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27 UNITED STATES DISTRICT COURT  
28 NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

29 MARA BERTON, on behalf of herself and  
30 all others similarly situated,

31 Plaintiff,

32 v.

33 AETNA INC. and AETNA LIFE  
34 INSURANCE COMPANY,

35 Defendants.

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

**JOINT CASE MANAGEMENT  
STATEMENT AND RULE 26(f)  
REPORT**

Date: March 19, 2024  
Time: 2:00 p.m.  
Dept.: Courtroom 2, 4<sup>th</sup> Floor  
Judge: Hon. Haywood S. Gilliam

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20 Aetna Inc. and Aetna Life Insurance

21 Company

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

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 fertility 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 Plaintiff will demonstrate that Aetna’s Infertility Policy has created wholly unequal  
23 systems of fertility coverage that disadvantage LGBTQ members seeking to get pregnant who  
24 cannot do so through sexual intercourse because of their sexual orientation or gender identity or  
25 that of their partners, compared to heterosexual members seeking to get pregnant with their  
26 partners. Specifically, under Aetna’s Infertility Policy, heterosexual members seeking to become  
27 pregnant are deemed eligible for fertility treatment coverage if the member simply states to a

1 doctor that no pregnancy has resulted from frequent, unprotected sexual intercourse for six or 12  
2 months, depending on the age of the person seeking treatment. However, LGBTQ members who  
3 want to become pregnant but cannot do so through sexual intercourse with their partner are  
4 deemed eligible for coverage only after submitting proof that they have undergone six or 12  
5 cycles (depending on age) of arduous and expensive artificial insemination treatments—often the  
6 very fertility treatments for which they seek coverage—which require substantial out-of-pocket  
7 costs and take far longer 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 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 the certifiability of a national injunctive class and a statewide  
16 damages class will be a major issue in the lawsuit.

#### 17 Plaintiff’s Position

18 In denying Aetna’s motion to dismiss, the Court addressed one of the key legal issues in  
19 this case, holding that “Plaintiff has adequately pled that she was discriminated against in a  
20 health care program or activity on the basis of sex in violation of Section 1557” because she has  
21 plausibly alleged that Aetna’s “differential treatment on the basis of sexual orientation is facially  
22 discriminatory because it imposes an unequal burden on same-sex couples as compared to  
23 opposite-sex couples.” ECF 70 at 6–7.

24 Plaintiff expects the remaining legal issues in this case to involve the application of the  
25 Court’s discrimination analysis to the facts that will be produced in discovery, including facts  
26 related to the relative burdens Aetna’s Infertility Policy imposes on heterosexual and LGBTQ  
27

1 members. Plaintiff further expects the legal issues in this case to include any affirmative defenses  
2 Aetna asserts in its forthcoming Answer to Plaintiff's complaint.

### 3 Defendants' Position

4 Defendants expect the viability of Plaintiff's discrimination theory to be a focus of the  
5 litigation. Plaintiff's plan's definition of medical infertility followed broadly accepted clinical  
6 criteria at the time she sought benefits. The application of those criteria to Plaintiff did not  
7 discriminate against her on any prohibited ground.

8 Defendants also anticipate further litigation over the proper parties to this lawsuit.  
9 Defendants believe discovery will show (1) that Aetna, Inc. is an improper party because it has  
10 no role in the administration of Aetna health insurance plans, including the Encore Plan; and (2)  
11 that Encore is a necessary party to this lawsuit. While the Court denied Defendants' party-  
12 related arguments in the motion to dismiss order, it noted regarding joinder of Encore that "it is  
13 not entirely certain what an injunction solely against Aetna would accomplish," ECF No. 70 at  
14 10, and that it "may revisit this issue once a more complete factual record is developed." *Id.*

15 Whether Aetna Life Insurance Company received federal financial assistance and is  
16 properly subject to Section 1557 will also be a significant issue in this lawsuit, as will the issue  
17 of whether Plaintiff's Section 1557 claim would require Aetna to violate duties owed under  
18 ERISA.

### 19 **4. Motions**

20 Defendants' Motion to Dismiss Complaint was denied on February 29, 2024. ECF No.  
21 70. The Court also granted in part and denied in part Defendants' Motion to Seal. *See id.* The  
22 Court denied Defendants' request to seal the entire Master Services Agreement between Aetna  
23 and Encore ("MSA"), but permitted Defendants to re-file the motion to seal only "specific,  
24 targeted portions of the MSA containing truly sensitive information." *Id.* at 13. On March 8,  
25 2024, Defendants filed a renewed administrative motion to seal limited, specific portions of the  
26 MSA. ECF No. 72. Plaintiff did not oppose this motion and the Parties entered a stipulation  
27 reflecting their agreement. ECF No. 73.



1 Plaintiff will seek discovery on topics including, but not limited to, Aetna’s Infertility  
2 Policy and modifications thereto, Aetna’s marketing and sale of plans that incorporate the  
3 Infertility Policy, identification of class members, processing of claims for fertility benefits,  
4 whether Aetna receives financial assistance, and whether Aetna, Inc. is a proper defendant.

5 Defendants will initially focus discovery on the threshold legal issues of (a) the proper  
6 parties to this lawsuit; and (b) whether Aetna Life Insurance Company is properly subject to  
7 Section 1557. Otherwise, Defendants plan to serve written discovery on Plaintiff and take  
8 Plaintiff’s deposition.

9 The Parties agree there is no need for formal phasing or bifurcation of discovery and will  
10 work cooperatively to sequence discovery in an efficient manner.

11 C. Electronically Stored Information (“ESI”)

12 The parties agree that an ESI protocol appropriately tailored to the needs of the case may  
13 be useful and will further meet and confer.

14 D. Claims of Privilege or Protection

15 The parties agree to meet and confer regarding entering into a protocol regarding  
16 assertions of privilege and challenges thereto early in the discovery process, once the volume of  
17 privileged documents is more clear.

18 E. Changes to the Limitations on Discovery

19 The parties agree there is no need to change the limitations on discovery set forth in the  
20 Federal Rules of Civil Procedure.

21 F. Other Orders the Court Should Issue

22 The parties anticipate filing a proposed Stipulated Protective Order shortly.

23 **9. Class Actions**

24 Counsel for the parties have reviewed the Procedural Guidance for Class Action  
25 Settlement.

26 Plaintiff’s Position and information required under Civil L.R. 16-9(b)



1 (1) The specific paragraphs of Fed. R. Civ. P. 23 under which the action is maintainable  
2 as a class action.

3 Plaintiff intends to seek certification of a National Injunctive Relief Class under Rule  
4 23(b)(2) and a California Damages Class under Rule 23(b)(3).

5 (2) A description of the class or classes in whose behalf the action is brought.

6 This action is being brought on behalf of a National Injunctive Relief Class of all  
7 LGBTQ individuals with uteruses who are or will be in a relationship with a partner with whom  
8 they cannot become pregnant through sexual intercourse because of their or their partner's sexual  
9 orientation or gender identity and who are or will be Members of an Aetna health plan in the  
10 United States that includes fertility benefits and incorporates the Infertility Policy.

11 The request for damages in this action is asserted on behalf of a California Damages  
12 Class of all LGBTQ individuals with uteruses who, at any time in the last four years, are or were  
13 in a relationship with a partner with whom they could not become pregnant through sexual  
14 intercourse because of their or their partner's sexual orientation or gender identity and are or  
15 were Members of an Aetna health plan in California that included fertility benefits and  
16 incorporated Aetna's Infertility Policy, and who incurred out-of-pocket expenses and/or other  
17 compensable damages as a result of Aetna's Infertility Policy.

18 (3) Facts showing that the party is entitled to maintain the action under Fed. R. Civ. P.  
19 23(a) and (b).

20 An estimated 39 million people in the United States rely on Aetna health coverage plans  
21 and services, and approximately 7.2% of U.S. adults identify as lesbian, gay, bisexual, or  
22 transgender. Aetna administers health coverage plans for over one million Californians, and  
23 approximately 9.1% of Californians, identify as lesbian, bisexual, gay or transgender. Aetna's  
24 members thus include many thousands of people with uteruses and of reproductive age who, due  
25 to their sexual orientation or gender identity or that of their partner, have needed or will need  
26 fertility treatment to become pregnant.

1 Common issues of law and fact predominate over any individual issues arising from  
2 Class Members' claims against Aetna for unlawful discrimination in violation of Section 1557.  
3 Aetna incorporates the Infertility Policy into health plans nationwide that it designs, issues, or  
4 administers. Facts related to the application of that policy, including what requirements Aetna's  
5 Infertility Policy imposes on members in heterosexual partnerships who seek coverage for  
6 fertility treatments and whether those are less burdensome than the requirements on members  
7 who are LGBTQ, are common to the class.

8 A class action is superior to other methods for the resolution of this dispute, as joinder of  
9 all members of the Classes is impracticable, and members of the proposed Classes can be  
10 identified from Aetna's records and/or through publication notice.

11 Plaintiff's claims are typical of those in the National Injunctive Relief Class and the  
12 California Damages Class. She has no conflicts of interest with any members of the Classes, is  
13 committed to vigorous prosecution of all claims on behalf of members of the Classes, and will  
14 fairly and adequately protect the interests of the Classes.

15 (4) A proposed date for the Court to consider whether the case can be maintained as a  
16 class action.

17 The Parties propose the deadline to move for class certification be set for December 13,  
18 2024.

19 Defendants' Position

20 Defendants contend that this case cannot be maintained as a class action because it does  
21 not meet the requirements of Rule 23. Specifically, common issues of law and fact do not  
22 predominate because the individuals in Plaintiff's proposed class were subject to innumerable  
23 different health plans with different fertility benefits. Further, class treatment is not a superior  
24 method of adjudication because it would require thousands of mini-trials to identify plan  
25 members who may be eligible to participate in the class because they are LGBTQ+ and who  
26 suffered an injury as a result of the alleged discrimination by paying out-of-pocket for IUI.

1 Defendants believe that the parties should work towards resolving class certification as  
2 quickly as reasonably possible and agree with the proposed class certification schedule set forth  
3 below. *See* Fed. R. Civ. P. 23(c)(1) (Court must address class certification at “an early  
4 practicable time”). Defendants propose that the parties' initial discovery focus on issues relevant  
5 to class certification.

#### 6 **10. Related Cases**

7 *Goidel v. Aetna Life Insurance Company*, S.D.N.Y. Case No. 1:21-cv-07618-VSB-VF, is  
8 a putative class action on behalf of a class of New York individuals who have suffered  
9 discrimination as a result of Aetna’s Infertility Policy, seeking New York-wide injunctive relief  
10 and damages on behalf of that class. The *Goidel* plaintiffs allege that Aetna’s policy violates  
11 Section 1557 of the ACA as well as N.Y. Exec. Law §296(2)(a) and N.Y.C. Admin. Code § 8-  
12 107(4).

13 *Kulwicki v. Aetna Life Insurance Company*, D. Conn. Case No. 3:22-cv-00229-RNC, is a  
14 putative class action seeking declaratory relief and damages, alleging that Aetna’s Infertility  
15 Policy violates Section 1557 of the ACA. On March 12, 2024, the District Court granted in part  
16 and denied in part Aetna’s motion to dismiss the *Kulwicki* complaint under Rule 12(b)(1) and  
17 denied Aetna’s motion to dismiss under Rule 12(b)(7). *See Kulwicki*, Dkt. 113.

#### 18 **11. Relief**

##### 19 Plaintiff’s Position

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



Event	Deadline
Rule 26(f) Conference:	March 7, 2024
Initial Disclosures:	March 21, 2024
Class certification motion:	December 13, 2024
Class certification opposition:	February 14 2025
Class certification reply:	March 21, 2025
Fact discovery cutoff:	May 2, 2025
Expert designation:	May 30, 2025
Rebuttal Experts:	June 27, 2025
Expert discovery cutoff:	July 25, 2025
Dispositive motions filed:	August 22, 2025
Pretrial Conference:	TBD after class certification/dispositive motion rulings
Trial:	TBD

### 17. Trial

Plaintiff included a demand for jury trial in her Complaint. The length of a trial is difficult to predict at this time.

#### Plaintiff's Position

As the Parties agreed in their previous Joint Case Management Statement (*see* ECF 51 at 8), the case should be tried to a jury. In addition to equitable relief, Plaintiff seeks compensatory and punitive damages, for which she is entitled to a jury trial.

#### Defendant's Position

Defendants are assessing the propriety of a jury trial in this case, particularly in light of the fact that Plaintiff seeks primarily equitable relief for which there is no right to a trial by jury. Defendants reserve the right to move to strike Plaintiff's demand as to equitable claims for which there is no right to a jury trial.

### 18. Disclosure of Non-party Interested Entities or Persons

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

4 **19. Professional Conduct**

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

7 Respectfully submitted,

8 Dated: March 12, 2024

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21 Dated: March 12, 2024

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By: /s/ Susannah K. Howard

Susannah K. Howard

*Attorneys for Defendant*

**SIGNATURE ATTESTATION**

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

/s/ Connie K. Chan

Connie K. Chan

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