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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

ALABAMA DOE, INDIANA DOE, and MISSOURI DOE, Individually, and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

GILEAD SCIENCES, INC.,

Defendant.

Case No.: 20-CIV-03699

DEFENDANT GILEAD SCIENCES, INC.'S NOTICE OF HEARING ON MOTION TO STRIKE AND MOTION TO STRIKE THE CLASS ALLEGATIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Filed Concurrently with Notice of Hearing on Demurrer and Demurrer to Plaintiffs' Class Action Complaint; Memorandum of Points and Authorities in Support Thereof*]

Date: December 11, 2020
Time: 9:00 a.m.
Judge: Hon. Danny Chou
Dept.: 22

Complaint Filed: September 1, 2020

NOTICE OF HEARING ON MOTION TO STRIKE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 11, 2020, at 9:00 a.m., in Department 22 of the above-entitled Court, located at 1050 Mission Road, Courtroom K, South San Francisco, California 94080, before the Honorable Danny Chou, Defendant Gilead Sciences, Inc. ("Gilead") will and hereby does move to strike the class allegations in Plaintiffs' Class Action Complaint.

This motion to strike is based on this notice of motion to strike and motion to strike, the memorandum of points and authorities contained herein; any reply papers that Gilead may file; all pleadings, records, and papers filed in this action; and such further arguments as may be presented to the Court at or prior to the hearing on the motion to strike.

Dated: October 20, 2020

ARNOLD & PORTER KAYE SCHOLER LLP

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INTRODUCTION

> [W]here the invalidity of the class allegations is revealed on the face of the complaint . . . the class issue may be properly disposed of by . . . motion to strike . . . . In such circumstances, there is no need to incur the expense of an evidentiary hearing or class-related discovery.

Canon U.S.A., Inc. v. Super. Ct., 68 Cal. App. 4th 1, 5 (1998).

This case should be dismissed in its entirety pursuant to the concurrently filed demurrer, in which case this motion would be moot. But in the event any claim survives, the Class Action Complaint ("Complaint" or "Compl.") itself makes clear that this case can never be certified as a class action, and therefore the Court should strike the class allegations at this juncture. Although Defendant Gilead Sciences, Inc. ("Defendant" or "Gilead") is mindful that class certification issues are more frequently resolved at a later stage, the unusual allegations here leave no doubt that class certification will never be possible, and it is therefore appropriate to strike the class allegations now to promote the efficient resolution of Plaintiffs Alabama Doe, Indiana Doe, and Missouri Doe's ("Plaintiffs") claims. *Id.*

In order for the three Plaintiffs—or any individual member of the putative classes—to establish liability under the core claim they have asserted under the Confidentiality of Medical Information Act ("CMIA"), they would be required to allege and prove that an "unauthorized person" "in fact" "actually viewed" the return address on a letter (the "Mailer") sent to them by Defendant. Under controlling Court of Appeal decisions, no assumptions or presumptions are permitted—each putative class member will have to individually allege with particularity and prove that an "unauthorized person" "in fact" "actually viewed" the return address on the Mailer. *Eisenhower Med. Ctr. v. Sup. Ct.*, 226 Cal. App. 4th 430, 434 n.3 (2014) ("The plaintiff in *Regents* could not maintain her cause of action because she could not allege that **her** medical records had, **in fact, been viewed by an unauthorized person.**");[1] *Sutter Health v. Super. Ct.*, 227 Cal. App. 4th 1546, 1550 (2014) (plaintiffs failed to state CMIA claim "because they do not allege that the stolen medical information was **actually viewed** by an **unauthorized person**"); *Regents of Univ. of Cal. v.*

[1] All emphasis added and internal quotation marks omitted unless otherwise noted.

Super. Ct., 220 Cal. App. 4th 549, 570 (2013) *as modified on denial of reh'g* (Nov. 13, 2013) ("[N]o one (except perhaps the thief) knows what happened to the encrypted external hard drive" and therefore the plaintiff "cannot allege **her** medical records were, **in fact, viewed** by an **unauthorized individual**.").

This cannot be done on a class-wide basis. The Court would have to scrutinize the unique factual circumstances of each individual putative class member to determine whether they can meet these requirements. The allegations of the three named Plaintiffs prove this point: each Plaintiff tells a highly unique and individual story about the different types of settings in which their Mailer arrived, where it was placed, and the different precautions they individually undertook to ensure their privacy. But, at the end of each story, each Plaintiff concedes they have personally no evidence that even one unauthorized person in fact actually viewed the return address on their Mailers.

The same is true with regard to each of the other claims in this lawsuit, albeit for a different reason. Those claims require that the Plaintiffs allege some actual loss or damages as an essential element of each of cause of action. This is not just a matter of calculating the amount of damages; this is a matter of establishing liability in the first instance. This also cannot be resolved on a class-wide basis. The Complaint speculates that different individuals might have suffered a wide and disparate variety of harms, ranging from workplace firings to home evictions to physical violence to denial of healthcare services. Once again, scrutiny of the allegations of the three named Plaintiffs proves why the Court cannot conclude that putative class members suffered actual damage or loss on a class-wide basis. Following their unique factual allegations, the three Plaintiffs ultimately concede that they have not personally suffered any one of these injuries, or any other injury for that matter.

More specifically, the face of the Complaint establishes that this lawsuit inevitably requires plaintiff-by-plaintiff resolution of essential questions necessary to establish liability, which will dominate the litigation and outweigh any possible common issues. Those questions include:

1. Did anyone other than Plaintiffs and putative class members see the return address on the Mailer?

There can be no liability under the CMIA if no one other than the plaintiff "in fact" "actually viewed" their particular Mailer. *E.g.*, *Eisenhower Med. Ctr.*, 226 Cal. App. 4th at 434 n.3; *Sutter Health*, 227 Cal. App. 4th at 1550.[2] Whether anyone other than Plaintiffs or putative class members saw the Mailer is an inquiry that can only be determined on a plaintiff-by-plaintiff basis. Indeed, the unique stories alleged by the three named Plaintiffs here make clear that *no one* saw the return address on their Mailer. Is it possible that some unnamed putative class member might be able to allege that a third person "actually viewed" the Mailer? Yes, it is possible. But that is the whole point—if such a person ever surfaced, the Court would have to individually scrutinize each such person's allegations even to decide whether such claims could survive a demurrer.

2. If a third party did see the Mailer, who was it?

If some other person did see the Mailer and the return address, but it turns out that person was someone who was authorized to see it, then there would be no liability under the CMIA, *see Sutter Health*, 227 Cal. App. 4th at 1557 ("No breach of confidentiality takes place until an **unauthorized** person views the medical information."), and this can only be determined here on an individual basis. A putative class member may well have authorized their spouse or partner or parents to have access to their medical information, but this cannot be determined on a class-wide basis.

3. If an unauthorized third party saw the Mailer, did that person thereafter harm the putative class members because of inferences they drew from the return address on the Mailer?

Even if a putative class member was able to identify some unauthorized third person who saw the Mailer, each such putative class member would still be required to show that the third person drew some negative inference and thereafter took some action that harmed Plaintiff because

[2] The same is true for Plaintiffs' invasion of privacy claim, which requires "publicity" of a private matter. *E.g.*, *S.B. v. Saint James Sch.*, 959 So. 2d 72, 98 (Ala. 2006) ("[T]here is no invasion of privacy by publicity of a private matter if the matter is communicated only to a single person or to a small group of persons.").

of that inference, because some actual injury or loss is essential for Plaintiffs' non-CMIA claims.[3] This is not a question of the *amount* of damages, which sometimes can be determined on a class-wide basis. This is a question of whether the putative class members could even allege facts sufficient to state the elements of their claims in the first place. *See Wilens v. TD Waterhouse Grp., Inc.*, 120 Cal. App. 4th 746, 756 (2003) (distinguishing between "mere calculation" of damages and "each class member's *entitlement* to damages") (emphasis in original).

Here, Plaintiffs speculate in their Complaint that some putative class members might have lost their employment, housing, or health care, or even faced some risk of physical harm—although, again, none of those things actually happened to the three Plaintiffs who filed this lawsuit.[4] But if this individual examination demonstrated that the return address on the Mailer was viewed only by an intimate partner, roommate, family member or friend who already knew about the putative class members' sexual orientation or preventative regimen, that would cause the putative class member no harm or loss—and they would not be able to establish the elements of their claims. It is plausible that an intimate partner or family member might already have known that the putative class member was seeking information to manage their own health. Or if the person who saw the Mailer had a purely neutral reaction, that would not cause them to fire, evict, or physically harm the putative class member. And then even if the person who saw the Mailer thereafter developed a negative view of the putative class member, they still might not have acted on that view to cause any of the alleged harms. Again, these inquiries all relate not to the amount of damages, but to whether any individual putative class member will be able to establish the elements of their causes of action in the first place.

Plaintiffs disregard that these (and other) individual questions will inevitably need to be explored in detail for each putative class member, and seek in their Complaint to certify four (4) classes: a Nationwide Class, an Alabama Class, an Indiana Class, and a Missouri Class comprised

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[3] *See* cases cited *infra* note 5 (identifying each cause of action and case law establishing damage or loss requirement for each).

[4] The named Plaintiffs' failure to allege any damages or loss, or an "actual viewing" by an "unauthorized person" renders them inadequate class representatives, since their claims would not be typical to the extent they seek to represent any putative class member who may be able to make such allegations.

of "[a]ll persons who received Gilead's [Mailer] at their [] mailing address." Compl. ¶ 51. Given the individual issues explored above, none of these classes could ever be certified. *See Newell v. State Farm Gen. Ins. Co.*, 118 Cal. App. 4th 1094, 1103 (2004) (class treatment unwarranted where each putative class member's potential recovery is based on individual assessments). If for any reason the Complaint is not dismissed pursuant to the demurrer filed concurrently herewith, the Court should exercise its authority to strike the class allegations. Doing so now would expedite the resolution of this matter before the parties spend unnecessary time and resources on what is plainly a futile exercise.

I. FACTUAL ALLEGATIONS

Plaintiffs and putative class members were prescribed Gilead's pre-exposure prophylaxis ("PrEP") medications, which may be taken to reduce the risk of contracting HIV through sexual activity. *See* Compl. ¶¶ 2, 4. Plaintiffs and putative class members were enrolled in Gilead's Advancing Access® program, which provides financial assistance for eligible individuals in need, including commercial insurance co-pay costs or the full cost for uninsured individuals for PrEP medications, as well as other insurance-related support, such as benefits investigations. *See id.* ¶¶ 2, 3.

In April 2020, Gilead mailed the Mailer to Plaintiffs and putative class members, who had enrolled in the Advancing Access program. *See id.* ¶ 7. The Mailer displayed the Plaintiffs' and putative class members' names and the mailing addresses they provided to Gilead, a return address of "HIV Prevention Team, 1649 Adrian Road, Burlingame CA 94010," and the tagline "The latest from Gilead Sciences." *Id.* Plaintiffs and putative class members allege that they received the Mailer. *Id.* ¶ 44. Plaintiffs seek "redress against Gilead for its [alleged] unlawful exposure of Plaintiffs' and [putative] Class Members' confidential HIV-related information." *Id.* ¶ 10.

II. STANDARD OF REVIEW

A party seeking class treatment must show the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012). The "community of interest" requirement requires a showing of "(1)

predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Id.* Courts also consider whether the class action procedure is "superior" to litigating claims individually. *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 332 (2004); *Schermer v. Tatum*, 245 Cal. App. 4th 912, 923–24 (2016).

A motion to strike class allegations is appropriate at the pleading stage. "[W]here the invalidity of the class allegations is revealed on the face of the complaint, and/or by matters subject to judicial notice, the class issue may be properly disposed of by . . . motion to strike." *Canon U.S.A.*, 68 Cal. App. 4th at 5; *also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 440 (2000) ("[N]othing prevents a court from weeding out legally meritless suits prior to certification via a defendant's demurrer or pretrial motion. In fact, it is settled that courts are authorized to do so."). This motion is warranted when "it is clear that there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact." *Tucker v. Pac. Bell Mobile Servs.*, 208 Cal. App. 4th 201, 212 (2012). "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.'" *Brinker*, 53 Cal. 4th at 1021 (quoting *Collins v. Rocha*, 7 Cal. 3d 232, 238 (1972)).

III. ARGUMENT

A. Plaintiffs' CMIA Claim Is Not Amenable to Class Treatment Because Individual Issues Necessarily Predominate Over the "Release" of Each Putative Class Members' Medical Information

With respect to Plaintiffs' CMIA claim, the Complaint alleges that "Plaintiffs and [putative] Class Members have been harmed by Gilead's willful and unauthorized disclosure and release of their personal medical information." Compl. ¶ 66. As discussed more fully in Gilead's demurrer, the central mandatory element of a CMIA claim is the "release" of medical information, which means that each individual plaintiff's information must "in fact" have been "actually viewed" by an "unauthorized person." *Regents*, 220 Cal. App. 4th at 570 ("[N]o one (except perhaps the thief)

knows what happened to the encrypted external hard drive" and therefore the plaintiff "cannot allege **her** medical records were, **in fact, viewed** by an **unauthorized individual**."); *Sutter Health*, 227 Cal. App. 4th at 1550 (plaintiffs failed to state CMIA claim "because they do not allege that the stolen medical information was **actually viewed** by an **unauthorized person**"); *Eisenhower Med. Ctr.*, 226 Cal. App. 4th at 434 n.3 ("The plaintiff in *Regents* could not maintain her cause of action because she could not allege that **her** medical records had, **in fact, been viewed by an unauthorized person.**"); *Falkenberg v. Alere Home Monitoring, Inc.*, No. 13-CV-00341-JST, 2014 WL 5020431, at *3 (N.D. Cal. Oct. 7, 2014) ("[T]here can be no liability for negligent release of [confidential information] under sections 56.101 and 56.36 absent allegations, and subsequent[] proof, that the [information] has been **actually viewed** by a third party.").

Whether or not the medical information of each putative class member was in fact actually viewed by any third party, much less an unauthorized third party, is an individualized factual inquiry that will dwarf the entire litigation, and thus Plaintiffs cannot establish that common issues of fact and law will predominate. *See Tucker*, 208 Cal. App. 4th at 212. Indeed, the Complaint itself demonstrates that individual issues will necessarily predominate in evaluating whether a release has occurred under the CMIA. The Complaint alleges that Plaintiffs Alabama Doe, Indiana Doe, and Missouri Doe received the Mailer under different factual circumstances: Alabama Doe enrolled in the Advancing Access program over the phone and "gave his workplace address, in order to avoid having any mail sent to his home"; found the Mailer in his workplace mail room; and is concerned that someone at his workplace might have seen it although he has no facts to support that speculation. Compl. ¶ 45. Indiana Doe is a "prominent" figure in the entertainment industry; does not allege where he received the Mailer (so it could have been to a private mailbox at his home, particularly since he alleges that he "is fearful that his business and standing in his professional community will suffer if his sexual orientation or sexual practices are publicly known"); but also does not allege that anyone viewed his Mailer. *Id.* ¶ 46. And Missouri Doe alleges he received the Mailer at his twenty-two-unit apartment building; says that "[e]nvelope[s] too big to fit in individual mailboxes are placed on top of the rows of mailboxes"; and also alleges nothing showing that anyone viewed his Mailer. *Id.* ¶ 47. Beyond their failure to allege that anyone saw their Mailer,

much less the return address on it, no Plaintiff has alleged that any "unauthorized" person "in fact" "actually viewed" their Mailer. Six months have passed. The individual stories of the only three Plaintiffs to have come forward makes clear they cannot state the essential CMIA elements that an unauthorized person actually viewed their Mailer.

The questions of whether an "unauthorized person" "in fact" "actually viewed" the return address on any individual's particular Mailer is central to whether Plaintiffs and putative class members could even assert a viable claim under the CMIA. As discussed in Gilead's demurrer, the Court of Appeal has explicitly held that a CMIA claim cannot be based on mere presumptions or speculation—which is all the Plaintiffs here have alleged—or the possibility that someone could have seen the confidential information. *See Sutter Health*, 227 Cal. App. 4th at 1557; *Regents*, 220 Cal. App. 4th at 570. Rather, the Complaint must include specific allegations demonstrating that Plaintiffs' confidential information was in fact actually viewed by an unauthorized third party. *See Sutter Health*, 227 Cal. App. 4th at 1550 (dismissing CMIA claim absent allegation of actual viewing); *Regents*, 220 Cal. App. 4th at 570 (same). Those allegations must not be general but must be particularized. *See Carter v. Prime Healthcare Paradise Valley LLC*, 198 Cal. App. 4th 396, 410 (2011). Here, not only are such particularized allegations missing in the Complaint, but individualized inquiries of every putative class member would be an impossible and futile task because, absent eyewitness testimony or an admission from an unauthorized third party, it would require putative class members to speculate about who could have viewed the Mailer.[5]

[5] Plaintiffs' California Unfair Competition Law ("UCL"), negligence per se, and invasion of privacy claims are not amenable to class treatment for the same reasons. The UCL claim is premised on Gilead's alleged "unauthorized disclosure and release" of Plaintiffs' and putative class members' confidential medical information, Compl. ¶ 69, and the negligence per se claim is predicated in part on the CMIA claim, *id*. ¶ 82. Similarly, the invasion of privacy claim requires a showing that a private matter was "made public by communicating it to a large segment of the public." *Saint James Sch.*, 959 So. 2d at 98. Accordingly, class treatment is inappropriate with respect to Plaintiffs' UCL, negligence per se, and invasion of privacy claims because, as discussed above, individual issues with respect to the "release" and publicity of each putative class members' medical information will predominate.

B. Class Treatment Is Not Warranted as to Each Non-CMIA Claim Because Individual Issues Relating to Each Putative Class Members' Right to Recovery Will Predominate

Each of Plaintiffs non-CMIA claims require a showing of some actual injury or loss in order to establish a viable claim.[6] As discussed above, this is not a matter of differences in calculating damages—rather, the question is whether Plaintiffs and the putative class members are entitled to any relief in the first place. *See Wilens*, 120 Cal. App. 4th at 756. But the allegations in the Complaint make clear that the inquiry into whether any putative class member has been injured at all will be a purely individual one, requiring a person-by-person analysis. Accordingly, class treatment will never be warranted with respect to each of these claims because "there are substantial and numerous factually unique questions to be resolved in determining plaintiffs' and the putative class members' right to recovery, if any." *Schermer*, 245 Cal. App. 4th at 926; *see also Acree v. Gen. Motors Acceptance Corp.*, 92 Cal. App. 4th 385, 397 (2001) (class action can be maintained only "so long as each class member would not be required to litigate substantial and numerous factually unique questions to determine his or her individual right to recover").

Thus, in *Newell*, plaintiffs filed a class action complaint against their homeowners' insurance carriers for denying them benefits after the Northridge earthquake. 118 Cal. App. 4th at 1097. Plaintiffs alleged that they were wrongfully denied policy benefits and brought breach of contract and UCL claims, among others. *Id.* at 1097–98. With respect to the breach of contract claim, the California Court of Appeal found that "[e]ven if [defendants] adopted improper claims

[6] *See, e.g.*, *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 321–22 (2011) (standing under the **UCL** requires a plaintiff to allege that he has suffered an injury in fact and has lost money or property as a result of the unfair competition); *Ex parte Stonebrook Dev., L.L.C.*, 854 So. 2d 584, 589 (Ala. 2003) (essential element of **negligence** claim is "actual loss or damage"); *Dickinson v. Land Developers Constr. Co.*, 882 So. 2d 291, 302 (Ala. 2003) (**negligence per se** claim requires proof that "the plaintiff's injury was the kind of injury contemplated by the statute"); *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010) (essential element of **breach of contrac**t claim is "damages suffered by the plaintiff"); *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010) (**unjust enrichment** claim requires a plaintiff to prove that he conferred a benefit on the defendant and defendant retained the benefit under unjust circumstances); *Thompson v. Allergan USA, Inc.*, 993 F. Supp. 2d 1007, 1012 (E.D. Mo. 2014) (essential element of a claim under the **Missouri Merchandising Practices Act** is "[a]n ascertainable loss of money or property"); *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 966 (Ind. Ct. App. 2001) (general tort of **invasion of privacy** "includes four distinct injuries," including public disclosure of private facts). Even if the invasion of privacy claim did not require a showing of actual injury, no class could be certified here because it would require an inquiry into whether a large segment of the public saw the Mailer. *See* note 2, *supra*.

practices to adjust Northridge earthquake claims, each putative class member . . . could recover for breach of contract and bad faith *only* by proving his or her individual claim was wrongfully denied, in whole or in part, and the insurer's action in doing so was unreasonable." *Id.* at 1103 (emphasis in original). Since "each putative class member's potential recovery would involve an individual assessment of his or her property, the damage sustained and the actual claims practices employed," the court held that class treatment was unwarranted. *Id.* The court therefore affirmed the trial court's order sustaining a demurrer without leave to amend the class allegations in the complaint. *Id.* at 1106.[7]

Here, too, each cause of action in the Complaint is premised on Gilead's alleged disclosure of Plaintiffs' and putative class members' medical information, and Plaintiffs seek damages resulting from such disclosure. *See* Compl. ¶¶ 66–67, 69, 74, 76, 80, 82, 87, 91–92, 95, 97, 101, 104, 108, 111, 113, 118. Each putative class member's right to recovery under each cause of action, however, requires individualized assessments of the circumstances under which each putative class member received the Mailer and the damages sustained, if any. *See Newell*, 118 Cal. App. 4th at 1103. The Court would therefore be required to resolve substantial and numerous factually unique questions to determine Plaintiffs' and putative class members' right to recovery, including but not limited to the questions and issues discussed above.

The three named Plaintiffs allege no damage or loss at all. They speculate that absent putative class members might have suffered workplace termination, home eviction, physical attacks, or a denial of health care. Just as the individual examination of Plaintiffs' allegations reveals they have failed to plead the essential element of damage or loss, so too would the Court have to individually examine the allegations of each putative class member to make the same assessment.

Under these circumstances, class treatment will never be warranted. *See Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 850 (2009), *as modified* (Oct. 26, 2009) (affirming denial of class certification because individual issues predominated for the UCL claim, including

[7] Moreover, the court found that plaintiffs' UCL claim "fare[d] no better" insofar as it was premised on the improper denial of policy benefits and sought restitution because "the individualized assessments necessary for the breach of contract and bad faith causes of action also are necessary to establish liability for unfair competition." *Id.* at 1103–04.

"the practices employed by any given independent agent [of defendant]—such as whether the agent involved in any given transaction took [defendant]'s training and read [defendant]'s manuals or used the training and materials in sales presentations, and what materials, disclosures, representations, and explanations were given to any given purchaser"); *Wilens*, 120 Cal. App. 4th at 756–57 (2003) (affirming denial of class certification on breach of contract claim because named plaintiff "would have to call on individual members to prove their particular damages"); *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal. App. 4th 908, 923–24 (2001) (denying motion for class certification as to negligence claim based on need for "individualized proof" of each putative class member to "come forward and prove specific damage to her home (e.g., uneven floors, insect infestation, misaligned doors and windows)"); *Silva v. Block*, 49 Cal. App. 4th 345, 352 (1996) (affirming order dismissing class allegations without leave to amend because even if plaintiffs could prove allegation of common improper policy, recovery of each putative class member was dependent on individualized proof of constitutional injury).

Finally, Plaintiff Missouri Doe's claim under Missouri's HIV confidentiality statute could never be certified for a somewhat different reason. That statute creates a cause of action only for the disclosure of information "concerning an individual's HIV infection status or the results of any individual's HIV testing." Mo. Rev. Stat. § 191.656(1)(1). Missouri Doe has not alleged what their HIV status is, and without knowing what an individual's HIV status is, it cannot be determined whether or what HIV status information was supposedly disclosed without conducting an individualized inquiry which, particularly given the degrees to which the named Plaintiffs have sought confidentiality through their Doe status, would be unmanageable on a class basis.

IV. CONCLUSION

Gilead believes that the Court should dismiss this case pursuant to its concurrently filed demurrer. But in the event any claim is not dismissed, Gilead respectfully requests that the Court grant its motion to strike the class allegations without leave to amend. This highly unique case could never be litigated on a class-wide basis.

Dated: October 20, 2020

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