

1 Barbara J. Chisholm (SBN 224656)  
2 Danielle E. Leonard (SBN 208201)  
3 Connie K. Chan (SBN 284230)  
4 Robin S. Tholin (SBN 344845)  
5 **ALTSHULER BERZON LLP**  
6 177 Post Street, Suite 300  
7 San Francisco, CA 94108  
8 Tel: (415) 421-7151  
9 Fax: (415) 362-8064  
10 Email:

11 bchisholm@altshulerberzon.com  
12 dleonard@altshulerberzon.com  
13 cchan@altshulerberzon.com  
14 rtholin@altshulerberzon.com

15 Michelle Banker (admitted pro hac vice)  
16 Alison Tanner (admitted pro hac vice)  
17 Noel León (admitted pro hac vice)  
18 **NATIONAL WOMEN'S LAW CENTER**  
19 1350 I Street NW, Suite 700  
20 Washington, DC 20005  
21 Tel: (202) 588-5180  
22 Email: mbanker@nwlc.org  
23 atanner@nwlc.org  
24 nleon@nwlc.org

Rebecca Peterson-Fisher (SBN 255359)  
Jennifer L. Liu (SBN 279370)  
**KATZ BANKS KUMIN LLP**  
235 Montgomery St. Suite 665  
San Francisco, CA 94104  
Tel: (415) 813-3260  
Fax: (415) 813-2495  
Email: peterson-fisher@katzbanks.com  
liu@katzbanks.com

Hugh Baran (admitted pro hac vice)  
Marilyn Robb (admitted pro hac vice)  
**KATZ BANKS KUMIN LLP**  
111 Broadway, Suite 1702  
New York, NY 10006  
Tel: (646) 759-4501  
Fax: (646) 759-4502  
Email: baran@katzbanks.com

Marilyn Robb (admitted pro hac vice)  
**KATZ BANKS KUMIN LLP**  
11 Dupont Circle NW, Suite 600  
Washington, DC 20036  
Tel: (202) 299-1140  
Fax: (202) 299-1148  
Email: robb@katzbanks.com

*Attorneys for Plaintiff and the Putative Class*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiff,

v.

AETNA INC. and AETNA LIFE INSURANCE  
COMPANY,

Defendants.

Case No. 4:23-cv-01849-HSG

Hon. Haywood S. Gilliam, Jr.

**NOTICE OF FILING OF AMENDMENT  
NO. 1 TO SETTLEMENT AGREEMENT**

Hearing: November 6, 2:00 p.m.

Location: Courtroom 2

Filed: April 17, 2023

1 Pursuant to the Court’s Minute Entry for proceedings held on November 6, 2025, ECF  
2 No. 135, Plaintiff hereby submits as Exhibit A hereto Amendment No. 1 to the proposed class  
3 action settlement agreement (previously filed at ECF No. 132-5), in support of Plaintiff’s Motion  
4 for Order Provisionally Certifying Settlement Class and Preliminarily Approving Class  
5 Settlement (ECF No. 132). A Revised [Proposed] Order Granting Plaintiff’s Motion for Order  
6 Provisionally Certifying Settlement Class and Preliminarily Approving Class Settlement is filed  
7 concurrently herewith.

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DATED: November 17, 2025

Respectfully submitted,

**KATZ BANKS KUMIN LLP**



---

Rebecca Peterson-Fisher

*Counsel for Plaintiff and Putative Class*

1 Barbara J. Chisholm (SBN 224656)  
Danielle E. Leonard (SBN 208201)  
2 Connie K. Chan (SBN 284230)  
Robin S. Tholin (SBN 344845)  
3 **ALTSHULER BERZON LLP**  
177 Post Street, Suite 300  
4 San Francisco, CA 94108  
Tel: (415) 421-7151  
5 Fax: (415) 362-8064  
Email:

6 bchisholm@altshulerberzon.com  
dleonard@altshulerberzon.com  
7 cchan@altshulerberzon.com  
rtholin@altshulerberzon.com

8 Michelle Banker (admitted pro hac vice)  
9 Alison Tanner (admitted pro hac vice)  
Noel León (admitted pro hac vice)  
10 **NATIONAL WOMEN’S LAW CENTER**  
1350 I Street NW, Suite 700  
11 Washington, DC 20005  
Tel: (202) 588-5180  
12 Email: mbanker@nwlc.org  
atanner@nwlc.org  
13 nleon@nwlc.org

Rebecca Peterson-Fisher (SBN 255359)  
Jennifer L. Liu (SBN 279370)  
**KATZ BANKS KUMIN LLP**  
235 Montgomery St. Suite 665  
San Francisco, CA 94104  
Tel: (415) 813-3260  
Fax: (415) 813-2495  
Email: peterson-fisher@katzbanks.com  
liu@katzbanks.com

Hugh Baran (admitted pro hac vice)  
Marilyn Robb (admitted pro hac vice)  
**KATZ BANKS KUMIN LLP**  
111 Broadway, Suite 1702  
New York, NY 10006  
Tel: (646) 759-4501  
Fax: (646) 759-4502  
Email: baran@katzbanks.com

Marilyn Robb (admitted pro hac vice)  
**KATZ BANKS KUMIN LLP**  
11 Dupont Circle NW, Suite 600  
Washington, DC 20036  
Tel: (202) 299-1140  
Fax: (202) 299-1148  
Email: robb@katzbanks.com

*Attorneys for Plaintiff and the Putative Class*

16 **UNITED STATES DISTRICT COURT**  
17 **NORTHERN DISTRICT OF CALIFORNIA**

19 MARA BERTON, on behalf of herself and all  
20 others similarly situated,

21 Plaintiff,

22 v.

23 AETNA INC. and AETNA LIFE INSURANCE  
24 COMPANY,

25 Defendants.

Case No. 4:23-cv-01849-HSG

Hon. Haywood S. Gilliam, Jr.

**REVISED [PROPOSED] ORDER  
GRANTING PLAINTIFF’S MOTION FOR  
ORDER PROVISIONALLY CERTIFYING  
SETTLEMENT CLASS AND  
PRELIMINARILY APPROVING CLASS  
SETTLEMENT**

Hearing: November 6, 2:00 p.m.

Location: Courtroom 2

Filed: April 17, 2023

1 Pending before the Court is Plaintiff’s unopposed motion for preliminary approval of  
2 class action settlement. See Dkt. No. 132 (“Mot.”). The Court held a hearing on the motion on  
3 November 6, 2025. Dkt. No. 135. For the reasons detailed below, the Court GRANTS the  
4 motion.

5 **I. BACKGROUND**

6 **A. Factual Allegations**

7 This is a putative class action lawsuit in which Plaintiff Mara Berton alleges that  
8 Defendants Aetna Inc. and Aetna Life Insurance Company (collectively, “Aetna” or  
9 “Defendants”) designed, sold, and administered health benefit plans that facially discriminated  
10 on the basis of sex, including sexual orientation and/or gender identity, in the provision of  
11 fertility benefits. Plaintiff alleges that Aetna imposed different and significantly more  
12 burdensome requirements on plan members in LGBTQ+ relationships seeking to become  
13 pregnant than on cisgender members in heterosexual relationships pursuant to the definition of  
14 infertility set forth in Aetna’s Clinical Policy Bulletin No. 327 (the “Definition of Infertility”).  
15 *See Berton v. Aetna Inc.*, No. 23-cv-01849-HSG, 2024 WL 869651, at \*1–2 (N.D. Cal. Feb. 29,  
16 2024).

17 Plaintiff filed the Complaint on April 17, 2023, alleging a single cause of action for  
18 discrimination in violation of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), on  
19 behalf of a California Damages Class and a National Injunctive Relief Class. *See* Dkt. No. 1. On  
20 July 24, 2023, Defendants filed a motion to dismiss the complaint, Dkt. No. 40, which the Court  
21 denied on February 29, 2024. Dkt. No. 70.

22 **B. Settlement Agreement**

23 On October 30, 2024, February 18, 2025, and March 4, 2025, the parties participated in  
24 three full-day mediations with Judge Steven M. Gold (Ret.). *See* Dkt. No. 132-4 (“Peterson-  
25 Fisher Decl.”) ¶ 33. The parties ultimately entered into a settlement agreement. *See* Dkt. No.  
26 132-5, Peterson-Fisher Decl. Ex. A (“Settlement Agreement,” or “SA”). The key terms are as  
27 follows:

28

1           Damages Class Definition: The Damages Settlement Class is defined as:

2           All California Commercial Plan members: (1) who were covered during the California  
3           Damages Class Period and at the time of service by a plan that offered coverage for  
4           infertility treatments; (2) for whom there is not a reason, other than the Definition of  
5           Infertility, why the individual did not qualify for coverage for infertility treatments  
6           obtained under the individual's healthcare plan; (3) who meet the criteria for Categories  
7           A, B, C, or D as set forth below; and (4) who, if members of Categories B, C, or D, file  
8           any Attestation and/or Claim Form Submission required by the Settlement Agreement  
9           to participate in the Settlement.

10           Category A: Category A class members consist of California residents whose  
11           Aetna member files contain a denial of a precertification or claim request for one  
12           of an agreed-upon set of IUI/ICI codes and whose member files contain  
13           information to suggest they were a person with a uterus in an Eligible LGBTQ+  
14           Relationship at the time they sought coverage for IUI/ICI. Category A members  
15           will receive notice of the settlement and will be automatically entitled for all  
16           payments unless they opt out.

17           Category B: Potential Category B California Damages Class Members consist of  
18           California residents whose Aetna member files contain a denial of a  
19           precertification or claim request for one of an agreed-upon set of IUI/ICI codes  
20           and whose Aetna member files do not indicate they were in a heterosexual  
21           relationship at the time they sought coverage. These individuals will receive notice  
22           and an opportunity to submit an Attestation certifying they were individuals with  
23           uteruses in an Eligible LGBTQ+ Relationship at the time they sought IUI/ICI  
24           coverage. The people who submit an Attestation and meet the other eligibility  
25           criteria in this Agreement will be Category B California Damages Class Members  
26           entitled to receive settlement payments.

27           Category C: Potential Category C Class Members who will receive direct notice  
28           are Aetna members who were either denied or approved for an agreed-upon set of  
29           IVF codes during the Class Period. In addition to direct notice to Potential Category  
30           C Class Members, the Parties will issue publication notice via an agreed-upon set  
31           of publications and/or social media sites. The people who respond with (1) an  
32           Attestation certifying they were individuals with uteruses in an Eligible LGBTQ+  
33           Relationship at the time of seeking services during the Class Period, and (2) a  
34           Claim Form setting forth evidence satisfactory to the Parties of out-of-pocket costs  
35           incurred for IUI/ICI during the Class Period, will be Category C California  
36           Damages Class Members entitled to receive settlement payments.

37           Category D: Potential Category D Class Members consist of California residents  
38           whose Aetna member files contain a denial of a precertification or claim request  
39           for one of an agreed-upon set of IUI/ICI codes and whose Aetna member files  
40           establish that the individual had a denial that was followed by an approval within  
41           90 days, or was otherwise paid by Aetna. There are two subcategories of potential  
42           California Damages Class Members within D:

- 43           i. Category D-A is made up of individuals with uteruses whose Aetna  
44           member files contain information to suggest they were in an Eligible  
45           LGBTQ+ Relationship at the time they sought coverage;
- 46           ii. Category D-B is made up of individuals with uteruses whose Aetna  
47           member files do not indicate they were in a heterosexual relationship at  
48           the time they sought coverage.

1 Potential members of Category D will receive notice and an opportunity to submit a  
2 Claim Form setting forth satisfactory evidence of out-of-pocket costs incurred for IUI/ICI  
3 during the Class Period, and for potential members of D-B an Attestation confirming they  
4 were individuals with uteruses in an Eligible LGBTQ+ Relationship at the time of  
5 seeking services during the Class Period. Individuals who demonstrate eligibility are  
6 Category D California Damages Class Members entitled to settlement payments.

7 Injunctive Relief Class Definition: The Injunctive Relief Settlement Class is defined as  
8 “Individuals with uteruses in an Eligible LGBTQ+ Relationship who are currently or will be  
9 covered during the Class Period for the National Injunctive Relief Class by a commercial health  
10 plan provided or administered by Aetna Life Insurance Company in the United States that  
11 includes fertility benefits and (1) who meet the clinical criteria for fertility services under the  
12 currently operative or any subsequent version of CPB No. 327 other than the criteria challenged  
13 in this Civil Action and (2) who currently or will in the future want to obtain coverage for  
14 intrauterine (“IUI”) or intracervical insemination (“ICI”), or request a form of IVF consistent  
15 with Advanced Reproductive Technology (“ART”) coverage pursuant to Aetna’s clinical policy  
16 requiring trials of less invasive therapeutic approaches as defined in CPB No. 327.”

17 Settlement Benefits: The Settlement Agreement provides for three different components  
18 of monetary compensation to the Damages Class. First, all damages class members will receive a  
19 Default or Pro Rata Payment, depending on the final class size. If there are 175 or fewer  
20 Damages Class Members, each Class Member will receive a Default Payment of \$10,000. SA  
21 ¶¶ 24, 72. If more than 175 eligible Class Members participate in the settlement, Aetna will  
22 establish a non-reversionary common fund of \$1,750,000 to be distributed *pro rata* to all Class  
23 Members (the “Pro Rata Payments”). *Id.* ¶ 48, 72.

24 Second, each Damages Class member who has not already been reimbursed for eligible  
25 procedures by Aetna or a secondary coverage provider will receive a Dollars for Benefits  
26 Payment. *Id.* ¶ 71. The Default Dollars for Benefits Payments are \$1,408 for each class member,  
27 and the settlement also provides a process for class members to receive higher Dollars for  
28 Benefits Payments if their coverage would have allowed greater reimbursement but for Aetna’s  
Definition of Infertility. *Id.* ¶ 71(ii).

1 Third, Aetna will make a \$250,000 non-reversionary payment into a Special Harms  
2 Common Fund. *Id.* ¶¶ 56, 73, 110. Special Harms Payments will be available to compensate  
3 Class Members who experienced greater harm as a result of Aetna’s allegedly unlawful  
4 Definition of Infertility than would be compensated by the Dollars for Benefits Payment and  
5 Default or Pro Rata Payment, as determined by a Special Master according to the Settlement’s  
6 Allocation Plan. SA ¶¶ 57, 73. If there is money remaining in the Special Harms Common Fund  
7 after payments are allocated by the Special Master, those funds will be redistributed to all  
8 California Damages Class Members on a *pro rata* basis. *Id.* ¶ 74.

9 To receive settlement benefits, Class Members in Categories B, C, and D must fill out  
10 and submit a claim form, online or in hard copy, providing an attestation that they were an  
11 individual with a uterus in an Eligible LGBTQ+ Relationship at the time they received an  
12 infertility service for which they sought, or could have sought, coverage from Aetna during the  
13 Damages Class Period. *Id.* ¶ 12, 16. Class Members in Categories C and D will also be required  
14 to provide evidence of out-of-pocket costs incurred for IUI/ICI during the Class Period. *Id.*  
15 ¶ 70(c), (d). All Class Members, including those in Category A, may request higher Dollars for  
16 Benefits Payments or Special Harm Payments and submit supporting documentation in the same  
17 claim form. *Id.* ¶ 16.

18 The Settlement Administrator will conduct an initial review of all claims to identify any  
19 missing information or other deficiencies. *Id.* ¶ 75(a). Aetna will then review claims from  
20 potential Category B, C, and D class members to determine whether the individual making the  
21 claim was an Aetna plan member on an eligible plan that covered infertility services at the time  
22 they received infertility services. *Id.* ¶ 75(b). Additionally, Aetna will review all claims to  
23 determine whether they are eligible for the Default Dollars for Benefits Payment or for a  
24 requested higher Dollars for Benefits Payments to determine the amount to which the class  
25 member is entitled. *Id.* ¶ 75(c). The Settlement also provides for a Special Master, Hon. Steven  
26 M. Gold (Ret.), to resolve any disputes as to those determinations, to evaluate all Special Harm  
27 Submissions, and to allocate amounts from the Special Harms Common Fund to the Damages  
28 Class Members. *Id.* ¶ 59, 96. Under the Settlement Agreement, Aetna will pay the costs of the

1 Settlement Administrator and the Special Master separate and apart from the payments used to  
2 fund the Settlement Fund. *Id.* ¶ 95, 97.

3 The Settlement Agreement also provides national injunctive relief. As part of a prior  
4 settlement in *Goidel v. Aetna Life Insurance Company*, S.D.N.Y. Case No. 1:21-cv-07619  
5 (VSB), Aetna agreed to implement a new policy making IUI and ICI diagnostic and standard  
6 medical benefits under its fully insured commercial plans and to propose such changes to its self-  
7 funded commercial plans upon renewal or initiation (“the New IUI Policy”). Dkt. No. 132-11  
8 (“Tanner Decl.”) ¶ 52. However, the *Goidel* class is limited to New York residents, and its  
9 injunctive relief is only enforceable in New York. *Id.* ¶ 50. This Settlement Agreement requires  
10 Aetna to implement the New IUI Policy nationwide. *Id.* ¶¶ 53, 56; Peterson-Fisher Decl. ¶ 49.  
11 Aetna will also revise CPB 327 to ensure that Aetna’s medical directors can consider the limited  
12 availability of plan members’ chosen sperm for purposes of qualifying for IVF coverage,  
13 alongside other relevant clinical criteria. Tanner Decl. ¶ 54; Peterson-Fisher Decl. ¶ 49. Finally,  
14 Aetna will further revise CPB 327 to ensure that individuals who have previously met the criteria  
15 set forth in CPB No. 327 for Advanced Reproductive Technology (“ART,” which includes IVF)  
16 coverage will not be required to undergo additional cycles of artificial insemination before  
17 qualifying for ART coverage for subsequent attempts at pregnancy. Tanner Decl. ¶ 55; Peterson-  
18 Fisher Decl. ¶ 49.

19 These changes will be made to all fully insured Aetna plans. Peterson-Fisher Decl. ¶ 50.  
20 Additionally, Aetna will propose the New IUI Policy to new or renewing self-funded commercial  
21 plan sponsors that otherwise provide coverage for infertility services, and Aetna will request  
22 indemnification from any plan sponsor that does not conform to the New IUI Policy. SA ¶ 64.

23 Release: Class members will release Aetna from:

24 [A]ll claims or causes of action that were or could have been raised by the Class  
25 Representative and/or the Class or any California Damages Class Member based on the  
26 factual allegations in the Complaint, including but not limited to alleging that Aetna or  
27 any of the Released Parties is liable under 42 U.S.C. § 18116(a) or any state law for  
discrimination on the basis of sex, sexual orientation, and gender identity during the  
California Damages Class Period.

28 SA ¶ 127.

1 This release covers “Aetna and all of its predecessors, successors, assigns, past, present  
2 or future, direct or indirect parents, subsidiaries, affiliated entities that rely on and utilize Aetna’s  
3 CPB No. 327 and Aetna Life Insurance Company’s claims processing systems and procedures,  
4 and their respective plan administrators, shareholders, directors, officers, employees, trustees,  
5 accountants, representatives, administrators, insurers, agents and attorneys with respect to any  
6 Commercial Plan covered by this Agreement.” SA ¶ 51.

7 Notice to Class Members will include the following language about this release:  
8 “Members of the settlement class will ‘release’ their claims as part of the settlement, which  
9 means they cannot participate in another lawsuit against Aetna for the same issues in this lawsuit.  
10 The full terms of the release can be found [here].” Dkt. No. 132-9, Peterson-Fisher Decl. Ex. E.  
11 Notice to Category A class members, who are members of the class without submitting a claim  
12 form, further includes the following language:

13 You can opt out. If you do, you will not receive payment and cannot object to the  
14 settlement. However, you will not be bound or affected by anything that happens in  
15 this lawsuit and may be able to file your own case. You cannot exclude yourself  
from the policy changes called for by the proposed settlement.

16 *Id.* at 14. Notice to all other Class Members, who must submit a claim form to be part of the  
17 class, explains that if an individual does not want to be part of the settlement:

18 Do not send in a claim form. You will not receive any money and you will not be  
19 bound by anything that happens in this lawsuit and may be able to file your own  
20 case. You cannot exclude yourself from the policy changes called for by the  
proposed settlement.

21 *Id.* at 30.

22 Incentive Awards: According to the Settlement Agreement, Class Counsel may apply for  
23 an incentive award for the named Plaintiff of \$15,000. SA ¶ 115. If approved by the Court, this  
24 award will be paid separate and apart from the Default or Pro Rata Payments and the Special  
25 Harms Common Fund. *Id.*

26 Attorneys’ Fees and Costs: The Settlement Agreement provides that Class Counsel will  
27 apply for attorneys’ fees in the amount of \$1,600,000.00 and for costs up to \$25,000.00. SA ¶  
28 108.

1           Opt-Out Procedure: Class members must object to the Settlement Agreement or opt out  
 2 (via regular mail only) within 180 days after the date of mailing of Class Notice. SA ¶¶ 52, 116,  
 3 118.

## 4           **II. PROVISIONAL CLASS CERTIFICATION**

5           The plaintiff bears the burden of showing by a preponderance of the evidence that class  
 6 certification is appropriate under Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v.*  
 7 *Dukes*, 564 U.S. 338, 350–51 (2011). Class certification is a two-step process. First, a plaintiff  
 8 must establish that each of the four requirements of Rule 23(a) is met: numerosity, commonality,  
 9 typicality, and adequacy of representation. *Id.* at 349. Second, it must establish that at least one  
 10 of the bases for certification under Rule 23(b) is met. Where a plaintiff seeks to certify a class  
 11 under Rule 23(b)(2), it must show that “the party opposing the class has acted or refused to act  
 12 on grounds that apply generally to the class, so that final injunctive relief or corresponding  
 13 declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). And  
 14 where a plaintiff seeks to certify a class under Rule 23(b)(3), it must show that “questions of law  
 15 or fact common to class members predominate over any questions affecting only individual  
 16 members, and that a class action is superior to other available methods for fairly and efficiently  
 17 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

18           “The criteria for class certification are applied differently in litigation classes and  
 19 settlement classes.” *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019)  
 20 (“*Hyundai II*”). When deciding whether to certify a litigation class, a district court must consider  
 21 manageability at trial. *Id.* However, this concern is not present in certifying a settlement class. *Id.*  
 22 at 556–57. In deciding whether to certify a settlement class, a district court “must give  
 23 heightened attention to the definition of the class or subclasses.” *Id.* at 557.

### 24           **A. Rule 23(a) Certification**

25           The Court finds that all the requirements of Rule 23(a) are met for both the Proposed  
 26 National Injunctive Relief Class and the Proposed California Damages Class:

- 27           • **Numerosity.** Joinder of the thousands of estimated Injunctive Relief Class Members  
 28           nationwide would be impracticable. And although the total class size will not be known

1 until the deadline to opt out or file claims has expired, Plaintiff expects the Damages  
 2 Class to be between 100 and 175 people based on Aetna’s records and experience in the  
 3 *Goidel* litigation. *See* Tanner Decl. ¶ 61. This is sufficiently numerous for certification.

- 4 • **Commonality.** Common questions of law and fact include whether Aetna’s Definition of  
 5 Infertility facially discriminated based on sex, including sexual orientation and gender  
 6 identity, in violation of Section 1557 of the ACA. *See* Mot. at 14.
- 7 • **Typicality.** Plaintiff’s claims are both factually and legally similar to those of the  
 8 putative class because all Class Members are people with uterus in LGBTQ+  
 9 relationships, and members of plans incorporating Aetna’s Definition of Infertility. *See*  
 10 Mot. at 14–15.
- 11 • **Adequacy of Representation.** The Court is unaware of any actual conflicts of interest in  
 12 this matter and no evidence in the record suggests that either Plaintiff or counsel have a  
 13 conflict with other class members. Plaintiff’s counsel have been appointed class counsel  
 14 in numerous federal and state class actions. *See* Peterson-Fisher Decl. ¶ 9–11, 15-16; Dkt.  
 15 No. 132-2 (“Chan Decl.”) ¶ 5, 8–9; Tanner Decl. ¶ 37, 43, 49. The Court finds that  
 16 proposed Class Counsel and Plaintiff have prosecuted this action vigorously on behalf of  
 17 the class to date and will continue to do so.

#### 18 **B. Rule 23(b)(2)**

19 The Court also finds that the requirements of Rule 23(b)(2) are met for the National  
 20 Injunctive Relief Class because Aetna’s Definition of Infertility was incorporated into its plans  
 21 nationwide and used to determine whether to deny or grant preauthorization or claims for fertility  
 22 treatment, making final injunctive relief or corresponding declaratory relief appropriate  
 23 respecting the class as a whole. *See* Dkt. No. 1 ¶ 21.

#### 24 **C. Rule 23(b)(3)**

25 The Court also finds that the predominance and superiority requirements of Rule 23(b)(3)  
 26 are met for the California Damages Class:

- 27 • **Predominance.** The Court concludes that common questions predominate here because  
 28 the common question of whether Aetna’s Definition of Infertility imposed significantly

1 more burdensome requirements for plan members in LGBTQ+ relationships seeking  
 2 fertility treatment than it did for cisgender members in heterosexual relationships, and  
 3 thus whether it facially discriminated in violation of Section 1557, predominates over any  
 4 individual questions.

- 5 • **Superiority.** A class action in this case enables the most efficient use of Court and  
 6 attorney resources and reduces costs to the class members by allocating costs among  
 7 them. *See Shields v. World Aquatics*, Nos. 23-15092 & 23-15156, 2024 WL 4211477, at  
 8 \*4 (9th Cir. Sept. 17, 2024) (noting that individually prosecuting an action was cost  
 9 “prohibitive,” where most class members lost less than \$10,000). Further, this forum is  
 10 appropriate, and manageability is not a relevant consideration in the settlement approval  
 11 context.

#### 12 **D. Class Representative and Class Counsel**

13 Because the Court finds that Plaintiff meets the commonality, typicality, and adequacy  
 14 requirements of Rule 23(a), the Court appoints Plaintiff as Class Representative. When a court  
 15 certifies a class, it must also appoint class counsel. Fed. R. Civ. P. 23(c)(1)(B). Counsel have  
 16 investigated and litigated this case throughout its existence and have submitted declarations  
 17 detailing their expertise in representing plaintiffs in antidiscrimination cases and class actions.  
 18 *See Peterson-Fisher* ¶ 4–21; *Chan Decl.* ¶ 4–9; *Tanner Decl.* ¶ 19–25, 29–49. Accordingly, the  
 19 Court appoints Katz Banks Kumin LLP, Altshuler Berzon LLP, and National Women’s Law  
 20 Center as Class Counsel. *See Fed. R. Civ. P. 23(g)(1)(A)* (listing factors courts must consider  
 21 when appointing class counsel).

### 22 **III. PRELIMINARY SETTLEMENT APPROVAL**

23 Finding that provisional class certification is appropriate, the Court considers whether it  
 24 should preliminarily approve the parties’ class action settlement.

#### 25 **A. Legal Standard**

26 Federal Rule of Civil Procedure 23(e) provides that “[t]he claims, issues, or defenses of a  
 27 certified class—or a class proposed to be certified for purposes of settlement—may be settled ...  
 28 only with the court’s approval.” Fed. R. Civ. P. 23(e). “The purpose of Rule 23(e) is to protect

1 the unnamed members of the class from unjust or unfair settlements affecting their rights.” *In re*  
 2 *Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, before a district court  
 3 approves a class action settlement, it must conclude that the settlement is “fundamentally fair,  
 4 adequate and reasonable.” *In re Heritage Bond Litig.*, 546 F.3d 667, 674–75 (9th Cir. 2008).

5 Where the parties reach a class action settlement prior to class certification, district courts  
 6 apply “a higher standard of fairness and a more probing inquiry than may normally be required  
 7 under Rule 23(e).” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (quotations  
 8 omitted). Such settlement agreements ““must withstand an even higher level of scrutiny for  
 9 evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e)  
 10 before securing the court’s approval as fair.”” *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035,  
 11 1048–49 (9th Cir. 2019) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946  
 12 (9th Cir. 2011) (“*Bluetooth Headset*”). A more “exacting review is warranted to ensure that  
 13 class representatives and their counsel do not secure a disproportionate benefit at the expense of  
 14 the unnamed plaintiffs who class counsel had a duty to represent.” *Id.* (quotations omitted).

15 Courts may preliminarily approve a settlement and notice plan to the class if the proposed  
 16 settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2)  
 17 does not grant improper preferential treatment to class representatives or other segments of the  
 18 class; (3) falls within the range of possible approval; and (4) has no obvious deficiencies. *In re*  
 19 *Lenovo Adware Litig.*, No. 15-MD-02624-HSG, 2018 WL 6099948, at \*7 (N.D. Cal. Nov. 21,  
 20 2018) (citation omitted). Courts lack the authority, however, to “delete, modify or substitute  
 21 certain provisions. The settlement must stand or fall in its entirety.” *Dennis v. Kellogg Co.*, 697  
 22 F.3d 858, 868 (9th Cir. 2012) (quotation omitted).

## 23 **B. Analysis**

### 24 **i. Evidence of Conflicts and Signs of Collusion**

25 The first factor the Court considers is whether there is evidence of collusion or other  
 26 conflicts of interest. See *Roes*, 944 F.3d at 1049. The Ninth Circuit has directed district courts to  
 27 look for “subtle signs of collusion,” which include whether counsel will receive a  
 28 disproportionate distribution of the settlement, whether the parties negotiate a “‘clear sailing’

1 arrangement (i.e., an arrangement where defendant will not object to a certain fee request by  
2 class counsel),” and whether the parties agree to a reverter that returns unclaimed funds to the  
3 defendant. *Id.*

4 Here, the Plaintiff’s motion for preliminary approval states that Plaintiff’s counsel will  
5 request up to \$1,600,000 in attorneys’ fees and up to \$25,000 in costs, representing under two-  
6 thirds of the fees that counsel have so far incurred over the course of this litigation. Mot. at 11.  
7 Aetna has agreed not to object to this fee request, which Plaintiff’s counsel and Aetna negotiated  
8 only after an agreement had been reached on the Class Members’ recovery. *Id.* Aetna has agreed  
9 to pay attorneys’ fees and costs separate from monetary relief for the Class, so the award will not  
10 reduce Class Members’ recovery. *Id.* And the proposed settlement is non-reversionary: Any  
11 remaining money in the Special Damages Common Fund after allocation will be redistributed to  
12 the Class on a pro rata basis, SA ¶ 50, 74, and unclaimed payments will be made to Controller’s  
13 Unclaimed Property Division in the name of the California Damages Class Member. *Id.* ¶ 80.

14 Because the Settlement Agreement contains a clear sailing provision, the Court “has a  
15 heightened duty to peer into the provision and scrutinize closely the relationship between  
16 attorneys’ fees and benefit to the class, being careful to avoid awarding ‘unreasonably high’ fees  
17 simply because they are uncontested.” *Bluetooth Headset*, 654 F.3d at 948. The Ninth Circuit “has  
18 signed off on two methods for determining reasonable attorneys’ fees in class actions: the  
19 ‘lodestar’ method and the ‘percentage-of-recovery’ method.” *In re Cal. Pizza Kitchen Data Breach*  
20 *Litig.*, 129 F.4th 667, 679 (9th Cir. 2025) (“*Cal. Pizza Kitchen*”). Because “injunctive relief is  
21 inherently difficult to monetize,” *Kim v. Allison*, 8 F.4th 1170, 1181 (9th Cir. 2021), courts tend to  
22 use the lodestar method in class actions that result in injunctive relief. See *Hanlon v. Chrysler*  
23 *Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Lilly v. Jamba Juice Co.*, No. 13-CV-02998-JST, 2015  
24 WL 2062858, at \*5 (N.D. Cal. May 4, 2015) (“Because the settlement resulted in injunctive relief,  
25 the lodestar method is the appropriate measure for calculating attorneys’ fees.”). The “[b]enefit to  
26 the class is the ‘[f]oremost’ consideration” in assessing the reasonableness of attorneys’ fees. *Kim*,  
27 8 F.4th at 1181; *see also Cal. Pizza Kitchen*, 129 F.4th at 679 (holding that the “touchstone” for  
28 the Court’s attorneys’ fees “analysis is ‘the benefit to the class’—class counsel can only reap

1 rewards if they have delivered results for class members”).

2 The Court is cognizant of its obligation to review class fee awards with rigor, and at the  
3 final approval stage the Court will scrutinize the circumstances and determine what fee award is  
4 appropriate in this case. The Court does not find the proposed award so disproportionate as to raise  
5 concerns at this preliminary approval stage, particularly because of the combination of monetary  
6 and injunctive relief obtained in this case and because one of the goals of this litigation was to  
7 change Aetna’s policies to provide equal treatment to LGBTQ+ couples.

8 At this stage, the Court does not find that the Agreement’s clear sailing provision creates an  
9 inference of collusion or conflict that warrants invalidating the settlement as a whole. The parties  
10 represent that the Agreement is “a result of arm’s length negotiations,” Peterson-Fisher Decl. ¶ 69,  
11 and the Agreement was facilitated through extensive discussions overseen by a neutral mediator,  
12 former Magistrate Judge Gold, thereby reducing the likelihood of fraud or collusion. *See Estorga*  
13 *v. Santa Clara Valley Transp. Auth.*, No. 16-CV-02668-BLF, 2020 WL 7319356, at \*6 (N.D. Cal.  
14 Dec. 11, 2020).

## 15 **ii. Preferential Treatment**

16 The Court next considers whether the Settlement Agreement provides preferential  
17 treatment to any class members. The Ninth Circuit has instructed that district courts must be  
18 “particularly vigilant” for signs that counsel have allowed the “self-interests” of “certain class  
19 members to infect negotiations.” *Bluetooth Headset*, 654 F.3d at 947. Under Rule 23(e), the  
20 Settlement Agreement must “treat class members equitably relative to each other.” Fed. R. Civ.  
21 P. 23. The Court finds that the Agreement satisfies this standard for purposes of preliminary  
22 approval.

23 First, all Class Members will receive the Default or Pro Rata Payment and the Default  
24 Dollars for Benefits Payment, SA ¶¶ 70, 71, and all Class Members will have the opportunity to  
25 submit a claim for higher amounts from the Special Harms Common Fund and for a higher  
26 Dollars for Benefits payment, such that Class Members with higher substantiated damages will  
27 get a higher recovery. *Id.* ¶¶ 71(ii), 73.

28

1 Second, the Settlement Agreement authorizes Class Counsel to apply for an incentive  
2 award for the Class Representative of up to \$15,000. SA ¶ 20. The Court will ultimately  
3 determine whether the Class Representative is entitled to such an award and the reasonableness  
4 of the amount requested. Incentive awards “are intended to compensate class representatives for  
5 work done on behalf of the class, to make up for financial or reputational risk undertaken in  
6 bringing the action.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009).  
7 Plaintiff must provide sufficient evidence to allow the Court to evaluate this award “individually,  
8 using ‘relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the  
9 class, the degree to which the class has benefitted from those actions, ... [and] the amount of time  
10 and effort the plaintiff expended in pursuing the litigation ....’ ” *Stanton*, 327 F.3d at 977. The  
11 Court will consider the evidence presented at the final fairness hearing and evaluate the  
12 reasonableness of any incentive award request. Since the proposed incentive award here is not  
13 *per se* unreasonable, particularly in light of the average Class Member recovery in this matter,  
14 the Court finds that this factor weighs in favor of preliminary approval. *See Rodriguez*, 563 F.3d  
15 at 958 (finding that “[i]ncentive awards are fairly typical in class action cases” and “are  
16 discretionary” (emphasis omitted)).

### 17 **iii. Settlement within Range of Possible Approval**

18 The third factor the Court considers is whether the settlement is within the range of  
19 possible approval. To evaluate whether the settlement amount is adequate, “courts primarily  
20 consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *In re*  
21 *Lenovo Adware Litig.*, No. 15-MD-02624-HSG, 2018 WL 6099948, at \*8 (N.D. Cal. Nov. 21,  
22 2018). This requires the Court to evaluate the strength of Plaintiff’s case.

23 The Settlement Agreement provides comprehensive injunctive relief. It makes nationally  
24 enforceable a critical policy change achieved in a parallel New York class case: the classification  
25 of intrauterine insemination (“IUI”) and intracervical insemination (“ICI”) as standard diagnostic  
26 medical benefits covered on equal terms for all commercial plan members. This settlement  
27 ensures that Aetna will not roll back the changes it made to CPB 327 and provides enforceable  
28 relief to the National Injunctive Relief Class. *See Tanner Decl.* ¶ 56. The Settlement Agreement

1 also requires other important changes to CPB 327 to treat LGBTQ+ couples equitably by  
2 specifying that individuals who have previously met the criteria set forth in CPB No. 327 for  
3 Advanced Reproductive Technology (“ART,” which includes IVF) coverage will not be required  
4 to undergo additional cycles of artificial insemination before qualifying for ART coverage for  
5 subsequent attempts at pregnancy and that the limited availability of a plan member’s chosen  
6 sperm may be considered by Aetna’s medical directors for the purpose of qualifying for IVF  
7 coverage. SA ¶¶ 62–63; *see also* Tanner Decl. ¶ 54. These substantial benefits place this  
8 settlement well within the range of possible approval, particularly when weighed against the  
9 risks of further litigation.

10 A comparison of monetary relief in the Settlement Agreement to the expected recovery at  
11 trial also supports the reasonableness of the settlement. Plaintiff’s counsel estimates, based on  
12 investigation of the average costs of IUI cycles and the estimated average number of cycles Class  
13 Members underwent, that the average cost of out-of-pocket medical expenses for Class Members  
14 totaled \$10,869. Peterson-Fisher Decl. ¶ 53, 58-59. Given that some of these costs include testing  
15 and monitoring likely covered as diagnostic, the damages recoverable through this lawsuit are  
16 likely less than \$10,869 for most Class Members. *Id.* ¶ 60. Based on the parties’ estimates of the  
17 class size, the Settlement Agreement therefore provides roughly a full recovery for Class  
18 Members. Although the total number of Class Members is uncertain, the Settlement Agreement  
19 provides for a minimum of \$11,408 per Class Member if the total class is less than 175 people.  
20 *Id.* ¶ 61. If the class size is higher than 175, Class Members will receive a pro rata share of a  
21 \$1,750,000 common fund, plus a minimum of \$1,408 per class member in the Dollars for  
22 Benefits Payment. *Id.* The Settlement Agreement also provides that Class Members will have the  
23 opportunity to submit a claim for greater recovery from the Special Harms Common Fund and  
24 for a higher Dollars for Benefits payment, such that the settlement will not undercompensate  
25 Class Members with higher substantiated damages. *Id.* ¶¶ 71(ii), 73.

26 Finally, Plaintiff argues that continuing the litigation would create significant risks and  
27 result in substantial delay, expenses, and potential harm to Class members, because Defendant  
28 strongly denies liability and would mount a vigorous defense to Plaintiff’s claims. Mot. at 22.

1 Given that the settlement amount enables Class Members to receive a virtually full  
2 recovery, and the risks that Plaintiffs identify if the case were to go forward, the Court finds that  
3 the settlement amount is reasonable and weighs in favor of granting preliminary approval.

4 **iv. Obvious Deficiencies**

5 The Court also considers whether there are obvious deficiencies in the Settlement  
6 Agreement. The Court finds no obvious deficiencies and therefore finds that this factor weighs in  
7 favor of preliminary approval.

8 **IV. PROPOSED CLASS NOTICE PLAN**

9 For Rule 23(b)(3) class actions, “the court must direct to the class members the best  
10 notice that is practicable under the circumstances, including individual notice to all members  
11 who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Individual notice  
12 must be sent to all class members “whose names and addresses may be ascertained through  
13 reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). District courts have  
14 “broad power and discretion vested in them by [Rule 23]” in determining the contours of  
15 appropriate class notice. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979).

16 With respect to the content of the notice itself, the notice must clearly and concisely state  
17 in plain, easily understood language:

- 18 (i) the nature of the action;
- 19 (ii) the definition of the class certified;
- 20 (iii) the class claims, issues, or defenses;
- 21 (iv) that a class member may enter an appearance through an attorney if the member so  
22 desires;
- 23 (v) that the court will exclude from the class any member who requests exclusion;
- 24 (vi) the time and manner for requesting exclusion; and
- 25 (vii) the binding effect of a class judgment on members[.]

26 Fed. R. Civ. P. 23(c)(2)(B).

27 The parties have agreed that a third-party settlement administrator, Atticus  
28 Administration (“Atticus”), will send the class notice. SA ¶ 85. Notice will be sent by direct

1 mail. Peterson-Fisher Decl. ¶ 87. Notice will also be sent electronically via secure messages to  
2 Aetna members who utilize Aetna’s secure online portal, and push notifications will be sent to  
3 those utilizing Aetna’s mobile application. *Id.* ¶ 88. Ads will also be placed in publications  
4 whose target audience is the California LGBTQ+ community, including social media ad  
5 placements. *Id.* ¶¶ 87-88. Class Members will be able to submit their claims either online on a  
6 dedicated website or by mail. *Id.* ¶ 89.

7         The Court finds that the proposed notice process is “reasonably calculated, under all the  
8 circumstances, to apprise all class members of the proposed settlement.” *Roese*, 944 F.3d at 1045  
9 (quotation omitted). Sending messages via Aetna’s secure online portal is particularly well-  
10 calculated to provide notice to be distributed by more effective electronic means while avoiding  
11 potential privacy concerns that could arise when sending messages about the sensitive health  
12 information involved in this case to a member’s work email address. *See* Peterson-Fisher Decl. ¶  
13 88.

14         As to the substance of the notice, the parties have provided a copy of claim forms, *see*  
15 Dkt. No. 132-10, and the proposed class notices, *see* Dkt. No. 132-9, for all categories of Class  
16 Members. All of the notices explain the nature of the action and claims, define the class, and  
17 inform Class Members about what payment they will receive and how to opt out of or object to  
18 the Settlement Agreement. *See id.* Additionally, the Proposed Notices comply with the Northern  
19 District of California Procedural Guidance for Class Action Settlements, inform the classes about  
20 the allocation of attorneys’ fees, costs, and service award, and provide specific information  
21 regarding the date, time, and place of the final approval hearing. The Proposed Notices thus  
22 provide the best notice practicable under the circumstances and fully comply with due process  
23 and Federal Rule of Civil Procedure 23.

## 24         V.         CONCLUSION

25         The Court **GRANTS** Plaintiff’s motion for preliminary approval of class action  
26 settlement, Dkt. No. 132. The Court appoints Atticus Administration as the Settlement  
27  
28

1 Administrator and Hon. Steven M. Gold (Ret.), of JAMS ADR as Special Master,<sup>1</sup> and directs  
 2 them to comply with the terms of the Settlement. The parties are further **DIRECTED** to  
 3 implement the proposed class notice plan and procedure, as follows:

4 Defendants to provide necessary data to 5 Administrator for Class Notice	5 days after Preliminary Approval Order
6 Class Notice to be mailed	14 days after Preliminary Approval Order
7 Motion for Attorneys' Fees, Costs, Service 8 Award Due	35 days before Response Deadline
9 Response Deadline	180 days after Class Notice is mailed
10 Special Harm Submissions Sent to Special 11 Master Where Validity of Claims for 12 Eligibility Purposes is Determined	15 days after Response Deadline
13 Deadline to Notify Class Members/Potential 14 Class Members of Deficiencies;	30 days after Response Deadline
15 Last Day for Corrections to deficient 16 submissions	60 days after Response Deadline
17 Last Day for Special Master to Determine 18 Disputes re: Validity of Claims for Eligibility 19 Purposes; Preliminary Special Harms 20 Allocations to Parties/Administrator	75 days from Response Deadline
21 Administrator to Report Final Class Size to the 22 Parties, Deadline for Aetna to determine 23 Dollars for Benefits Payments	80 days from Response Deadline
24 Deadline for Final Special Harms Allocation 25 Determinations, Resolution of Contested 26 Dollars for Benefits Payments, Redistribution 27 Payments to be determined	95 days after Response Deadline
28 Final Approval Motion Due	105 days after Response Deadline
Fairness Hearing	135 days after Response Deadline
Funding date	30 days after Effective Date

<sup>1</sup> The Court incorporates by reference Judge Gold's fee schedule, attached hereto.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	Payment Date for Settlement Awards, Dollars for Benefits Payments, Service Award, Attorneys' Fees and Costs	10 business days after Funding Date
	Payment Date for Dollars for Benefits Payments	60 days after the Effective Date
	Check-cashing deadline	180 days after initial issuance, at least 90 days for re-issued checks

The Court will hold a Fairness Hearing on \_\_\_\_\_ at \_\_\_\_\_, in Courtroom 2 on the 4th floor of the Oakland Courthouse 1301 Clay Street, Oakland, CA 94612.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_, 2025

\_\_\_\_\_  
Hon. Haywood S. Gilliam, Jr.  
United States District Judge