.aetnastudenthealth.com/schools/bls/masterpolicy2021.pdf>.

¹⁵ Certificate of Coverage 2021–2022, Cornell University Student Health Plan at 40 (approved by N.Y. Dep’t of Fin. Servs. June 1, 2021), <https://www.aetnastudenthealth.com/schools/cornell2/coc2122.pdf>; Certificate of Coverage 2021–2022, Cornell University Student Health Plan Plus at 36 (approved by N.Y. Dep’t of Fin. Servs. June 1, 2021), <https://www.aetnastudenthealth.com/schools/cornell2/cocPLUS2122.pdf> (both have identical infertility language and together serve Cornell University, Cornell Tech, and Weill Cornell Medicine students).

¹⁶ Student Health Insurance Policy, Aetna Life Ins. Co. at 39 (eff. Aug. 15, 2020), <https://www.aetnastudenthealth.com/schools/fitnyc/masterpolicy2021.pdf>.

¹⁷ Student Health Insurance Policy, Aetna Life Ins. Co. at 45 (eff. Aug. 1, 2020), <https://www.aetnastudenthealth.com/schools/hofstrauniversity/masterpolicy2021.pdf>.

¹⁸ Student Health Insurance Policy, Aetna Life Ins. Co. at 47 (eff. Aug. 1, 2020), <https://www.aetnastudenthealth.com/schools/Icahn/masterpolicy2021-0801.pdf>.

¹⁹ Student Health Insurance Policy, Aetna Life Ins. Co. at 41 (eff. Aug. 1, 2020), <https://www.aetnastudenthealth.com/schools/manhattanville/masterpolicy2021.pdf>.

²⁰ Student Health Insurance Policy, Aetna Life Ins. Co. at 45 (eff. Sept. 15, 2020), <https://www.aetnastudenthealth.com/schools/newyorkfilmny/masterpolicy2021.pdf>.

²¹ Student Health Insurance Policy, Aetna Life Ins. Co. at 42 (eff. Aug. 1, 2020), <https://www.aetnastudenthealth.com/schools/nyitdom/masterpolicy2021.pdf>.

²² Student Health Insurance Policy, Aetna Life Ins. Co. at 41 (eff. July 1, 2020), <https://www.aetnastudenthealth.com/schools/nymedical/masterpolicy2021.pdf>.

²³ Student Health Insurance Policy, Aetna Life Ins. Co. at 44 (eff. Aug. 18, 2020), <https://www.aetnastudenthealth.com/schools/pratt/masterpolicy2021.pdf>.

²⁴ Student Health Insurance Policy, Aetna Life Ins. Co. at 39 (eff. Aug. 15, 2020), <https://www.aetnastudenthealth.com/schools/rit/masterpolicy2021.pdf>.

²⁵ Student Health Insurance Policy, Aetna Life Ins. Co. at 39 (eff. Aug. 1, 2020), <https://www.aetnastudenthealth.com/schools/syracuse/masterpolicy2021.pdf>.

²⁶ Student Health Insurance Policy, Aetna Life Ins. Co. at 42 (eff. Aug. 10, 2020), <https://www.aetnastudenthealth.com/schools/sunymaritime/masterpolicy2021.pdf>.

²⁷ Student Health Insurance Policy, Aetna Life Ins. Co. at 46 (eff. Aug. 14, 2020), <https://www.aetnastudenthealth.com/schools/purchase/masterpolicy2021.pdf>.

²⁸ Student Health Insurance Policy, Aetna Life Ins. Co. at 40 (eff. July 1, 2020), <https://www.aetnastudenthealth.com/schools/dentalouro/masterpolicy2021.pdf>; Student Health Insurance Policy, Aetna Life Ins. Co. at 40 (eff. July 1, 2020), <https://www.aetnastudenthealth.com/schools/tourocom/masterpolicy2021.pdf>; Student Health Insurance Policy, Aetna Life Ins. Co. at 40 (eff. July 1, 2020), <https://www.aetnastudenthealth.com/schools/teop/masterpolicy2021.pdf>.

University of Rochester.²⁹ Together, these schools enroll over 150,000 students in New York, including over 60,000 professional and graduate school students.

166. Upon information and belief, Aetna applies its discriminatory policy to all health plans that it provides or administers in New York, irrespective of the type of health plan, so long as such health plans provide coverage for fertility treatment.

167. Upon information and belief, therefore, thousands of New Yorkers enrolled in Aetna health plans that otherwise provide coverage for fertility treatments are forced to pay out-of-pocket for those fertility treatments based on their sexual orientation or gender identity, because of Aetna's discrimination.

168. The questions of law and fact presented by Plaintiffs are common to all members of the Plaintiff Classes. Among others, questions common to the Plaintiff Classes include:

- a. Whether Aetna's CPB language regarding infertility treatment results in members who, due to their sexual orientation or gender identity, cannot meet Aetna's CPB prerequisite of showing an inability "to conceive or produce conception after 1 year of frequent, unprotected heterosexual sexual intercourse, or 6 months of frequent, unprotected heterosexual sexual intercourse if the female partner is 35 years of age or older;" or, "[a]lternately," inability "to conceive or produce conception after at least 12 cycles of donor insemination (6 cycles for women 35 years of age or older); and

²⁹ Certificate of Coverage 2021–2022, University of Rochester Student Health Insurance Plan at 41–42 (approved by N.Y. Dep't of Fin. Servs. May 18, 2021), <https://www.aetnastudenthealth.com/schools/rochester/coc2122.pdf>.

- b. Whether this policy constitutes discrimination on the basis of sex, including sexual orientation and/or gender identity.

169. Common issues of law and fact predominate any individual issues.

170. All members of the Plaintiff Classes are likely to be subjected to the same practices and policies of Aetna under its CPB and other similar documents.

171. Plaintiffs' claims for prospective relief are typical of the Plaintiff Class under Rule 23(b)(2). Individuals enrolled in plans provided or administered by Aetna in New York are likely to continue to seek fertility treatment coverage under Aetna's plans, these individuals are likely to include many individuals who, due to their sexual orientation or gender identity, will not be able to meet Aetna's prerequisite of showing an inability "to conceive or produce conception after 1 year of frequent, unprotected heterosexual sexual intercourse, or 6 months of frequent, unprotected heterosexual sexual intercourse if the female partner is 35 years of age or older;" or, "[a]lternately," inability "to conceive or produce conception after at least 12 cycles of donor insemination (6 cycles for women 35 years of age or older)." Plaintiffs and members of the Plaintiff Class are reasonably fearful that Aetna will continue to subject its members to discrimination on the basis of sex by maintaining its discriminatory policy and applying it across all health plans.

172. The entire Plaintiff Class under Rule 23(b)(2) will benefit from the injunctive relief sought herein.

173. Plaintiffs have no conflicts of interest with any members of the Plaintiff Classes, are committed to vigorous prosecution of all claims on behalf of members of the Plaintiff Classes, and will fairly and adequately protect the interests of the Plaintiff Classes.

174. A class action is superior to any other method for the fair and efficient resolution of this legal dispute, as joinder of all members of the Plaintiff Classes is impracticable. Further, the prosecution of thousands of individual actions by individual members of the Plaintiff Classes would create the substantial risk of inconsistent or varying adjudications, which would establish potentially incompatible standards of conduct for Defendant Aetna.

175. The Plaintiff Classes are represented by competent counsel experienced in litigating discrimination cases and class action cases.

FIRST CAUSE OF ACTION

42 U.S.C. § 18116(a)

Discrimination in Health Care on the Basis of Sex

176. Plaintiffs and the Plaintiff Classes reallege as if fully set forth herein the allegations contained in the preceding paragraphs.

177. Section 1557 of the ACA prohibits discrimination on the basis of sex, including discrimination on the basis of sexual orientation and gender identity, in any health program or activity that receives federal financial assistance.

178. Aetna receives federal financial assistance and is a health program or activity, and it is therefore covered by Section 1557 of the ACA.

179. Aetna discriminates on the basis of sex under Section 1557 by requiring LGBTQ individuals—who cannot conceive through sexual intercourse because of their gender identity or their sexual orientation—to incur substantial costs as a prerequisite to receiving coverage for fertility services.

180. As a direct result of Defendant’s violation of Plaintiffs’ and the Plaintiff Classes’ rights under Section 1557 of the ACA, Plaintiffs and the Plaintiff Classes have suffered emotional distress and physical and financial injury.

181. All the acts and omissions committed by Defendant described herein for which liability is claimed were done intentionally, unlawfully maliciously, wantonly, recklessly, negligently, and/or with bad faith and said acts meet all of the standards for imposition of punitive damages.

182. Accordingly, Plaintiffs and Plaintiff Class under Rule 23(b)(3) are entitled to compensatory and punitive damages, as well as reasonable attorneys’ fees, costs, and disbursements.

183. Plaintiffs and Plaintiff Class under Rule 23(b)(2) are entitled to injunctive and declaratory relief; as well as reasonable attorneys' fees, costs, and disbursements.

SECOND CAUSE OF ACTION

N.Y. Exec. Law § 296(2)(a)

Discrimination on the Basis of Sex in Violation of NYSHRL

184. Plaintiff Emma Goidel and the Plaintiff Classes reallege as if fully set forth herein the allegations contained in the preceding paragraphs.

185. The NYSHRL prohibits discrimination on the basis of sex, sexual orientation, and gender identity or expression by any place of public accommodation.

186. Aetna and Columbia University are both places of public accommodation within the meaning of NYSHRL, § 296(2)(a).

187. Aetna discriminates on the basis of sex under the NYSHRL by requiring LGBTQ individuals who cannot conceive through sexual intercourse because of their gender identity or their sexual orientation to incur substantial costs as a prerequisite to receiving coverage for fertility services.

188. As a direct result of Defendant's violation of Plaintiff's and the Plaintiff Classes' rights under the NYSHRL, Plaintiff and members of the Plaintiff Class have suffered emotional distress and physical and financial injury.

189. All the acts and omissions committed by Defendant described herein for which liability is claimed were done intentionally, unlawfully maliciously, wantonly, recklessly, negligently, and/or with bad faith and said acts meet all of the standards for imposition of punitive damages.

190. Accordingly, Plaintiff and Plaintiff Class under Rule 23(b)(3) are entitled to compensatory and punitive damages, as well as reasonable attorneys' fees, costs, and disbursements.

191. Plaintiff and Plaintiff Class under Rule 23(b)(2) are entitled to injunctive and declaratory relief; as well as reasonable attorneys' fees, costs, and disbursements.

THIRD CAUSE OF ACTION

N.Y.C. Admin. Code § 8-107(4)

Discrimination on the Basis of Sex in Violation of NYCHRL

192. Plaintiff Emma Goidel and Plaintiff Classes reallege as if fully set forth herein the allegations contained in the preceding paragraphs.

193. The NYCHRL prohibits discrimination on the basis of gender or sexual orientation by any place or provider of public accommodation.

194. Aetna and Columbia University are both places or providers of public accommodation within the meaning of NYCHRL, §§ 8-102 and 8-107(4).

195. Aetna discriminates on the basis of sex under the NYCHRL by requiring LGBTQ individuals who cannot conceive through sexual intercourse because of their gender identity or their sexual orientation to incur substantial costs as a prerequisite to receiving coverage for fertility services.

196. As a direct result of Defendant's violation of Plaintiff's and the Plaintiff Classes' rights under the NYCHRL, Plaintiff and members of the Plaintiff Class have suffered emotional distress and physical and financial injury.

197. All the acts and omissions committed by Defendant described herein for which liability is claimed were done intentionally, unlawfully maliciously, wantonly, recklessly,

negligently, and/or with bad faith and said acts meet all of the standards for imposition of punitive damages.

198. Accordingly, Plaintiff and Plaintiff Class under Rule 23(b)(3) are entitled to compensatory and punitive damages, as well as reasonable attorneys' fees, costs, and disbursements.

199. Plaintiff and Plaintiff Class under Rule 23(b)(2) are entitled to injunctive and declaratory relief; as well as reasonable attorneys' fees, costs, and disbursements.

JURY TRIAL DEMANDED

200. Plaintiffs demand a trial by jury.

WHEREFORE, Plaintiffs respectfully requests judgment against Defendant as follows:

- a. Declaring that Defendant violated Plaintiffs' and Plaintiff Classes' rights under Section 1557 of the ACA, the NYSHRL, and the NYCHRL, by virtue of its discriminatory policy on coverage for infertility treatments, and that Defendant is likely to continue to cause ongoing violations of Plaintiffs' and Plaintiff Classes' rights;
- b. Permanently enjoining Defendant from implementing and enforcing its discriminatory CPB and all other similar Aetna policies to deny infertility treatment coverage to individuals who cannot conceive through sexual intercourse because of their gender identity or their sexual orientation;
- c. Awarding compensatory damages in an amount to be determined at trial;
- d. Awarding punitive damages in an amount to be determined at trial;
- e. Awarding reasonable attorneys' fees, costs, and disbursements; and
- f. Awarding such other and further relief as this Court deems just and equitable.

Dated: New York, New York
November 4, 2021

By: _____ /s/
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EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

TARA KULWICKI, on behalf of herself and all
others similarly situated,

PLAINTIFF,

v.

AETNA LIFE INSURANCE COMPANY,

DEFENDANT

Case No. 3:22-CV-00229 (RNC)

JURY TRIAL DEMANDED

AMENDED COMPLAINT – CLASS ACTION

1. Plaintiff, Tara Kulwicki, by and through her undersigned counsel, on behalf of herself and all others similarly situated, upon personal knowledge as to herself, and upon information and belief as to all other matters, alleges as follows:

INTRODUCTORY STATEMENT

2. A person's access to health care must not be determined by their sex, sexual orientation, race, national origin, age, disability, or religion. When a health insurance policyholder seeks treatment from a physician, hospital, or other medical facility that is otherwise covered by the insurer, the policyholder expects, and is entitled to receive, the appropriate available care, regardless of whether they are a member of any class protected from discrimination by the Affordable Care Act ("ACA").

3. This class action challenges the health insurance plan issued and administered by Defendant, Aetna Life Insurance Company ("Defendant" or "Aetna") which, on its face,

discriminates on the basis of sex, by denying those individuals assigned female sex at birth who cannot engage in coitus by reason of their sexual orientation, equal access to infertility treatments.

4. Tara Kulwicki (“Plaintiff” or “Kulwicki”) wants to have a child. As a homosexual woman, she cannot engage in coitus, but can become pregnant with alternative infertility treatments such as intrauterine insemination (“IUI”), in vitro fertilization (“IVF”) or other Advanced Reproduction Technology (“ART”).

5. Plaintiff was employed as a Registered Labor and Delivery Nurse for Wellstar Health System at Wellstar Cobb Hospital in Atlanta, GA, and was enrolled in the Wellstar Employee Medical Plan (the “Medical Plan”).

6. The pertinent terms of the Medical Plan were drafted and designed by Aetna.

7. Aetna performs claim administration services under the Medical Plan.

8. Because Aetna is a health program or activity and issues and administers the Medical Plan, and because Aetna receives federal financial assistance including credits, subsidies, or contracts of insurance, Aetna is subject to the nondiscrimination provisions of the ACA. *See* 42 U.S.C. § 18116.

9. Defendant’s Medical Plan is a health program or activity that provides advanced infertility services benefits for individuals who wish to have a child but are considered “infertile,” as defined in the Medical Plan.

10. The Medical Plan defines an individual as “infertile” if they are under the age of 35 and have had either: 1) 12 months of timed, unprotected coitus; or 2) twelve cycles of IUI.¹

¹ The twelve-month/twelve-cycle requirement is reduced to six-months/six-cycles for individuals older than age 35.

11. The Medical Plan, designed by Defendant, provides full health benefits for infertility treatment services to females who represent to Defendant that they have engaged in unprotected coitus for the requisite number of months without a successful pregnancy.

12. However, for Plaintiff and other non-heterosexuals, the option of “unprotected coitus” is unavailable. Consequently, Plaintiff and other non-heterosexual individuals assigned female sex at birth are discriminatorily forced to pay out-of-pocket for the costs of the requisite number of IUI cycles before they can obtain benefits for infertility treatment services (including IUI).

13. In short, heterosexual individuals assigned female sex at birth may obtain infertility treatment without paying out-of-pocket for IUI treatments under the Medical Plan, while non-heterosexual individuals assigned female sex at birth must first pay for 6 or more IUI treatments before becoming eligible for infertility treatments under the Medical Plan (which, ironically, includes IUI treatments). In this regard, Defendant’s Medical Plan is facially discriminatory against non-heterosexual individuals assigned female sex at birth.

14. Plaintiff has suffered financial harm and emotional distress as a result of Defendant’s discriminatory Medical Plan. After being denied coverage for IUI treatments under the Medical Plan, Plaintiff incurred the costs of IUI treatments directly.

15. Defendant’s Medical Plan facially subjects Plaintiff and other similarly situated non-heterosexual individuals assigned female sex at birth to discrimination, as it denies them, on the basis of their sexual orientation, the benefit of choosing how to establish “infertility” without out-of-pocket costs before they can qualify for alternative methods of infertility treatment under the Medical Plan.

16. The Medical Plan, by its very terms, subjects non-heterosexual individuals assigned female sex at birth to discrimination by forcing them to pay out-of-pocket for IUI, compared to heterosexuals assigned female sex at birth, who are offered a choice between engaging in coitus or paying for IUI.

17. Lacking such a choice, Plaintiff and other non-heterosexual individuals assigned female sex at birth have been excluded from full participation in Defendant's Medical Plan.

18. Plaintiff brings this action on behalf of herself and all other similarly situated non-heterosexual individuals assigned female sex at birth who seek infertility treatment benefits under Defendant's Medical Plan, in order to end Defendant's willful and facial violation of the ACA's nondiscrimination provisions, by denying Plaintiff and similarly situated non-heterosexual individuals assigned female sex at birth the benefits of, and full participation in the Medical Plan, based on the sexual orientation of the individuals enrolled in the Medical Plan (the "Plan Holders"), and for a declaratory judgment.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as this action arises under 28 U.S.C. § 18116(a).

20. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) because, at all times relevant to this Complaint, Aetna's corporate headquarters and principal place of business is located in this District at 151 Farmington Ave, Hartford, Connecticut, 06156, and substantial parts of the events or omissions giving rise to the claims at issue in this Complaint occurred in this District. Venue is also proper because the causes of action arose here.

PARTIES

21. Plaintiff Tara Kulwicki is a 40-year-old woman, and a citizen of the State of Georgia. Plaintiff is a homosexual woman assigned female sex at birth.

22. Defendant Aetna Life Insurance Company is a subsidiary of Aetna Inc., with its principal place of business in Hartford, Connecticut, and is a citizen of the State of Connecticut.

23. Aetna is one of the nation's largest health benefits companies and issues, administers, participates in, or is made up of numerous health programs and activities, including medical insurance plans that Aetna designs and issues to employers, educational institutions, and private individuals in Connecticut and throughout the United States.

24. Aetna receives federal financial assistance via credits, subsidies, and/or contracts of insurance. For example, Aetna provides coverage of medical services in exchange for payments through Medicaid.

25. At all relevant times, Aetna has issued and administered the Wellstar Employee Medical Plan for Plan Holder employees of Wellstar Health System, as well as numerous other medical plans also designed by Aetna, and containing the same pertinent provisions, for employers throughout the nation.

FACTUAL ALLEGATIONS

Aetna's discriminatory Medical Plan

26. In February 2019, Plaintiff began working for Wellstar Health System, and enrolled in the Medical Plan, designed and administered by Defendant.

27. Under the Medical Plan, coverage is provided for costs to "diagnose and to surgically treat the underlying medical cause of infertility."

28. “Infertility” is defined under the Medical Plan as:

For a woman who is under 35 years of age: 1 year or more of timed, unprotected coitus, or 12 cycles of artificial insemination; or [f]or a woman who is 35 years of age or older: 6 months or more of timed, unprotected coitus, or 6 cycles of artificial insemination.

29. Those enrolled in the Medical Plan who qualify for infertility treatment benefits may have the costs of Comprehensive Infertility Services (“CIS”) covered under the Medical Plan. CIS includes “ovulation induction with menotropins,” and IUI.

30. Under the Medical Plan, if CIS treatments do not result in pregnancy, Plan Holders may receive authorization for Advanced Reproductive Technology (“ART”) such as IVF.

31. For the costs of CIS, and thus ART, to be covered under the Medical Plan, a Plan Holder would need to show that they meet the Defendant’s definition of “infertile.”

32. Under the Medical Plan, Defendant offers individuals over the age of 35, two ways to establish that the Plan Holder is “infertile” and eligible to receive infertility treatment benefits. The Plan Holders may: 1) engage in unprotected coitus² at least once a month for a period of six months, without successful pregnancy, or 2) receive six monthly cycles of IUI, without successful pregnancy.

33. Under this framework, Plan Holders who were assigned female sex at birth and have the capacity to engage in coitus are given a choice as to how they can establish that they are “infertile,” as defined by the Medical Plan.

34. If a Plan Holder assigned female sex at birth does not wish to or is unable to pay out-of-pocket costs for six cycles of IUI (or twelve cycles if under age 35), they need only represent

² Merriam Webster defines coitus as the “physical union of male and female genitalia accompanied by rhythmic movements. <https://www.merriam-webster.com/dictionary/coitus> (last accessed January 18, 2022).

to Defendant that they 1) are over the age of 35, and 2) have engaged in unprotected coitus for six months without successful pregnancy.

35. However, Plaintiff and other similarly situated non-heterosexual individuals who were assigned female sex at birth do not have the capacity to become pregnant through “unprotected coitus” with their sexual partners.

36. Under Defendant’s Medical Plan, Plaintiff and other similarly situated non-heterosexual individuals assigned female sex at birth can only show that they are “infertile” by *paying the out-of-pocket costs* of six cycles of IUI. In other words, Plaintiff and other non-heterosexual individuals assigned female sex at birth can only qualify for CIS benefits by first paying for CIS for the requisite number of months (based upon their age).

37. Plaintiff and other similarly situated non-heterosexual individuals assigned female sex at birth are thus deprived of the same benefits under the Medical Plan as heterosexual Plan Holders.

38. Plaintiff and other similarly situated individuals are forced to pay thousands of dollars in out-of-pocket costs for IUI in order to qualify as “infertile,” under the Medical Plan.

39. The Medical Plan, by its very terms, limits non-heterosexual individuals assigned female sex at birth to the sole option of having to pay for IUI, compared to heterosexuals who have the choice between engaging in unprotected coitus or paying for IUI.

40. Solely by virtue of their sexual orientation, therefore, Plaintiff and similarly situated non-heterosexual individuals assigned female sex at birth have suffered, and will continue to suffer discrimination by being denied the same benefits under the Medical Plan as those provided to heterosexual individuals.

41. Plaintiff and other similarly situated individuals have suffered financial and emotional harm as a result of the discriminatory provisions in the Medical Plan.

Defendant denies Plaintiff benefits under the Medical Plan due to her Sexual Orientation

42. Plaintiff, by reason of her sexual orientation does not have the capacity to become pregnant through coitus.

43. In 2021, Plaintiff, desiring to become pregnant and start a family, submitted a request to Defendant for precertification to receive benefits for intrauterine insemination.

44. However, Defendant denied Plaintiff's request, claiming that Plaintiff did not meet the definition of "infertile" under the Medical Plan.

45. On July 15, 2021, Plaintiff sent Defendant a petition to reconsider its denial of her request for infertility treatment benefits on the basis that she did not wish to pay for the six cycles of IUI, and that the Medical Plan discriminated against her and other similarly situated individuals who, because of their sexual orientation, are unable to engage in coitus for the required number of months.

46. In a letter to Plaintiff dated July 27, 2021, Defendant again denied Plaintiff's petition for infertility treatment benefits, stating that, "criteria has not been met," since Plaintiff has not shown that she is "infertile" by having, "[f]or a woman who is 35 years of age or older: six months or more of timed, unprotected coitus, or six cycles of artificial insemination, single female desiring for a donor insemination cycle."

47. Defendant's denial letter stated that, in making its decision to uphold the denial, Defendant used its Clinical Policy Bulletin on Infertility ("Infertility CPB").

48. The Infertility CPB states that:

For purposes of this policy, a member is considered infertile if he or she is unable to conceive or produce conception after 1 year of frequent, unprotected

heterosexual sexual intercourse, or **6 months of frequent, unprotected heterosexual sexual intercourse** if the female partner is 35 years of age or older. **Alternately, a woman without a male partner** may be considered infertile if she is unable to conceive or produce conception after at least 12 cycles of donor insemination (6 cycles for women 35 years of age or older).³

49. Defendant responded to Plaintiff's July 15, 2021 complaint in a letter dated September 8, 2021.

50. In the letter, Defendant stated that its "actions are in no way to discriminate against [Plaintiff], but to [apply benefits and] process claims equitably to all plan participants, in accordance with our claims policies and procedures." Further, Defendant also stated that it "is not discriminating against its members but [is] following the guidelines of [its] medical plan provision."

51. Defendant's claim that it is not discriminating, but rather, simply following its "policies and procedures," overlooks the fact that Defendant's "policies and procedures"—which it drafted and designed—are facially discriminatory. The Medical Plan and the Infertility CPB expressly provide that individuals who have the capacity to engage in coitus need not pay out-of-pocket costs in order to obtain infertility treatment, but individuals who, because of their sexual orientation, are unable to engage in coitus, must first incur the costs of IUI before becoming eligible for such treatment.

52. Plaintiff has been injured by Defendant's discriminatory Medical Plan that requires her and other similarly situated non-heterosexual individuals assigned female sex at birth, based on their sexual orientation, to pay out-of-pocket for infertility treatments as a prerequisite to receiving coverage for such services.

³ Aetna, Infertility, Clinical Policy Bulletin No. 0237 (last reviewed November 12, 2021), available at: https://www.aetna.com/cpb/medical/data/300_399/0327.html (emphasis added).

53. After being denied coverage, Plaintiff in fact incurred the costs of IUI treatments directly.

54. Plaintiff has endured great emotional distress as of result of being denied the benefits of the Medical Plan and thereby having to choose a course of treatment based on cost, rather than based on her personal and medical circumstances in consultation with her doctor. Had Defendant covered the costs for IUI and IVF for Plaintiff as she initially requested, she would not have been forced to delay her personal decision to have a child.

55. Since it becomes increasingly difficult to become pregnant with age, the delays caused by Defendant's discriminatory Medical Plan threatened the health of Plaintiff and her potential future child, and her ability to get pregnant. Pregnancy also becomes increasingly dangerous to a pregnant person's health, as well as to the health of the fetus, with age.

CLASS ALLEGATIONS

56. **Class Definition:** Plaintiff brings this action as a class action under Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure, seeking declaratory relief and damages on behalf of the following Class of individuals:

All non-heterosexual individuals who: 1) were assigned "female" at birth; 2) are covered by an Aetna medical or health insurance plan that includes or is governed by the definition of "infertility" appearing in Aetna's Clinical Policy Bulletin No. 0237 or a substantively similar definition; 3) because of their sexual orientation, cannot engage in coitus; and 4) either (a) submitted a claim for infertility treatment benefits and were denied; (b) paid out-of-pocket for infertility treatment; or (c) will submit and be denied benefits, or pay out-of-pocket, for infertility treatment.

57. The following people are excluded from the Class: (1) any judge or magistrate presiding over this action and members of their families; (2) Defendant, Defendant's subsidiaries, parents, successors, predecessors, affiliates, and any entity in which the Defendant or its parents have a controlling interest and its current or former officers and directors; (3) persons who properly

execute and file a timely request for exclusion from the Class; (4) persons whose claims in this matter have been finally adjudicated on the merits or otherwise released; (5) Plaintiff's counsel and Defendant's counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

58. **Numerosity:** The exact number of Class members is unknown to Plaintiff at this time, but it is clear that individual joinder is impracticable. Defendant is a large insurer that administers medical insurance plans, including employee plans, student health insurance plans, and plans for individuals and families. In 2018, Forbes listed Aetna as the third-largest health insurance company in the United States, with 22.2 million "health plan enrollees," and \$60.6 billion in revenue.⁴ Upon information and belief, because of Defendant's discriminatory Medical Plan, a sufficient number of these individuals will be within the class definition to meet the numerosity requirement. The alleged Class is therefore sufficiently numerous.

59. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- a. Whether Defendant and/or Defendant's Medical Plan is a health program or activity, any part of which is receiving federal financial assistance, including credits, subsidies, or contracts of insurance, or is administered by an Executive Agency or any entity established under the ACA, 42 U.S.C. § 18001, *et seq.*

⁴ Forbes, *America's Biggest Health Insurance Companies In 2018* (Feb. 20, 2018), <https://www.forbes.com/pictures/5a8c601ca7ea43169013eb91/3-aetna/?sh=4c9d757f13e2>.

- b. Whether the Medical Plan and any others containing the same pertinent provisions and that were drafted, designed, or administered by Aetna facially discriminate on the basis of sex, which includes sexual orientation.
- c. Whether Plaintiff and putative Class members were excluded from participation in, denied the benefits of, or subjected to discrimination under Defendant's medical or health insurance plans while seeking infertility treatment benefits.
- d. Whether the Defendant's policies and practices regarding disbursement of infertility treatment benefits under its medical plans constitute disparate treatment of Plaintiff and the putative Class.
- e. Whether Defendant's policies and practices regarding disbursement of infertility treatment benefits under its medical plans has resulted in, or will result in, a disparate impact on Plaintiff and the putative Class.
- f. Whether, as a result of Defendant's policies and practices regarding disbursement of infertility treatment benefits under its Medical Plan, Plaintiff and the putative Class are entitled to equitable, and/or declaratory relief, and if so, the nature of such.
- g. Whether Plaintiff and members of the putative Class are entitled to receive monetary damages as relief for their financial and emotional harm.

60. **Adequacy:** Plaintiff will fairly and adequately represent and protect the interests of the Class and have retained counsel competent and experienced in complex litigation and class actions. Plaintiff has no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff. Plaintiff and her counsel are committed to vigorously prosecuting this action

on behalf of the members of the Class and have the financial resources to do so. Neither Plaintiff nor her counsel have any interest adverse to those of the other members of the Class.

61. **Superiority:** This class action is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this dispute and joinder of all members of the Class is impracticable. The damages suffered by the individual members of the Class are likely to have been small relative to the burden and expense of individual prosecution of the complex litigation necessitated by Defendant's wrongful conduct. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Defendant's misconduct. Even if members of the Class could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in their Complaints. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. Economies of time, effort, and expense will be fostered, and uniformity of decisions will be ensured.

62. **Declaratory Relief: Federal Rule of Civil Procedure 23(b)(2).** The prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendant. Such individual actions would create a risk of adjudications that would be dispositive of the interests of other Class members and impair their interests. Defendant has acted and/or refused to act on grounds generally applicable to the Class, making final declaratory relief appropriate.

COUNT I – DISPARATE TREATMENT DISCRIMINATION

Violation of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a)

63. Plaintiff and the putative Class reallege the allegations contained in the preceding paragraphs as if fully set forth herein.

64. Defendant receives federal financial assistance and is a “health program or activity” within the meaning of and subject to Section 1557 of the ACA.

65. Section 1557 of the ACA provides that an individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, *et seq.* (race, color, national origin), Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, *et seq.* (sex), the Age Discrimination Act of 1975 (Age Act), 42 U.S.C. § 6101, *et seq.* (age), or Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (disability), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Act or its amendments. All of the enforcement mechanisms provided for and available under the foregoing statutes apply for purposes of Section 1557.

66. Plaintiff and the putative Class members are (or were) otherwise participants in Defendant’s health program(s) and are protected by the anti-discrimination provisions of Section 1557 of the ACA.

67. On June 15, 2020, the Supreme Court of the United States issued its decision in *Bostock v. Clayton County*, holding that Title VII’s protection against discrimination on the basis of sex also protects against discrimination based on sexual orientation, as “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against

that individual based on sex.” *Bostock v. Clayton Cty. Georgia*, 140 S. Ct. 1731, 1741 (2020). The holding in *Bostock*, i.e., that discrimination under Title VII “on the basis of sex” includes discrimination on the basis of sexual orientation, applies analogously to discrimination “on the basis of sex” under Title IX, and, by statutory extension, to Section 1557 of the ACA.

68. Section 1557 of the ACA, therefore, prohibits discrimination on the basis of sexual orientation in any health program or activity that receives federal financial assistance.

69. Defendant has intentionally discriminated against Plaintiff and the putative Class on the basis of their sexual orientation, in violation of Section 1557 of ACA, as a matter of policy or practice.

70. Specifically, Defendant intentionally discriminates on the basis of sexual orientation under Section 1557 by providing, under the express terms of its Medical Plan, stricter prerequisites to obtaining insurance benefits for infertility treatments for Plaintiff and the putative Class than it does for individuals with a different sexual orientation. Defendant’s Medical Plan, for purposes of determining “infertility,” treats non-heterosexual individuals differently than heterosexual individuals, by providing that “infertility” may be established by engaging in unprotected coitus, or, alternatively, by paying out-of-pocket for a requisite number of IUI treatments. Defendant’s policy therefore constitutes facial disparate treatment discrimination in violation of Section 1557 or, at a minimum, evidence of Defendant’s policy or practice of intentional disparate treatment discrimination, on the basis of sexual orientation.

71. Just as the Supreme Court held in *Bostock*, that “[b]y discriminating against homosexuals, the [defendant] intentionally penalizes men for being attracted to men and women for being attracted to women,” so too does Defendant’s Medical Plan penalize Plaintiff and the putative Class, because of their sexual orientation. *Bostock*, 140 S. Ct. at 1746.

72. As a direct result of Defendant's violation of Plaintiff's and putative Class members' rights under Section 1557 of the ACA, Plaintiff and the Class have suffered emotional distress and physical and financial injury.

73. All acts and omissions committed by Defendant described herein for which liability is claimed were done intentionally, unlawfully, maliciously, wantonly, recklessly, negligently, and/or with bad faith and said acts meet all of the standards for imposition of punitive damages.

74. Accordingly, Plaintiff and the putative Class under Rule 23(b)(3) are entitled to compensatory and punitive damages, as well as reasonable attorneys' fees, costs, and disbursements.

75. Plaintiff and members of the putative Class under Rule 23(b)(2) are entitled to declaratory relief; as well as reasonable attorneys' fees, costs, and disbursements.

COUNT II – DISPARATE IMPACT DISCRIMINATION

Violation of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a)

76. Plaintiff and the putative Class reallege the allegations contained in the preceding paragraphs (other than in Count I) as if fully set forth herein.

77. Defendant receives federal financial assistance and is a "health program or activity" within the meaning of and subject to Section 1557 of the ACA.

78. Section 1557 of the ACA provides that an individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, *et seq.* (race, color, national origin), Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, *et seq.* (sex), the Age Discrimination Act of 1975 ("Age Act"), 42 U.S.C. § 6101, *et seq.* (age), or Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (disability), be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under, any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Act or its amendments. All of the enforcement mechanisms provided for and available under the foregoing statutes apply for purposes of Section 1557.

79. Plaintiff and the putative Class members are or were otherwise participants in Defendant's health program(s) and are protected by the anti-discrimination provisions of Section 1557 of the ACA.

80. On June 15, 2020, the Supreme Court of the United States issued its decision in *Bostock v. Clayton County*, holding that Title VII's protection against discrimination on the basis of sex also protects against discrimination based on sexual orientation, as "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty. Georgia*, 140 S. Ct. 1731, 1741 (2020). The holding in *Bostock*, i.e., that discrimination under Title VII "on the basis of sex" includes discrimination on the basis of sexual orientation, applies analogously to discrimination "on the basis of sex" under Title IX.

81. Section 1557 of the ACA, therefore, prohibits discrimination on the basis of sexual orientation in any health program or activity that receives federal financial assistance.

82. In the alternative to Count I, and to the extent that Defendant denies the existence of a facially discriminatory policy on the basis of sexual orientation against Plaintiff and the putative Class, Plaintiff and the Class allege that Defendant's policy, even if facially neutral as to their sexual orientation, has (or had) an illegal and discriminatorily disparate impact on Plaintiff and the putative Class, all of whom are non-heterosexual, without any business necessity.

Defendant's Medical Plan's adverse impact against non-heterosexual individuals stems from the Medical Plan's provision that "infertility" may be established by engaging in unprotected coitus, or, alternatively, by paying out-of-pocket for a requisite number of IUI treatments. The application of the Medical Plan, to the extent it is not facially and intentionally discriminatory against non-heterosexual individuals, adversely and disparately impacts non-heterosexual individuals.

83. Just as the Supreme Court held in *Bostock*, that "[b]y discriminating against homosexuals, the [defendant] intentionally penalizes men for being attracted to men and women for being attracted to women," so too does Defendant's Medical Plan penalize Plaintiff and the putative Class, simply because of their sexual orientation. *Bostock*, 140 S. Ct. at 1746.

84. As a direct result of Defendant's violation of Plaintiff's and putative Class members' rights under Section 1557 of the ACA, Plaintiff and the Class have suffered emotional distress and physical and financial injury.

85. All acts and omissions committed by Defendant described herein for which liability is claimed were done intentionally, unlawfully, maliciously, wantonly, recklessly, negligently, and/or with bad faith and said acts meet all of the standards for imposition of punitive damages.

86. Accordingly, Plaintiff and the putative Class under Rule 23(b)(3) are entitled to compensatory and punitive damages, as well as reasonable attorneys' fees, costs, and disbursements.

87. Plaintiff and members of the putative Class under Rule 23(b)(2) are entitled to declaratory relief, as well as reasonable attorneys' fees, costs, and disbursements.

COUNT III – DECLARATORY JUDGMENT

Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

88. Plaintiff and the putative Class reallege the allegations contained in the preceding paragraphs as if fully set forth herein.

89. Under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, this Court is authorized to enter a judgment declaring the rights and legal relations of the parties and grant further necessary relief. Furthermore, the Court has broad authority to restrain acts, such as here, that are tortious and violate the terms of the federal and state statutes described in this Complaint.

90. An actual controversy has arisen in light of Defendant's discrimination on the basis of sexual orientation in violation of Section 1557 of the ACA, by designing, drafting, and administering medical benefit plans that require non-heterosexual individuals assigned female sex at birth to pay large out-of-pocket costs as a prerequisite to receiving benefits for infertility treatment services. Section 1557 of the ACA prohibits discrimination on the basis of sex, including discrimination on the basis of sexual orientation and gender identity, in any health program or activity that receives federal financial assistance. By Defendant receiving federal financial assistance via credits, subsidies, and/or contracts of insurance and by providing coverage of medical services in exchange for payments through Medicaid, Defendant was required to comply with the ACA, 42 U.S.C. § 18001, *et seq.* Defendant denies these allegations.

91. Pursuant to its authority under the Declaratory Judgment Act, this Court should enter a judgment declaring, among other things, the following:

- a. Defendant owes a legal duty to comply with Section 1557 of the ACA to not deny benefits for infertility treatment on the basis of sexual orientation in any of the medical plans it designs, drafts, issues, sells, or administers;

- b. Reasonable consumers would expect Defendant to comply with Section 1557 of the ACA and to provide benefits for infertility treatment to Plaintiff and the putative Class; and
- c. Defendant continues to breach its legal duties by denying members of the putative Class benefits under the Medical Plan, and other medical plans throughout the country, for infertility treatment on the basis of sexual orientation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, respectfully request that this Court enter judgment against Defendant and in favor of Plaintiff and the Class, and award the following relief:

- A. An order certifying this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, declaring Plaintiff as representative of the Class and Plaintiff's counsel as counsel for the Class;
- B. An order awarding declaratory relief and all related damages, including, at the least, nominal damages in recognition of Plaintiff's vindication of important statutory and constitutional rights;
- C. An order awarding costs, restitution, disgorgement, compensatory damages, and out-of-pocket expenses in an amount to be determined at trial;
- D. An order requiring Defendant to pay both pre- and post-judgment interest on any amounts awarded;
- E. An award of costs, expenses, and attorneys' fees as permitted by law; and
- F. Such other or further relief as the Court may deem appropriate, just, and equitable.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury of any and all issues in this action so triable.

Dated: May 13, 2022

/s/ Gary F. Lynch

Gary F. Lynch (p.h.v.)

Kelly K. Iverson

Jamisen Etzel (p.h.v.)

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***Counsel for Plaintiff and the putative
Class***

PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 21, 2023, I served the following document(s):

NOTICE OF PENDENCY OF OTHER ACTIONS OR PROCEEDINGS

as designated below:

By First-Class Mail: I am familiar with Altshuler Berzon LLP’s practice of collection and processing correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business:

Aetna Life Insurance Company
1505 Corporation
CT CORPORATION SYSTEM
330 N Brand Blvd Ste 700
Glendale, CA 91203

Aetna Inc.
151 Farmington Ave
Hartford, CT 06156

By Electronic Mail: I caused such document(s) to be delivered in PDF format by electronically transmitting a PDF version to the email addresses listed in the service list below.

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Baker Botts L.L.P.
2001 Ross Avenue
Suite 900
Dallas, TX 75201-2980
Email: earl.austin@bakerbotts.com

*Counsel for Defendant Aetna Life
Insurance Company in
Goidel et al. v. Aetna Life
Insurance Company, Case No.
1:21-cv-07619-VSB-VF, in the
United States District Court for the
Southern District of New York*

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1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct and that I am employed in the office of a member of the bar of this
3 Court at whose direction the service was made. Executed on April 21, 2023, at San Francisco,
4 California.

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7 Isabella Kearns
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