

1 Rebecca Peterson-Fisher (SBN 255359)  
 2 Jennifer L. Liu (SBN 279370)  
 3 C. Leah Kennedy (SBN 346306)  
**KATZ BANKS KUMIN LLP**  
 4 150 California Street, 16<sup>th</sup> Floor  
 San Francisco, CA 94111  
 5 Tel: 415.813.3260  
 Fax: 415.813.2495  
 Email: Peterson-Fisher@katzbanks.com  
 Liu @katzbanks.com  
 Kennedy@katzbanks.com

7 Barbara J. Chisholm (SBN 224656)  
 8 Danielle E. Leonard (SBN 208201)  
 9 Connie K. Chan (SBN 284230)  
 Robin S. Tholin (SBN 344845)  
 10 **ALTSHULER BERZON LLP**  
 11 177 Post Street, Suite 300  
 San Francisco, CA 94108  
 12 Tel: 415.421.7151  
 Fax: 415.362.8064  
 13 E-mail: bchisholm@altshulerberzon.com  
 dleonard@altshulerberzon.com  
 14 cchan@altshulerberzon.com  
 rtholin@altshulerberzon.com

Michelle Banker (admitted *pro hac vice*)  
 Alison Tanner (admitted *pro hac vice*)  
 Noel León (admitted *pro hac vice*)  
 Sudria Twyman (admitted *pro hac vice*)  
**NATIONAL WOMEN’S LAW CENTER**  
 1350 I Street NW, Suite 700  
 Washington, DC 20005  
 Tel: 202.588.5180  
 Email: mbanker@nwlc.org  
 atanner@nwlc.org  
 nleon@nwlc.org  
 stwyman@nwlc.org

16 *Attorneys for Plaintiff and the Putative Class*

17  
 18 UNITED STATES DISTRICT COURT  
 19 NORTHERN DISTRICT OF CALIFORNIA  
 20 OAKLAND 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.

CASE NO.: 4:23-cv-01849-NC

**JOINT CASE MANAGEMENT  
 STATEMENT**

Date: October 12, 2023

Time: 2:00 p.m.

Dept.: Courtroom 2, 4<sup>th</sup> Floor

Judge: Hon. Haywood S. Gilliam

1 Counsel for the parties to the above-entitled action Plaintiff Mara Berton and Defendants  
2 Aetna, Inc. and Aetna Life Insurance Company, Inc. (“Aetna” or Defendants”), by and through  
3 their attorneys of record herein, submit the following Joint Case Management Conference  
4 Statement:

5 **1. Jurisdiction and Service**

6 This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. The sole cause  
7 of action in this case is a claim that Aetna has violated and continues to violate Section 1557 of  
8 the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18116(a). Plaintiff  
9 personally served Defendant Aetna Inc. on May 1, 2023, and personally served Defendant Aetna  
10 Life Insurance Company, Inc. on May 2, 2023.

11 **2. Facts**

12 Plaintiff’s Position

13 Aetna is a nationwide company that provides health coverage products, including fully-  
14 insured and self-funded health benefit plans. For self-funded plans, Aetna designs and markets  
15 plans that it offers for sale to employers and other plan sponsors, for which Aetna then acts as a  
16 third-party administrator (“TPA”). In Aetna-designed and -administered health plans that provide  
17 coverage for infertility treatments, Aetna by default incorporates into those plans Clinical Policy  
18 Bulletin No. 0327—Infertility (referred to herein as the “Infertility Policy” or “Policy”), which  
19 Aetna designed specifically to govern its determination of members’ eligibility for fertility  
20 benefits. The Infertility Policy also governs determinations of fully-insured-plan members’  
21 eligibility for fertility benefits.

22 Aetna’s Infertility Policy has created wholly unequal systems of fertility coverage that  
23 disadvantage LGBTQ members seeking to get pregnant who cannot do so through sexual  
24 intercourse because of their sexual orientation or gender identity or that of their partners,  
25 compared to heterosexual members seeking to get pregnant with their partners. Specifically,  
26 under Aetna’s Infertility Policy, heterosexual members seeking to become pregnant are deemed  
27 eligible for fertility treatment coverage if the member simply states to a doctor that no pregnancy  
28

1 has resulted from frequent, unprotected sexual intercourse for six or 12 months, depending on the  
2 age of the person seeking treatment. However, LGBTQ members who want to become pregnant  
3 but cannot do so through sexual intercourse with their partner are deemed eligible for coverage  
4 only after submitting proof that they have undergone six or 12 cycles (depending on age) of  
5 arduous and expensive artificial insemination treatments—often the very fertility treatments for  
6 which they seek coverage—which require substantial out-of-pocket costs and take far longer  
7 than six or 12 months to complete.

8 Plaintiff, who is female and married to a woman, was unlawfully denied coverage for  
9 intrauterine insemination by Aetna because she did not meet Aetna’s discriminatory definition of  
10 infertile. As a result, Plaintiff has spent thousands of dollars out-of-pocket on intrauterine  
11 insemination. Plaintiff seeks compensatory damages for the costs and other harms she and  
12 similarly situated Class Members have been subjected to, and injunctive relief to end Aetna’s  
13 policy of discrimination against LGBTQ members in need of fertility treatment.

#### 14 Defendant’s Position

15 Aetna denies Plaintiff’s allegations. Defendant Aetna Life Insurance Company serves as  
16 a third-party administrator of an employee health benefit plan sponsored by Plaintiff’s wife’s  
17 employer, Encore Group USA LLC (“Encore”). Encore has sole authority to set the terms of the  
18 Plan and determine who is eligible for benefits under it. Pursuant to the Master Services  
19 Agreement, Aetna Life Insurance Company merely determines initial entitlement to benefits and  
20 reviews denied claims, but is at all times required to act “in a manner consistent with the  
21 documents and instruments governing the Plan.” Defendant Aetna Inc. is a holding company  
22 that has no insurance operations or products and is a parent company of Aetna Life Insurance  
23 Company.

24 Encore elected to include a benefit to treat medical infertility through intrauterine  
25 insemination (“IUI”). At the time Plaintiff was attempting to conceive, the Plan required *all*  
26 members seeking the benefit to confirm a diagnosis of medical infertility by meeting standard  
27 medical criteria showing that they unsuccessfully tried to conceive for a specific, age-related

1 period of time through egg-sperm contact, whether through unprotected sexual intercourse or  
2 through donor insemination, and (for women) by meeting certain hormonal testing criteria  
3 defined in the Plan. Plaintiff is in a same-sex relationship and sought coverage for donor  
4 insemination through IUI without first establishing that she met the Plan’s medical necessity  
5 criteria for infertility treatments. Her benefit claim was denied as a result, based on her failure to  
6 meet the definition of medical “infertility” as defined in Plaintiff’s benefit plan document.  
7 Plaintiff does not allege that she had been diagnosed with medical infertility at the time she  
8 requested the benefit.

9 Plaintiff now asserts a single claim under Section 1557 of the Affordable Care Act, 42  
10 U.S.C. § 18116(a) (“Section 1557”), alleging that her Plan’s “requirement” that she establish  
11 medical infertility by paying out of pocket for IUI violates Section 1557 by imposing on same-  
12 sex couples costs that opposite-sex couples may avoid by attempting to conceive through  
13 heterosexual sex.

### 14 **3. Legal Issues**

15 The Parties anticipate legal issues concerning, as set forth in the Complaint, (1) whether  
16 Aetna’s Infertility Policy discriminates on the basis of sex, including on the basis of sexual  
17 orientation and/or gender identity; (2) whether Defendants have violated and are continuing to  
18 violate Section 1557 by designing, marketing, selling, supplying, issuing, underwriting, and/or  
19 administering plans that include, incorporate, or rely on Aetna’s Infertility Policy; and (3) the  
20 certifiability of a national injunctive class and a statewide damages class.

### 21 **4. Motions**

22 Defendants’ Motion to Dismiss Complaint is currently pending.

#### 23 Plaintiff’s Position

24 Plaintiff anticipates filing a motion for class certification and may file a motion for  
25 summary judgment.





1 **11. Relief**

2 Plaintiff's Position

3 On behalf of the National Injunctive Relief Class, Plaintiff seeks declaratory relief and  
4 injunctive relief to enjoin Aetna from implementing and enforcing its discriminatory infertility  
5 policy and from designing, marketing, selling, supplying, issuing, underwriting, or administering  
6 plans that include, incorporate, or rely on any policy that denies equal fertility treatment  
7 coverage to individuals who cannot become pregnant through sexual intercourse with their  
8 partner because of sexual orientation or gender identity. On behalf of the California Damages  
9 Class, Plaintiff seeks compensatory and punitive damages. Plaintiff also seeks attorneys' fees  
10 and costs as provided by applicable law.

11 Defendant's Position

12 Defendants seek their respective attorneys' fees and costs as provided by applicable law.

13 **12. Settlement and ADR.**

14 The Parties have discussed the possibility of early private mediation or a judicial  
15 settlement conference, and agree such discussions will be more productive once the Court rules  
16 on the pending motion to dismiss.

17 Plaintiff's Position

18 In addition to the Parties' agreement that mediation or a judicial settlement conference  
19 may be productive following a ruling on the pending motion to dismiss, Plaintiff notes that the  
20 scope of settlement discussions could be impacted by a potential settlement in the *Goidel* case.  
21 The parties in that case have agreed to a term sheet, but no motion for preliminary approval has  
22 yet been filed.

23 Defendant's Position

24 The *Goidel* case has limited relevance to the parties' settlement discussions here. *Goidel*  
25 involves unique issues that do not affect this case. Nonetheless, Defendants agree that early  
26 private mediation or a judicial settlement conference may benefit the parties in reaching a good  
27 faith settlement.

1 **13. Other References**

2 The Parties do not believe this case is suitable for reference to binding arbitration, a  
3 special master, or the Judicial Panel on Multidistrict Litigation.

4 **14. Narrowing of Issues.**

5 The Parties are not presently aware of any issues that can be narrowed.

6 **15. Expedited Trial Procedure**

7 The Parties agree this case is not appropriate for expedited trial procedure.

8 **16. Scheduling**

9 The Parties propose the following schedule:

- |                                    |  |
|------------------------------------|--|
| 10 Rule 26(f) Conference:          | November 2, 2023                             |
| 11 Initial Disclosures:            | November 16, 2023                            |
| 12 Class certification motion:     | 9 months from the motion to dismiss ruling.  |
| 13 Expert designation:             | 13 months from the motion to dismiss ruling. |
| 14 Rebuttal Experts:               | 14 months from the motion to dismiss filing. |
| 15 Discovery cutoff:               | 15 months from the motion to dismiss ruling. |
| 16 Hearing on dispositive motions: | 18 months from the motion to dismiss ruling. |
| 17 Pretrial Conference:            | 20 months from the motion to dismiss ruling. |
| 18 Trial:                          | 21 months from the motion to dismiss ruling. |

19 **17. Trial**

20 The case will be tried to a jury. The length of a trial is difficult to predict at this time.

21 **18. Disclosure of Non-party Interested Entities or Persons**

22 Plaintiff has filed her “Certification of Interested Entities or Persons” required by Civil Local  
23 Rule 3-15, and has no conflicts of interest to report. Defendants have filed their “Certification of  
24 Interested Entities or Persons” and disclosed CVS Health Corporation.

25  
26  
27 //

1 **19. Professional Conduct**

2 All attorneys of record for the parties have reviewed the Guidelines for Professional Conduct  
3 for the Northern District of California.

4  
5  
6 Respectfully submitted,

7 Dated: October 5, 2023

8 ALTSHULER BERZON LLP  
9 Barbara J. Chisholm  
10 Danielle E. Leonard  
11 Connie K. Chan  
12 Robin S. Tholin

13 KATZ BANKS KUMIN LLP  
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19 Alison Tanner  
20 Noel León  
21 Sudria Twyman

22 By: /s/ Rebecca Peterson-Fisher  
23 Rebecca Peterson-Fisher

24 *Attorneys for Plaintiff and the Putative Class*

25 Dated: October 5, 2023

26 O'MELVENY & MYERS LLP  
27 Susannah K. Howard  
28 Kristin MacDonnell  
Meaghan VerGow  
Molly Lens

By: /s/ Susannah K. Howard  
Susannah K. Howard

*Attorneys for Defendants*

**SIGNATURE ATTESTATION**

Pursuant to Local Rule 5-1(h)(3) regarding signatures, I, Rebecca Peterson-Fisher, hereby attest that concurrence in the filing of this document has been obtained from the other signatory to this document.

/s/ Rebecca Peterson-Fisher  
Rebecca Peterson-Fisher

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