IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Andrew Beckett, Arizona Doe, California Doe, S.A., Colorado Doe, Connecticut Doe, DC Doe, Florida Doe, Georgia Doe, Illinois Doe, Indiana Doe, Kansas Doe, Maine Doe, Maryland Doe, Minnesota Doe, Mississippi Doe, Missouri Doe, Nevada Doe, NewHampshire Doe, NewJersey Doe, NewMexico Doe, NewYork Doe1, NewYork Doe2, NewYork Doe3, NewYork Doe4, NorthCarolina Doe, Ohio Doe, Oklahoma Doe, SouthCarolina Doe, Tennessee Doe, Texas Doe, Virginia Doe, Washington Doe, John Doe, Jane Doe2, John Doe1, and John Doe2, individually and on behalf of all others similarly situated, Plaintiffs, v. Aetna, Inc., Aetna Life Insurance Company, and Aetna Specialty Pharmacy, LLC, Defendants.	Case No. 2:17-CV-3864-JS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs and Defendants Aetna, Inc., Aetna Life Insurance Company, and Aetna Specialty Pharmacy, LLC (collectively, "Aetna"),[1] through their respective counsel, have entered into a Settlement Agreement ("Settlement" or "Settlement Agreement"), which is attached as Exhibit 1, on behalf of a group of people whose Protected Health Information ("PHI") is alleged to have been disclosed improperly by Aetna and/or Aetna-related or affiliated entities, or on their behalf, to third parties, and/or to whom any written notice was mailed in connection with the settlement of legal claims that had been filed against certain Aetna-related entities or affiliates in *Doe v. Aetna, Inc.*, No. 14-cv-2986 (S.D. Cal.) and *Doe v. Coventry Health Care, Inc.*, No. 15-cv-62685 (S.D. Fla.) (collectively, the "*Doe* lawsuits).

Plaintiffs' Amended Complaint alleges two breaches of privacy: first, in July 2017, it is alleged that Aetna transmitted PHI improperly to its legal counsel and a settlement administrator without having the proper authorizations to do so; and second, through the sending of a "Benefit Notice." The term "Benefit Notice" means the notice that was sent by the settlement administrator to certain Settlement Class Members to inform Aetna members of their ability to fill prescriptions for HIV medications through mail order or retail pharmacy, as required by the settlement of legal claims that had been filed against certain Aetna-related entities or affiliates in *Doe v. Aetna, Inc.*, No. 14-cv-2986 (S.D. Cal.). Plaintiffs allege that the Benefit Notice was sent in an envelope with a large transparent glassine window in such a manner that the instructions about how individuals could obtain their medications were visible from the outside of the envelope.

Specifically, the term "Settlement Class" or "Settlement Class Members" as used in the Settlement Agreement means all persons whose Protected Health Information and/or Confidential

[1] All capitalized terms used in this Memorandum of Law have the meanings ascribed to them as set forth in the Parties' Settlement Agreement attached hereto as Exhibit 1.

HIV-related information was allegedly disclosed improperly by Aetna and/or Aetna-related or affiliated entities, or on their behalf, to third parties, including Gibson, Dunn & Crutcher, LLP ("GDC") and Kurtzman Carson Consultants LLC ("KCC"), and/or to whom any written notice was mailed as required by the settlement of the *Doe* lawsuits. GDC was Aetna's legal counsel in the *Doe* lawsuits and KCC was the settlement administrator for the *Doe* lawsuits.

Approximately 13,487 Settlement Class Members experienced the first privacy breach referenced above when it is alleged that Aetna and/or Aetna-related or affiliated entities, or on their behalf, improperly disclosed the Settlement Class Members' PHI to GDC and KCC and without a Business Associate Agreement, qualified protective order, or Court order in place, and these individuals thereafter received some form of written notice in connection with the *Doe* lawsuits. Included in this group are approximately 11,875 Settlement Class Members who were subject to the second privacy breach referenced above, when they were sent the Benefit Notice as described above, that Plaintiffs allege revealed PHI through the window of the envelope, resulting in serious harm to many Settlement Class Members when the envelope was received and reviewed by third parties such as family members, roommates, neighbors, and mail carriers.

The Settlement creates a gross, **non-reversionary** cash settlement fund of $17,161,200.00, which will provide substantial and meaningful – and immediate – benefits for the Settlement Class. The terms of the payment allocation and claims process are detailed in the Settlement Agreement and its Exhibits and are described below. The Settlement also includes programmatic relief in the form of significant policy and procedure changes with respect to how Aetna handles PHI in litigation that are intended to ensure that what is alleged to have occurred in this action never happens again.

The undersigned Co-Lead Class Counsel as well as all counsel for Plaintiffs who have executed the Settlement Agreement, respectfully and jointly submit that the terms of the Settlement Agreement are fair, reasonable, and adequate, and should be preliminarily approved. The Settlement provides substantial and immediate benefits for Settlement Class Members while avoiding protracted litigation and all risks of continued litigation, including the risk of delay and the risks presented by Aetna's affirmative defenses. Moreover, the Settlement allows any Settlement Class Member who wishes to opt out of the Settlement and pursue his or her individual claim the opportunity to do so.

At this first stage of the settlement approval process, Plaintiffs respectfully request that the Court: (1) find the terms of the proposed Settlement Agreement fair, reasonable, and adequate and grant preliminary approval to the proposed Settlement; (2) preliminarily approve the Parties' stipulation in the Settlement Agreement that the proposed Settlement Class be certified pursuant to FED. R. CIV. P. 23(b)(3) for purposes of administering the Settlement; (3) appoint each of the named Plaintiffs as Class Representatives; (4) appoint Shanon J. Carson, E. Michelle Drake, and Sarah R. Schalman-Bergen of Berger & Montague, P.C., Ronda B. Goldfein of the AIDS Law Project of Pennsylvania, and Sally Friedman of the Legal Action Center as Co-Lead Class Counsel for the Settlement Class; (5) approve Angeion Group, LLC ("Angeion") as the Settlement Administrator to provide notice to the Settlement Class and administer the Settlement; (6) approve the proposed Claim Form and Notice of Class Action Settlement (attached as Exhibits A and C, respectively, to the Settlement Agreement) as to form and content, as well as the other Settlement Agreement Exhibits, and direct that notice of the proposed Settlement be provided to the Settlement Class in accordance with the provisions of the Settlement Agreement; and (7) schedule a Final Approval Hearing to take place at the Court's convenience approximately 45 days after the

conclusion of the Claim Period (which means the time period of 120 days after the date that notice of this Settlement is issued by the Settlement Administrator to the Settlement Class). Specifically, the Parties request that a Final Approval Hearing be scheduled at the Court's convenience on a date between July 15 and August 15, 2018.

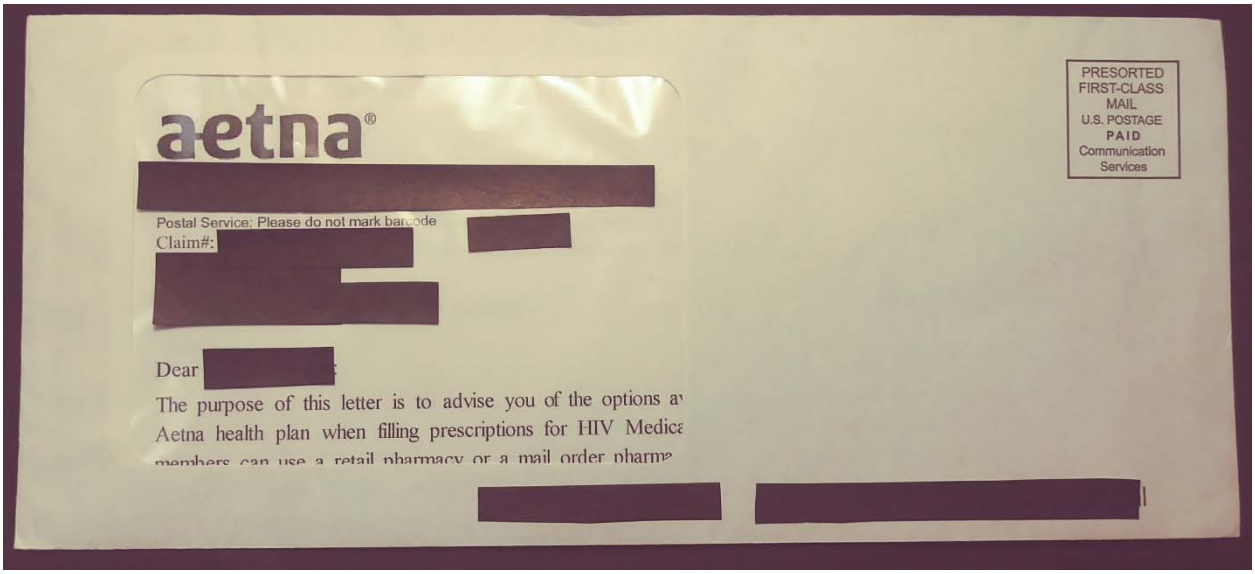
II. FACTUAL BACKGROUND

In 2014 and 2015, Aetna was sued in two lawsuits alleging that it had jeopardized the privacy rights of its insureds by requiring them to obtain HIV medication solely through the mail, and not in person at a retail pharmacy. *Doe v. Aetna, Inc.*, No. 14-cv-2986 (S.D. Cal.); *Doe v. Coventry Health Care, Inc.,* No. 15-cv-62685 (S.D. Fla.) (together, "the *Doe* lawsuits"). Coventry is an Aetna subsidiary. The plaintiffs in the *Doe* lawsuits were represented by Whatley Drake and Kallas ("WDK") and Consumer Watchdog ("CW"), and Aetna was represented in those lawsuits by GDC. None of the undersigned Class Counsel in this action were involved in the *Doe* lawsuits.

The *Doe* lawsuits were resolved in a consolidated individual settlement and never certified as class actions, *i.e.*, there were no litigation classes or settlement classes certified by the court overseeing those lawsuits. As part of the individual settlement of the *Doe* lawsuits, however, it was agreed that notices would be sent to former and current members of certain Aetna and Coventry health plans who had filled prescriptions for HIV-related medication. (Amended Complaint, Ex. 1 & Exs. A1, A2, B1, B2.) In total, there were four types of notices agreed to as part of the settlement of the *Doe* lawsuits (*i.e.*, a claim form and benefit notice that were each sent to certain Aetna members, and a claim form and benefit notice that were each sent to certain Coventry members). Of these, the only notice alleged to have been sent in a way that allowed part of the notice to be read through the outside of the envelope was the Benefit Notice, which was sent to approximately 11,875 Aetna members to inform them of their ability to fill prescriptions for

HIV medications through mail order or retail pharmacy (*i.e.*, the "Benefit Notice" as defined in the Settlement Agreement). (Settlement ¶ 1.1(E).) Aetna informed Plaintiffs that approximately 1,612 Aetna and Coventry members received a notice other than the Benefit Notice, making the total size of the Settlement Class approximately 13,487 people.

In more specifically describing the timeline of events, Plaintiffs allege that Aetna provided data identifying the approximately 13,487 people first to its own counsel in the *Doe* lawsuits, GDC, who in turn provided it to KCC so that KCC could prepare and mail the notices required as part of the settlement of the *Doe* lawsuits. At the end of July 2017 and beginning of August 2017, Aetna sent out the notices through KCC. For the Benefit Notice, KCC used a No. 10 envelope with a large transparent window, and the Benefit Notice was formatted, folded and inserted in the envelope such that the recipient's name, address, and claim number, as well as instructions related to filling prescriptions for HIV medication, including specifically the acronym "HIV", is alleged to have been visible through the envelope's transparent window as pictured below:



Upon Class Counsel's investigation, a similar large-windowed No. 10 envelope was used to send the other notices required as part of the settlement of the *Doe* lawsuits, but because the

content of the other notices was different, and because of the difference between the Coventry logo and the Aetna logo, the term "HIV" was not visible through the window of the envelopes used to send these other notices. Thus, the only mailed notice that subjected Settlement Class Members to potential harm because third parties could read the contents through the envelope was the Benefit Notice.

Within days after the Benefit Notice was mailed, the AIDS Law Project of Pennsylvania ("The AIDS Law Project") and the Legal Action Center ("LAC") – two non-profit organizations that have provided free legal services to people living with HIV for close to thirty years – began to hear from and receive complaints about harm to recipients of the Benefit Notice. LAC communicated with other organizations that represent people living with HIV across the United States to gauge the extent of the confidentiality breach, and together, the AIDS Law Project and LAC began compiling the experiences of individuals who were sent the Benefit Notice.[2] The AIDS Law Project and LAC, using their respective networks, also received information from six different HIV legal service organizations across the country, and soon had documented the experiences of Benefit Notice recipients in eight states and the District of Columbia.

On August 24, 2017, with input from the other HIV legal services providers, the AIDS Law Project, and LAC sent a letter to Aetna regarding the Incident,[3] and the Incident thereafter received widespread media attention after Aetna disclosed to the media that the Benefit Notices were sent to approximately 12,000 Aetna members. Hundreds of these individuals subsequently

[2] The AIDS Law Project and LAC were also contacted by persons who received notices related to the *Doe* settlements other than the Benefit Notice. Goldfein Decl. ¶ 21; Friedman Decl. ¶ 13.

[3] "Incident" means the alleged improper disclosure of Plaintiffs' and the Settlement Class Members' Protected Health Information and/or Confidential HIV-Related Information by Aetna and/or Aetna-related or affiliated entities, or on their behalf, to third parties, including GDC and KCC, and/or in connection with the mailing of notices to Settlement Class Members as required by the settlement in the *Doe* lawsuits. (Settlement ¶ 1.1(CC)).

contacted the AIDS Law Project and LAC and requested legal assistance. *See* Goldfein Decl. ¶ 20; Friedman Decl. ¶¶ 8-13.

On August 28, 2017, Plaintiff Andrew Beckett – represented by the AIDS Law Project, LAC and Berger & Montague, P.C. – filed the original Complaint in this case on behalf of a nationwide class and a Pennsylvania subclass. This Complaint was the first-filed complaint in the country regarding the Incident. Plaintiff Beckett alleged both statutory and common law claims, including: (1) violation of the Pennsylvania Confidentiality of HIV-Related Information Act (Act 148), 35 P.S. § 7601, *et seq.*; (2) negligence; (3) negligence *per se*; (4) breach of contract; (5) invasion of privacy; (6) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq.*; and (7) unjust enrichment.

Co-Lead Class Counsel and Aetna promptly began negotiations to address the possible risk of immediate harm to potentially affected individuals and their families who were sent the Benefit Notice, and in light of the allegations, negotiated and implemented a program to address any potential immediate needs of Settlement Class Members (the "Immediate Relief Program"). This Immediate Relief Program provided (without requiring any legal release of claims by any Aetna member, and without any admission by Aetna and regardless of fault or wrongdoing): (1) up to three counseling sessions, with an opportunity to request additional sessions, for Settlement Class Members and their families, paid in full by Aetna upon proof by the claimant of need and potential causal relationship to the Incident; and (2) cash reimbursements by Aetna for verifiable emergency out-of-pocket costs claimed to have been incurred by Settlement Class Members as a result of the Incident. This Immediate Relief Program was first publicized on September 28, 2017 and has been in place since then. The Parties have agreed that the Immediate Relief Program will remain in place until the Effective Date of this Settlement in order to provide a bridge to address the risk of

possible immediate harm to the time when the benefits of the Settlement Agreement can become effective.

In connection with the Immediate Relief Program, the AIDS Law Project and LAC set up mechanisms to field and process requests for immediate relief, forwarding them to Aetna using unique identifiers, rather than names, in order to preserve confidentiality. Individuals whose claims were approved then self-disclosed their identities to Aetna. The two organizations have to date submitted thirteen requests for relocation expenses ranging from $2,500 to $18,000, and two requests for counseling, all of which Aetna has approved.

After negotiating and putting the Immediate Relief Program into place, on October 7, 2017 and October 25, 2017, Co-Lead Class Counsel and Counsel for S.A., the plaintiff that filed the second-filed case regarding the Incident in California, and Aetna, participated in two full-day in-person mediation sessions with a highly experienced and respected mediator, former U.S. Magistrate Judge Diane Welsh of JAMS in Philadelphia (who previously served for eleven years as a Magistrate Judge in the U.S. District Court for the Eastern District of Pennsylvania).

Prior to and during the mediation process overseen by Judge Welsh, Aetna produced documents and information requested by Co-Lead Class Counsel to ensure that any potential settlement would be informed by relevant discovery and based on an adequate factual record. In addition, Co-Lead Class Counsel conducted their own independent factual and legal investigation of the case.

Aetna's production of documents and information to Co-Lead Class Counsel for purposes of the mediation included, for example: (1) documents regarding the underlying litigation and settlement that led to the Incident; (2) documents and data identifying the size and geographic location of all Settlement Class Members (*i.e.*, their distribution by state); (3) documents

evidencing Aetna's policies and procedures regarding printing/mailing PHI; (4) documents regarding the Incident; (5) certain communications between Aetna and governmental regulators regarding the Incident; (6) documents sufficient to identify relevant parties who were involved in and affected by the Incident; and (7) documents evidencing the timeline on which the Incident occurred.

The mediation overseen by Judge Welsh and all of the subsequent negotiations between Aetna and Co-Lead Class Counsel were at arm's-length and hard-fought. Prior to mediation, Co-Lead Class Counsel conducted extensive interviews with more than 260 Settlement Class Members who contacted the AIDS Law Project and LAC. Aetna and Co-Lead Class Counsel exchanged detailed mediation briefs. Co-Lead Class Counsel also conducted extensive legal and factual research with respect to the asserted claims and defenses. At the end of the second mediation session, the Parties had made substantial progress toward reaching a settlement, and over the course of the next two and a half months and with the further substantial assistance of the mediator, Judge Welsh, the Parties negotiated and drafted the Settlement Agreement and its Exhibits.

Throughout the mediation process, it was agreed among Co-Lead Class Counsel and Aetna that Aetna would stand in the shoes for all potentially other liable parties and pay a settlement amount to fully and completely compensate the Settlement Class. Aetna would reserve and retain the future right to seek contribution, indemnification, subrogation and/or reimbursement from such third parties.

Co-Lead Class Counsel regarded this settlement framework as a significant benefit for the Settlement Class, because in other words, Aetna assumed the full risk of non-recovery against these other parties while assuring that the Settlement Class could obtain a Settlement on a timely

basis without having to engage in potentially many years of litigation and all of the risks attendant with all affirmative defenses that would be presented in the context of protracted litigation with multiple defendants pointing the finger at each other (especially where Aetna hired the other defendants). During the mediation, Co-Lead Class Counsel fully took into account that any settlement would release all potentially liable parties and therefore Aetna would be responsible for paying 100% of any purported harm allegedly caused by the Incident. Further, to protect the Settlement Class in the event that the Settlement Agreement is not approved, Plaintiff Andrew Beckett, through his counsel, entered into written tolling agreements with KCC and GDC that toll the relevant statutes of limitation for all Settlement Class Members while settlement approval is pending.

On November 20, 2017, this Court held an in-person status conference where the basic terms of the proposed Settlement were discussed with the Court. After the status conference, the Court entered the parties' agreed-upon pre-trial order. (ECF No. 31.) On December 5, 2017, Plaintiffs filed a First Amended Complaint with 36 additional class representatives (in addition to Plaintiff Beckett) from 28 states and the District of Columbia, and additional common law and statutory claims. In addition to this case, multiple other class action cases and at least two individual cases have brought claims relating to the Incident. At this time, as set forth in detail below, the named plaintiffs in all but one of the subsequently filed class action cases have agreed to join this case and did so via the First Amended Complaint, thus effectively consolidating all but one of the class action cases in this Court and with all approving of the proposed Settlement Agreement.

Specifically, the following class actions have been joined with this case via the First Amended Complaint and are part of the proposed Settlement Agreement:

1. ***S.A. v. Aetna, Inc.*, No. BC674088 (Cal. Super. Ct. L.A. Cty., Aug. 28, 2017).** *S.A.* was filed subsequently but on the same day as this case. By agreement, *S.A.* was removed to federal court, transferred to the Eastern District of Pennsylvania, and consolidated with this case. Counsel for *S.A.*, Torin Dorros, Esq. of Dorros Law, participated in both mediation sessions with Judge Welsh as well as the subsequent settlement negotiations (overseen by Judge Welsh). Plaintiff S.A. is a Named Plaintiff and proposed Class Representative in the First Amended Complaint in this case, and approves of the Settlement Agreement.

2. ***Doe v. Aetna, Inc.*, No. 3:17-cv-5191 (N.D. Cal. Sept. 7, 2017)**. Plaintiff Doe in this alleged class action regarding the Incident, represented by Laurence D. King, Esq. and Matthew B. George, Esq. of Kaplan Fox & Kilsheimer, has also joined this case via the First Amended Complaint as a Named Plaintiff and proposed Class Representative, and approves of the Settlement Agreement.

3. ***R.H. v. Aetna Health, Inc., et al.*, No. 2:17-cv-04566-MMB (E.D. Pa. Oct. 12, 2017)**. Plaintiff R.H. in this alleged class action regarding the Incident, represented by Patricia M. Kipnis, Esq. of Bailey & Glasser LLP, Maureen M. Brady, Esq. of McShane & Brady LLC, and Anne Schiavone, Esq., has joined this case and is a Named Plaintiff and proposed Class Representative in the First Amended Complaint (under the pseudonym "Kansas Doe") and approves of the Settlement Agreement.

4. ***Jane Doe 1, et al. v. Aetna, Inc.*, No. 3:17-cv-01751 (D. Conn. Oct. 18, 2017)**. Two of the three named plaintiffs in this alleged class action regarding the Incident, represented by Brian P. Murray, Esq. of Glancy Prongay & Murray LLP, Paul C. Whalen, Esq. of the Law Office of Paul C. Whalen, P.C., Jasper D. Ward IV, Esq. of Jones Ward PLC, John Yanchunis, Esq. of Morgan & Morgan, and Jean S. Martin, Esq. of Law Office of Jean Sutton Martin, PLLC,

have joined this case and are Named Plaintiffs and proposed Class Representatives in the First Amended Complaint (under the pseudonyms Jane Doe2 and John Doe1), and approve of the Settlement Agreement.[4]

5. ***Doe v. Aetna, Inc.*****, No. 17-cv-1947 (S.D. Cal. Sept. 25, 2017)**. The named plaintiff in this alleged class action regarding the Incident, represented by Abbas Kazerounian, Esq. and Mona Amini, Esq. of Kazerouni Law Group, APC, Joshua B. Swigart, Esq. of Hyde & Swigart, and Steven Soliman, Esq. of The Soliman Firm, has joined this case and is a Named Plaintiff and proposed Class Representative in the First Amended Complaint (under the pseudonym John Doe2), and approves of the Settlement Agreement.

III. THE PROPOSED SETTLEMENT

The terms of the Settlement are contained in the Settlement Agreement executed on January 16, 2018, and its accompanying exhibits. *See* Exhibit 1. The Settlement establishes a $17,161,200.00 non-reversionary common fund, which is an *excellent* result for the Settlement Class in light of the alleged claims and defenses. Each Settlement Class Member who was sent a Benefit Notice will receive an automatic net payment of at least $500 (inclusive of the $75 payment noted below) without requiring them to fill out a Claim Form or take any action, and also will be allowed to submit a claim for up to an additional $20,000 for financial harm and non-financial harm resulting from the mailing of the Benefit Notice. (Settlement ¶ 4.1 & Ex. A.) Settlement Class Members who were not sent a Benefit Notice but whose information was allegedly disclosed improperly by Aetna to GDC and KCC will receive an automatic net payment of $75 without requiring them to fill out a Claim Form or take any action. (*Id.*)

A. The Settlement Class

[4] The third named plaintiff decided that she no longer desired to proceed as a named plaintiff at this time.

Plaintiffs and Aetna have stipulated in the Settlement Agreement and request that the Court certify a Settlement Class under Fed. R. Civ. P. 23(b)(3) defined as:

> All persons whose Protected Health Information and/or Confidential HIV-related information was allegedly disclosed improperly by Aetna and/or Aetna-related affiliated entities, or on their behalf, to third parties, including GDC and KCC, and/or to whom any written notice was mailed as required by the settlement of the *Doe* lawsuits.

(Settlement ¶ 1.1(OO).) There are approximately 13,487 members of the Settlement Class, and approximately 11,875 members who were sent the Benefit Notice.

B. Monetary Fund

The Settlement Agreement provides for a gross, non-reversionary Settlement Fund of $17,161,200.00 (the "Settlement Fund") which includes the costs of settlement administration, service awards to the Named Plaintiffs, and attorneys' fees and cost. (Settlement ¶ 1.1(PP).) After deductions for Court-approved attorneys' fees and costs, service awards and settlement administration fees and costs, the remaining amount (the "Net Settlement Fund") will be distributed to Settlement Class Members.[5] All Settlement Class Members who do not opt out of the Settlement will be allocated an automatic "Base Payment" without needing to submit a Claim Form. (*Id.* ¶1.1(D).) Settlement Class Members who were not mailed a Benefit Notice will receive a net Base Payment of $75. (*Id.*, Ex. A.) Settlement Class Members who were sent the Benefit Notice will receive a net Base Payment of $500 (inclusive of the $75 payment noted above). (*Id.*, Ex. A.)

In addition, the approximately 11,875 Settlement Class Members who were sent the Benefit Notice in an envelope that may have revealed their PHI to others such as family members, roommates and others may submit a claim for an additional monetary award if they can

[5] Aetna did not have any role in determining the method of allocating or distributing the Net Settlement Fund.

demonstrate through the submission of reasonable proof that as a result, they suffered: (a) financial harm (meaning non-reimbursed out-of-pocket expenses); or (b) non-financial harm. Settlement Class Members who meet these requirements can submit such a claim by filling out and returning a Claim Form during the Claim Period, which means the time period of 120 days after the date that notice of this Settlement is issued by the Settlement Administrator. (*Id.*, ¶ 1.1(K) and Exhibits A-E.). Claim Forms can be submitted by mail or online via the Settlement Website. (*Id.*, Ex. A.)

A Claimant's Financial Harm Award shall be calculated by the Settlement Administrator based on all reasonable non-reimbursed out-of-pocket expenses incurred by the Claimant as documented on the Claim Form. The Claim Form shall be submitted under penalty of perjury. Examples of such out-of-pocket expenses include, for example, moving costs, counseling costs, loss of income, or other non-reimbursed out-of-pocket expenses caused by the Benefit Notice. "Reasonable proof" is required. The term "reasonable proof" means the submission to the Settlement Administrator by the Claimant of copies of receipts, invoices, credit card statements, medical records, insurance records, returned checks, and/or any other reasonable form of proof of non-reimbursed out-of-pocket expenses incurred as a result of the Benefit Notice. Amounts that a Claimant already received from Aetna will offset any Financial Harm Award to the extent that it would result in a double-recovery.

A Claimant's Non-Financial Harm Award shall be calculated by the Settlement Administrator based on the Claimant's answers on their Claim Form using an objective point-scoring system as set forth in Exhibit D to the Settlement Agreement. All answers given on the Claim Form shall be submitted under penalty of perjury.

Claimants may receive up to $10,000 for financial harm as calculated by the Settlement Administrator and up to $10,000 for non-financial harm as calculated by the Settlement

Administrator, for a total maximum of up to $20,000 in addition to the minimum Base Payment described above. The final amount of any Claimant Awards, however, shall be based on the number of Claimants and a *pro rata* distribution of the amount remaining in the Net Settlement Fund for distribution after all minimum Base Payments are subtracted. If there is money remaining in the Net Settlement Fund after deducting the minimum Base Payments for all Settlement Class Members and all Claimant Awards, the remaining money shall be distributed *pro rata* to all Settlement Class Members who were sent the Benefit Notice, and shall have the effect of raising the Base Payment Amount for these individuals to an amount above $500.

Checks will be mailed to Settlement Class Members within 45 days of the Effective Date of the Settlement. (*Id.* ¶ 4.3.) Settlement Class Members shall have 180 days to cash their checks. (*Id.* ¶ 4.8.) Any amounts remaining in the Net Settlement Fund from uncashed checks will be submitted, subject to the approval of the Court, to a proposed *cy pres* recipient, the AIDS Coordinating Committee of the American Bar Association. (*Id.* ¶ 4.9.) The AIDS Coordinating Committee shall use a request for proposals ("RFP") process to distribute all funds that it receives to nonprofit public-interest law firms working on HIV-related privacy issues. (*Id.*) None of Plaintiffs' Counsel will request any of these funds. (*Id.*)

C. Process Changes

In addition to the Settlement Fund, Aetna has agreed to: (a) develop and implement a "best practices" policy (the "Policy") for use of PHI in litigation; (b) communicate the Policy to Aetna in-house and outside counsel in all existing litigation matters; (c) implement procedures to ensure that the Policy is clearly communicated to in-house and outside counsel on all new litigation matters; (d) provide training regarding the Policy and Aetna's requirements under HIPAA and applicable federal and state privacy laws as appropriate to all Aetna in-house counsel whose

primary responsibility is to manage litigation involving Aetna; and (e) conduct an audit of all outside counsel handling Aetna litigation matters to ensure that such counsel has executed an Aetna-approved Business Associates Agreement with Aetna. Aetna will keep records to ensure compliance with the terms of the Settlement Agreement for a period of seven (7) years. Aetna will incur additional costs to implement these actions that Aetna will pay in addition to the Settlement Fund described above. (*Id.* ¶ 5.1 & Ex. F.)

In exchange for the monetary and non-monetary consideration described above, Settlement Class Members will release all claims related to the Incident. (*Id.* ¶ 7.1.)

D. Administration Costs, Service Awards, and Attorneys' Fees and Costs

The Settlement Agreement provides that costs of settlement administration will be paid out of the Settlement Fund. (Settlement ¶ 3.2.) Following a request for proposal and competitive bidding process, Co-Lead Class Counsel recommend Angeion Group, LLC to be appointed by the Court as the Settlement Administrator. (*Id.* ¶ 3.1.1.) Angeion has submitted an accompanying declaration attesting to its experience and ability to properly administer this Settlement, and has stated that its fees and costs are likely to be $155,000 and in any event will not exceed $180,000. (*See* Declaration of Charles E. Ferrara).

Co-Lead Class Counsel will also request that the Court approve service awards for the Named Plaintiffs in an aggregate amount not to exceed $100,000 for all 37 Named Plaintiffs and Class Representatives. (Settlement ¶ 8.2.) Co-Lead Class Counsel will also petition the Court for reasonable attorneys' fees, payable from the Settlement Fund, in an amount not to exceed 25% of the Settlement Fund, plus reimbursement of reasonable out-of-pocket costs. (*Id.* ¶ 8.1.) Plaintiffs' arguments in support of the payment of attorneys' fees and costs, and service awards, will be filed

in a subsequent motion that will be made available to the Settlement Class before the conclusion of the time period to opt out or file objections to the Settlement.

E. Notice Plan

To maintain the strictest confidentiality given the sensitive nature of the PHI and HIV-related information at issue in this lawsuit, only after the Settlement Administrator is appointed by the Court and executes the agreement to be bound by the Court-approved Qualified Protective Order (which is incorporated in the Parties' proposed Preliminary Approval Order submitted with this Motion) will Aetna cause the Class List to be delivered to the Settlement Administrator in a confidential fashion, as ordered by the Court. (*Id.* ¶ 3.1.3.) The Settlement Agreement also details many measures that limit the Settlement Administrator's disclosure of PHI. For example, the Settlement Administrator shall not share any information regarding any Settlement Class Member with the Court, Co-Lead Class Counsel, counsel for any named plaintiff, counsel for Aetna, or *anyone else* unless the Court has ordered the Settlement Administrator to do so or the Settlement Class Member has executed an HIV-specific authorization form that is signed by the Settlement Class Member or someone with legal authorization on their behalf. (*Id.* ¶ 3.9.) Further, the Settlement Administrator shall develop a unique identifier system so the Settlement Administrator can communicate with and about Settlement Class Members without including or identifying any PHI belonging to any Settlement Class Member. (*Id.* ¶ 3.5.)

The Settlement Agreement provides for notice to the Settlement Class (*Id.* ¶ 3.6), including notice by U.S. first class mail to all Settlement Class Members:

(a) by using an opaque envelope of appropriate and sufficient stock and with no transparent window so as to obscure the contents of the envelope;

(b) by using a return address on the outside of the envelope with no identifying information other than a P.O. Box, City, State and Zip Code;

(c) by including a statement on the front of the envelope stating that it contains "Confidential Legal Information – To Be Opened Only By The Addressee";

(d) by using a protective cover page that folds around the Notice of Class Action Settlement and that identifies that the information being provided therein is confidential and solely for reading by the Settlement Class Member; and

(e) by using paper stock that will protect the confidentiality of the contents of the envelope from being read through the envelope.

Id.

Each Settlement Class Member will be sent the Notice of Settlement and all Settlement Class Members who received the Benefit Notice will also receive an enclosed Claim Form. (*Id.*, Exs. A, C.) The Notice of Settlement is based on the model notice provided by the Federal Judicial Center and contains all the information required by FED. R. CIV. P. 23(c)(2)(B).

The Settlement Administrator will also establish a Settlement Website where important case documents will be posted, including downloadable .pdf copies of the operative First Amended Complaint, Settlement Agreement, Notice of Settlement, Claim Form, Preliminary Approval Order, Final Approval Order, and other relevant case documents, as well as a "Frequently Asked Questions" webpage. (Settlement ¶ 3.3.) Claim Forms and Claim Packages may be submitted to the Settlement Administrator via the Settlement Website in a secure and private fashion that is HIPAA-compliant. (*Id.*) A draft of the Settlement Website will be reviewed and approved by Co-Lead Class Counsel before it goes live. (*Id.*) The Settlement Administrator will also establish a toll-free telephone number utilizing an interactive voice recording script, which will provide information regarding the Settlement and allow Settlement Class Members to speak with a live operator during business hours. (*Id.* ¶ 3.4.)

All Settlement Class Member information delivered to the Settlement Administrator, and any completed Claim Forms, Claim Packages, or other information submitted by Claimants to the Settlement Administrator, will be recorded by the Settlement Administrator in a secure and

confidential database that complies with HIPAA and all other applicable federal, state, and local laws. (*Id.* ¶ 3.8.) The Settlement Administrator will designate specially-assigned employees to handle its administration of this Settlement and train them concerning their legal duties and obligations with respect to the information. (*Id.*) At the conclusion of the litigation, and in accordance with the Court's Final Approval Order, the Settlement Administrator will destroy all of the information and data upon a written certification to be filed with the Court. (*Id.*) The Settlement Administrator will agree to immediately notify the Court, Co-Lead Class Counsel, and counsel for Aetna in writing if there is any breach of HIPAA or other applicable privacy law in any respect. (*Id.*)

F. Exclusion and Objection Rights

Settlement Class Members may choose to opt out of the Settlement Class within 60 days from the date the Notice of Settlement is disseminated. (*Id.* ¶ 6.6.) Those who wish to opt out can do so by providing a written Opt-Out Form that includes their name, address, telephone number, email address (if available), and date of birth, and expressly states that the potential Class Member desires to be excluded from the Settlement Class. (*Id.*) The Settlement Administrator shall provide redacted and de-identified opt-out requests to Co-Lead Class Counsel and counsel for Aetna. (*Id.*) The identities of persons who opt out will not be made part of the public record. If more than two percent (2%) of all Settlement Class Members submit time and valid opt-out requests, then Aetna may in its sole discretion exercise its right to void this Settlement Agreement within fourteen days of the 60-day deadline for opting out. (*Id.*)

Alternatively, Settlement Class Members may file a notice of intent to object to the Settlement if they wish to do so. (*Id.* ¶ 6.7.) Class Members who wish to object must submit their objections to the Settlement Administrator within 60 days from the date of the Notice of

Settlement. (*Id.*) The written statement must include a detailed statement of the Settlement Class Member's objection(s), as well as the specific reasons, if any, for each such objection, and shall contain the Settlement Class Member's printed name, address, telephone number, and date of birth, and any other supporting papers, materials, or briefs that the Settlement Class Member wishes the Court to consider when reviewing the objection. (*Id.*) The Settlement Administrator shall forward any objections received to Co-Lead Class Counsel and Counsel for Aetna. (*Id.*) Co-Lead Class Counsel shall file all objections not otherwise filed with the Court in conjunction with Co-Lead Class Counsel's response to the objection. All attorneys who are involved in any way in asserting objections on behalf of a Settlement Class Member must file a notice of appearance with the Court at the time when the objection is submitted, or as the Court may otherwise direct. (*Id.* ¶ 6.8.) The names of any objectors who wish to use a pseudonym shall be held in strict confidence by Co-Lead Class Counsel and counsel for Aetna and shall not be disclosed on the public record without the objector's written permission. (*Id.* ¶ 6.7.) Co-Lead Class Counsel and counsel for Aetna may take the deposition of any objector prior to the Final Approval Hearing. (*Id.* ¶ 6.8.)

For all the reasons stated herein, Plaintiffs respectfully request that the Court enter the Parties' proposed Preliminary Approval Order, and allow notice of the proposed Settlement to be sent to the Settlement Class Members. Aetna does not oppose this Motion.

IV. DISCUSSION

A. Applicable Legal Standard

The settlement of a class action requires court approval. FED. R. CIV. P. 23(e)(2). Review of a proposed class action settlement typically proceeds in two stages. At the first stage, the parties submit the proposed settlement to the court, which must make a preliminary fairness evaluation. If the proposed settlement is preliminarily acceptable, the court then directs that notice be provided to all class members who would be bound by the proposed settlement in order to afford them an

opportunity to be heard on, object to, or opt out of the settlement. *See* FED. R. CIV. P. 23(c)(3), (e)(1), (e)(5). At the second stage, after class members are notified of the settlement, the court holds a formal fairness hearing. *See* FED. R. CIV. P. 23(e)(1)(B). If the court concludes that the settlement is "fair, reasonable and adequate," the settlement is given final approval. FED. R. CIV. P. 23(e)(2). *See In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 197 (E.D. Pa. 2014).

Plaintiffs now seek preliminary approval of the settlement pursuant to Rule 23(e). "The preliminary determination establishes an initial presumption of fairness." *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). Under Rule 23, a settlement falls within the "range of possible approval" if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied. *Id.* In making a preliminary determination, the Court should look to whether there are any obvious deficiencies that would cast doubt on the proposed settlement's fairness. The Court should also consider whether the negotiations occurred at arm's length, whether there was significant investigation of Plaintiffs' claims, and whether the proposed settlement provides unwarranted preferential treatment to certain class members. *Id.* (citing *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003)).

B. The Proposed Settlement Is an Excellent Result for the Settlement Class, and There Are No Deficiencies to Cast Doubt on Its Fairness

Here, the proposed Settlement easily meets the standard for preliminary approval under Rule 23(e). Co-Lead Class Counsel, which includes attorneys who have represented people living with HIV for almost thirty years, was able to reach a nationwide class settlement in less than six months after the HIV privacy of over 13,000 Settlement Class Members was allegedly breached by Aetna. Under the terms of the Settlement, the non-reversionary Gross Settlement Amount of

$17,161,200.00 will provide significant monetary relief to the Settlement Class without subjecting them to the risks and delay of further litigation. To compensate the Settlement Class for the allegedly improper disclosure of PHI from Aetna to GDC and KCC, every Settlement Class Member will receive an automatic net Base Payment of $75. Settlement Class Members who were sent a Benefit Notice that allegedly exposed their PHI through a transparent envelope window will automatically receive a net Base Payment of at least $500 inclusive of the $75 payment noted above, as well as an opportunity to seek additional payments of up to $10,000 for financial harm and up to $10,000 for non-financial harm caused by the disclosure (for a total of up to $20,500 for each person sent the Benefit Notice). The Settlement also includes Aetna's development of a "best practices" policy to prevent similar disclosures in the future. In addition, approximately one month after the original Complaint was filed, Co-Lead Class Counsel and Aetna negotiated and implemented the Immediate Relief Program to provide financial assistance and counseling for those alleged to have been harmed by the disclosure, without an accompanying release of legal claims, which remains in effect through the Effective Date of the Settlement.

A comparison with the monetary recovery in other privacy breach settlements demonstrates the strength of this Settlement. On a per-person basis, this Settlement far exceeds what has been recovered in other privacy breach settlements, even for those receiving the $75 payment. For example, this Settlement provides approximately 10,000 times the per-person monetary relief provided in the Target data breach settlement that received national attention. *See In re Target Corp. Customer Data Security Breach Litig.*, No. MDL 14-2522, 2015 WL 7253765 (D. Minn.) (settled for $10 million fund for breach of 97 million credit card numbers).[6]

[6] *See, e.g.*, *St. Joseph Health System Medical Info. Cases*, No. JCCP 4716 (Cal. Superior Ct., Orange Cty.) (medical information for ***32,000*** patients was publicly accessible on the internet for 1 year and settled for (i) a $7.5 million common fund by which each class member could receive at least $241; and (ii) a $3 million claims-made fund to reimburse out-of-pocket losses.); *In re*

In addition, the proposed allocation formula is fair and reasonable and should be preliminarily approved. *See Chaverria v. New York Airport Serv., LLC*, 875 F. Supp. 2d. 164 (E.D.N.Y. 2012) ("As a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." (citations omitted)).

Here, Settlement Class Members will automatically receive a settlement check for the Base Payment without the need to submit a claim form, and the vast majority will receive $500 as a minimum Base Payment. This structure was established to recognize that the disclosure of Settlement Class Members' private HIV-related health information had significant and profound consequences. Since HIV and AIDS first entered the public consciousness as an ongoing public health crisis in the early 1980s, people living with HIV and AIDS have been subjected to social stigma and discrimination. It is a documented fact that HIV-related stigma is still widely prevalent, and such stigma can have a debilitating effect on people living with HIV. (*See* First Amended Compl. ¶¶ 55-59 (citing studies and surveys)). Individuals taking HIV mediations as part of a

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Anthem, Inc. Data Breach Litig., No. 15-md-02617 (N.D. Cal.) (***80 million*** insureds' social security numbers, medical information, and related information was breached and case settled for a $115 million non-reversionary fund to be used for 2-4 years of credit monitoring, or cash-in-lieu for class members who do not want credit monitoring; a $15 million fund to reimburse out-of-pocket costs such as fraud charges, protective measures paid for by class members, and lost time; attorneys' fees and costs of up to $40.95 million; and service awards for the Named Plaintiffs); *In re The Home Depot, Inc. Customer Security Breach Litig.*, No. 14-md-02583 (N.D. Ga.) (settled for $13 million common fund to compensate for out-of-pocket losses and/or time spent responding to the breach and $6.5 million to provide 18 months of "account monitoring" services for breach of ***40 million*** credit cards); *Juana Curry v. AvMed, Inc.*, No. 10-cv-24513 (S.D. Fla.) ($3 million settlement fund for ***1.2 million*** insureds' medical information that was stolen from a health services company); *In re TJX Companies Retail Security Breach Litig.*, 584 F. Supp. 2d 395 (D. Mass.) ($18 million settlement for breach of ***450,000*** driver's license numbers and ***45 million*** credit card numbers); *In re Ashley Madison Customer Data Security Breach Litig.*, No. 15-md-02669 (E.D. Mo.) ($11.2 million settlement for breach of information of ***37 million*** users of adultery web site).

regimen of pre-exposure prophylaxis ("PrEP") similarly experience stigmatization surrounding these medications, as they are often associated with "sexual risk taking." (*Id*. ¶ 60.)

While some Settlement Class Members experienced more profoundly damaging consequences as a result of the facts in this case, all individuals were harmed by the disclosure. Settlement Class Members who were sent the Benefit Notice will receive more than Settlement Class Members who were not sent the Benefit Notice because the mailing of the Benefit Notice publicly disclosed PHI, potentially to family members, roommates, neighbors, mail carriers, and others, who were unaware of the Class Member's HIV status. The automatic Base Payment amount recognizes this reality and also protects the right of individuals who may be loathe to submit additional personal information in order to receive value from the Settlement. At the same time, the Settlement also properly provides an opportunity for individuals who claim to have experienced financial harm and/or non-financial harm as a result of the mailing of the Benefit Notice to recover up to an additional $20,000 upon the submission of a confidential Claim Form. (*See* Exhibits A and C to Settlement Agreement.)

Moreover, the Settlement requires Aetna to undergo significant process changes for how it handles PHI in litigation in the future, which are intended to prevent a similar breach from ever occurring again. These provisions are a key component of the Settlement and provide a significant benefit for Settlement Class Members, many of whom remain insured by Aetna.

Where, in comparison to the proposed Settlement, proceeding with litigation would require a substantial amount of time to yield a benefit to class members, and might prolong the invasive nature of the original disclosure, it is another indication that the proposed settlement is fair, reasonable, and adequate. *See Craig v. Rite Aid Corp.*, No. 4:08-cv-2317, 2013 WL 84928, at *9 (M.D. Pa. Jan. 7, 2013), *appeal dismissed* (3d Cir. Feb. 20, 2013) (finding preliminary approval

of settlement appropriate where "[n]ot only would continued litigation of these cases result in a massive expenditure of Class Counsel's resources, it would likewise place a substantial drain on judicial resources.").[7] Here, the complexity and expense of proceeding with litigation is clearly outweighed by the efficiency and excellent financial relief presented by the Settlement Agreement. This is especially true given that Aetna would have contested liability and class certification, and there was no guarantee of any recovery should the case have proceeded.

C. The Settlement Agreement Is The Product of Informed, Non-Collusive Negotiation After a Significant Investigation of Plaintiffs' Claims

Whether a settlement arises from arm's-length negotiations is a key factor in deciding whether to grant preliminary approval. *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. at 198 (citing *In re CIGNA Corp. Sec. Litig.*, No. 02–8088, 2007 WL 2071898, at *2 (E.D. Pa. July 13, 2007) (noting that a presumption of fairness exists where parties negotiate at arm's-length, assisted by a mediator); *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 439, 444 (E.D. Pa. 2008) (stressing the importance of arm's-length negotiations and highlighting the fact that the negotiations included "two full days of mediation"); *see also* 4 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 11:41 (4th ed. 2010) (noting that courts usually adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval").

Here, Co-Lead Class Counsel and the other counsel who have approved the Settlement Agreement are experienced and respected class action litigators. Moreover, Co-Lead Class

[7] *See also In re Certainteed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 216 (E.D. Pa. 2014) ("[I]f the parties were to continue to litigate this case, further proceedings would be complex, expensive and lengthy, with contested issues of law and fact…. That a settlement would eliminate delay and expenses and provide immediate benefit to the class militates in favor of approval."); *Deitz v. Budget Renovations & Roofing, Inc.*, No. 4:12–cv–0718, 2013 WL 2338496, at *5 (M.D. Pa. May 29, 2013) ("The Court sees no reason to needlessly expend judicial resources on a matter that neither party has any interest in continuing to litigate.").

Counsel include the AIDS Law Project and LAC which are legal organizations and trusted advocates who have spent their careers protecting the PHI of people living with HIV. (*See* Carson Decl. ¶¶ 2-4, Goldfein Decl. ¶¶ 2-15; Friedman Decl. ¶¶ 3-7.) Even before the original Complaint was filed, the AIDS Law Project and LAC corresponded with Aetna to discuss the ramifications of the Incident. (Goldfein Decl. ¶ 28; Friedman Decl. ¶ 18.) A little more than a week after the filing of the *Beckett* Complaint, Co-Lead Class Counsel and Aetna met to discuss the Immediate Relief Program and to plan settlement discussions, which subsequently included numerous in-person meetings between counsel that took place at various locations in Philadelphia, as well as two full-day mediation sessions overseen by the Hon. Diane M. Welsh (Ret.) at JAMS, where the Parties reached an agreement in principle. The Parties then spent significant time negotiating the terms of the final written Settlement Agreement with the further assistance of Judge Welsh that is now presented to the Court for approval. At all times, these negotiations were at arm's-length and, while courteous and professional, the negotiations were intense and hard-fought on all sides.

This case and the proposed Settlement is also the product of significant investigation of Plaintiffs' claims. As part of their factual investigation, Co-Lead Class Counsel conducted lengthy interviews with 274 Settlement Class Members to investigate the impact of the Incident. (Goldfein Decl. ¶ 33.) Co-Lead Class Counsel also reviewed documents that they obtained from Aetna and GDC and researched the HIV/AIDS confidentiality laws of all 50 states, along with other relevant privacy laws.

Moreover, this case stands out in that it arose from the efforts of public interest and legal service organizations and lawyers who have dedicated their careers to serving the needs of people living with HIV. (Goldfein Decl. ¶¶ 2-15; Friedman Decl. ¶¶ 3-7.) The AIDS Law Project and LAC have substantial knowledge and experience litigating HIV confidentiality claims, and possess

significant expertise in relevant privacy health laws. (Goldfein Decl. ¶¶ 12-13, 15; Friedman Decl. ¶¶ 4-5, 7.) The privacy interests of the Settlement Class Members have always been at the forefront of Co-Lead Class Counsel's minds. Coupled with Berger & Montague, P.C.'s 48 years of class action experience, these qualifications allowed Co-Lead Class Counsel to negotiate an excellent result in the best interests of the Settlement Class Members.

D. The Proposed Service Awards To the Named Plaintiffs Are Justified And Should Be Preliminarily Approved

In recognition of their service to the Settlement Class, Co-Lead Class Counsel seeks preliminary approval of modest service awards to the 37 Named Plaintiffs in an aggregate amount not to exceed $100,000 and to be allocated in the proposed Final Approval Order based upon the discretion of Co-Lead Class Counsel taking into account the Plaintiffs' respective service to the Settlement Class. (*See* Settlement ¶ 8.2.) "[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation." *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) (internal citation omitted). It is particularly appropriate to compensate named representative plaintiffs with service awards where they have actively assisted plaintiffs' counsel in their prosecution of claims for the benefit of a class.

Here, the Named Plaintiffs have taken very real steps to advance the interests of the Settlement Class, and have done so at substantial personal risk. For example, Plaintiff Beckett spent substantial time meeting with Co-Lead Class Counsel, sharing personal details about his life, and risking his reputation in his community, as well as potential discrimination, if his HIV-related information became publicly known. (Goldfein Decl. ¶ 42.) Mr. Beckett also risked the security of his living arrangements as he discussed the impact the letter had on his family. (*Id.*) Plaintiffs will submit more specific proposals regarding allocations of service awards to the Named

Plaintiffs, but at this time submit that the aggregate amount, which represents *less than 1%* of the Gross Settlement Amount, should be preliminarily approved as fair and reasonable.

E. The Court Should Provisionally Certify The Settlement Class

A court must determine whether the proposed Settlement Class satisfies the requirements of Rule 23. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011) (*en banc*). At the preliminary approval stage, a court may conditionally certify the class for purposes of providing notice, leaving the final certification decision for the subsequent fairness hearing. *See* Manual for Complex Litigation (Fourth) § 21.632 (2004). This is what Plaintiffs request here.

Under Rule 23(a), Plaintiffs must demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a). Rule 23(b)(3), under which Plaintiffs seek class certification, requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). However, when a court is "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem v. Windsor*, 521 U.S. 591, 620 (1997).

1. The Settlement Class Is Sufficiently Numerous

To meet the numerosity requirement of Rule 23(a)(1), "the class size only need be large enough that it makes joinder impracticable." *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 467 (E.D. Pa. 2000). The Settlement Class here easily meets the numerosity requirement because, based on Aetna's records, the Class includes approximately 13,487 people. In addition, Settlement

Class Members are geographically dispersed throughout the United States. There can be no dispute, therefore, that the proposed Class meets the numerosity requirement.

2. The Settlement Class Seeks Resolution of Common Questions

The commonality requirement of Rule 23(a)(2) is satisfied if the Named Plaintiffs share at least one question of fact or law with the grievances of the prospective class. *See Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). Here, the central issues posed by this litigation are whether Aetna's conduct related to the Incident violated the duties owed to Settlement Class Members. These are common questions with common proof that can be answered on a Class-wide basis. Given the presence of these common questions central to this litigation, Rule 23(a)(2)'s requirement for the existence of common questions of fact or law is met.

3. The Claims of the Named Plaintiffs Are Typical of the Settlement Class

The typicality requirement of Rule 23(a)(3) is satisfied for purposes of preliminarily approving the Settlement because Plaintiffs' claims are reasonably coextensive with those of absent Class members and because Plaintiffs possess the same interests and suffered the same injuries as the Class members. *See Fry*, 198 F.R.D. at 468; *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 156 (1982). Here, the claims of the Named Plaintiffs and each of the Class Members are predicated on the same alleged conduct by Aetna. Aetna's liability for the alleged resulting damage to each Settlement Class Member does not depend on the individual circumstances of the Class Members. Rather, the First Amended Complaint alleges that Aetna's conduct related to the Incident was unlawful and gives rise to liability to all persons who, like Plaintiffs, had their PHI improperly shared and exposed. In order to prevail, therefore, the Plaintiffs and each Class Member will be required to make the same factual presentation and legal argument with respect to the common questions of liability.

The common issues necessarily share "the same degree of centrality" to Plaintiffs' claims, such that in litigating the liability issues, Plaintiffs reasonably can be expected to advance the interests of all Class Members in a favorable determination with respect to each such issue. *Franks v. O'Connor Corp.*, No. CIV. A. 92-0947, 1993 WL 76212, at *5 (E.D. Pa. Mar. 17, 1993). "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members and if based on the same legal theory." *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992). Accordingly, the typicality requirement is satisfied.

4. Co-Lead Class Counsel and Plaintiffs Meet the Adequacy Requirements

Rule 23(a)(4)'s adequacy prong requires that "the representative parties will fairly and adequately protect the interests of the class." The Third Circuit consistently has ruled that

> [a]dequate representation depends on two factors: (a) the Plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the Plaintiffs must not have interests antagonistic to those of the class.

Weiss v. York Hosp., 745 F.2d 786, 811 (3d Cir. 1984) (quoting *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975)); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 312 (3d Cir. 1998). These two components are designed to ensure that class members' interests are fully pursued.

i. The Class Has Been More Than Adequately Represented by Co-Lead Class Counsel

The presumption of adequate representation here cannot be rebutted. Co-Lead Class Counsel are highly qualified and are particularly suited to representing the Settlement Class in this case. Founded in 1988, the AIDS Law Project is the nation's only independent nonprofit public-interest law firm that provides free legal services exclusively to people living with HIV and AIDS and those affected by the epidemic. (Goldfein Decl. ¶ 3.) The AIDS Law Project's executive

director, Ronda B. Goldfein, is a nationally recognized advocate for people living with HIV and AIDS. (*Id.* ¶ 4.) The AIDS Law Project's managing attorney Yolanda French Lollis and staff attorney Adrian M. Lowe also have provided excellent service to the Settlement Class, overseeing and managing communications and interviews of 274 Members and coordinating the process of incorporating their allegations in the First Amended Complaint. (*Id.* ¶¶ 26, 32-33.)

Established in 1973, LAC is the nation's only nonprofit law and policy organization whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, or criminal records, and to advocate for sound public policies on behalf of these populations. (Friedman Decl. ¶ 3.) Sally Friedman directs LAC's Legal Department, which serves over 2,000 clients annually (at least 300 of whom are living with HIV) and provides trainings and technical assistance for hundreds of health and social service programs serving LAC's constituency. (*Id.* ¶ 4.) Since joining LAC in October 1993, Ms. Friedman has prosecuted more than a dozen cases involving breaches of HIV confidentiality and HIV-related discrimination, as well as cases involving discrimination based on criminal records and drug or alcohol addictions, and Ms. Friedman has authored publications on HIV confidentiality laws. (*Id.* ¶ 5.) Deputy Director Litigation Monica Welby and Senior Staff Attorney Karla Lopez substantially assisted as well, providing research and expertise on the HIV confidentiality laws relevant to the case, as well as participating in the negotiation and drafting of the Settlement Agreement. (*Id.* ¶ 14.)

Berger & Montague, P.C. specializes in class action litigation in federal and state courts and is one of the preeminent class action law firms in the United States. (Carson Decl. ¶ 3.) Berger & Montague has played lead roles in major class action cases for 48 years, resulting in recoveries totaling many billions of dollars for their clients and the classes they have represented. (*Id.*) Shanon Carson and E. Michelle Drake co-chair the Firm's Consumer Protection Department and

have extensive backgrounds in litigation on behalf of consumers, serving as lead or co-lead counsel in many successful class action cases. (*Id.* ¶¶4-9.) Sarah R. Schalman-Bergen, a Shareholder of the Firm, has served as Volunteer Of Counsel to the AIDS Law Project for the past decade. (*Id.* ¶ 10). Associate John Albanese also has provided excellent service to the Settlement Class, researching applicable causes of action and drafting numerous pleadings in the case.

Torrin Dorros, Esq. of Dorros Law represented Plaintiff S.A. in the first-filed California case, and participated in the mediations and settlement discussions with Co-Lead Class Counsel. Mr. Dorros has significant experience litigating privacy cases.

ii. The Class Representatives' Interests Are Not Antagonistic to Those of the Class

There is nothing to suggest that Plaintiffs have interests antagonistic to those of the Settlement Class. *See Dietrich v. Bauer,* 192 F.R.D. 119, 126 (S.D.N.Y. 2000) ("[G]auging the adequacy of representation requires an assessment whether the class representatives have interests antagonistic to those of the class they seek to represent."). Here, Plaintiffs and Settlement Class Members are equally interested in proving the case as alleged in their First Amended Complaint, and are committed to obtaining appropriate compensation.

Having demonstrated that each of the requirements of Rule 23(a) are satisfied, Plaintiffs now turn to consideration of the factors which justify class treatment under Rule 23(b)(3).

5. The Settlement Class Satisfies The Predominance And Superiority Requirements of Rule 23(b)(3)

Under Rule 23(b)(3), class certification is appropriate if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

The Settlement Class satisfies the predominance requirement because common questions of law and fact predominate here. The Settlement Class Members' claims for compensatory relief are founded upon common legal theories. Thus, Class Members have an interest in the adjudication of the issue of law and fact that predominates this litigation, *i.e.*, whether or not Aetna illegally disclosed Settlement Class Members' PHI.

In addition, the Settlement Agreement renders this class action superior to other potential avenues of recovery for Named Plaintiffs and the Class. In fact, this case presents a paradigmatic example of a dispute resolution that effectuates the fundamental goals of Rule 23: (1) to promote judicial economy through the efficient resolution of multiple claims in a single action; and (2) to provide persons with smaller claims, who would otherwise be economically precluded from doing so, the opportunity to assert their rights. Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 1754. At the same time, the Settlement fully preserves the due process rights of each individual plaintiff seeking damages. Accordingly, Plaintiffs respectfully request that the Court provisionally certify the Settlement Class for settlement purposes only.

F. The Proposed Notices Provide Adequate Notice to the Settlement Class Members and Satisfy Due Process

The U.S. Supreme Court has held that notice of a class action settlement must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Bozak v. FedEx Ground Package Sys., Inc.*, No. 11 Civ. 738, 2014 WL 3778211, at *3 (D. Conn. July 31, 2014) (approving notice that provides "notice to the Eligible Settlement Class Members of the terms of the Settlement and the options facing the Settlement Class"); *Wade v. Werner Trucking Co.*, No. 10 Civ. 270, 2014 WL 2535226, at *1 (S.D. Ohio June 5, 2014) (approving "Settlement Notice and Option Form proposed by the

Parties" as "fully and accurately inform[ing] the . . . Class Members of all material elements of the Litigation and the Agreement").

Here, the proposed Notice of Settlement (*see* Exhibit C to the Settlement Agreement) and manner of distribution negotiated and agreed upon by the parties in the Settlement Agreement is "the best notice practicable," as required under Rule 23(c)(2)(B). The proposed Notice provides clear and accurate information as to the nature and principal terms of the Settlement Agreement, including monetary and other relief the Settlement will provide Class Members, the procedures and deadlines for opting out of the Settlement or submitting objections, the consequences of taking or foregoing the various options available to Class Members, and the date, time, and place of the Final Approval Hearing. Pursuant to Rule 23(h), the proposed Notice also sets forth the maximum amount of attorneys' fees and costs that may be sought by Plaintiffs and Class Counsel. It also identifies and provides contact information for Co-Lead Class Counsel and the Court. Moreover, information regarding the Settlement will be posted on the Settlement Website established by the Settlement Administrator and on the websites for each of Co-Lead Class Counsel. The Parties have also agreed to issue press releases regarding the Settlement.

Moreover, and perhaps most importantly, the notice program is designed to maximize the privacy of Settlement Class Members and to comply with federal and state privacy laws. The Notice shall be sent by first class mail to all Settlement Class Members using practices that conform to industry standards and best practices for mailing confidential PHI. (*See* Settlement ¶¶ 3.1-3.9; *see also supra* Section III.E (describing notice program protections). This notice program meets the requirements of Rule 23 and should be approved.

G. The Court Should Schedule a Final Approval Hearing

The Court should schedule a Final Approval Hearing to obtain all information required to determine that class certification is proper and that the Settlement should be finally approved. *See*

Manual for Complex Litigation, Fourth § 21.633 (2008). Accordingly, Plaintiffs request that the Court schedule the time, date, and place of the Final Approval Hearing on a date convenient to the Court between July 15 and August 15, 2018.

V. CONCLUSION

Based upon the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion for Preliminary Approval and approve the Parties' proposed Preliminary Approval Order.

Dated: January 16, 2018

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