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SUPERIOR COURT FOR 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, v. GILEAD SCIENCES, INC., Defendant.	Case No. 20-CIV-03699 **CLASS ACTION** MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE THE CLASS ALLEGATIONS Date: December 11, 2020 Time: 9:00 a.m. Dept.: 22 Judge: Hon. Danny Y. Chou Complaint filed September 1, 2020

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I. PRELIMINARY STATEMENT

Plaintiffs' Class Action Complaint[1] asserts that Defendant Gilead Sciences, Inc. ("Gilead" or "Defendant") knowingly and recklessly revealed Plaintiffs' confidential medical information ("CMI"), including "confidential HIV-related information of patients prescribed Gilead's HIV-related medication." (Compl. ¶10.) Despite a promise of confidentiality, Gilead mailed an envelope to Plaintiffs and Class Members who were enrolled in Gilead's Advancing Access Program that revealed Plaintiffs' and Class Members' name and address information on the outside of the envelope along with the CMI in a large, bold, red font: "**HIV Prevention Team**". (*Id.* ¶ 7.) Every Class Member received an identical mailing. Every Class Member suffered the same release of CMI and suffered the same harm – the illegal revelation of protected CMI.

Gilead now moves to strike Plaintiffs' class allegations, prior to discovery, effectively asking the Court to preemptively deny a motion for class certification that has not yet been filed, based solely on Gilead's incorrect analysis of the law and the facts. To deny class certification, the Court would have to jettison clear law demanding that, absent exceptional circumstances, none of which apply here, class allegations be scrutinized on an adequate factual record, *i.e.*, after discovery, through a properly framed and argued motion for class certification. There is no basis for the Court to take that leap. At this stage, Plaintiffs' allegations plausibly satisfy the pleading requirements for class treatment under California Code of Civil Procedure Section 382.

In its Motion to Strike,[2] Gilead argues that the Court should strike Plaintiffs' class allegations because it believes that Plaintiffs cannot certify their claims under the California Confidentiality of Medical Information Act ("CMIA") or any of Plaintiffs' non-CMIA claims and because, in order to establish liability, "[t]he Court would have to scrutinize the unique factual circumstances of each individual putative class member." (Mot. Strike at 7.) These arguments fail

[1] All references to "Complaint" or "Compl." refer to Plaintiffs' Class Action Complaint, Superior Court of California for the County of San Mateo, September 1, 2020.

[2] All references to "Mot. Strike" refers to "Defendant Gilead Sciences, Inc.'s Motion to Strike the Class Allegations and Memorandum of Points and Authorities in Support Thereof," October 20, 2020.

because, as set forth below, Plaintiffs have adequately alleged classes under each cause of action they have pleaded.[3]

Claims involving breaches of medical information are routinely certified as class actions, including in two cases similar to this one involving the disclosure of HIV-information through the sending of inappropriate mailers. Defendant's concerns about proving injury or entitlement to damages are misplaced, and it is black letter law that individualized damage determinations do not bar certification.

At bottom, the core factual and legal questions here are common to all Class Members, namely, whether Defendant's mailer which disclosed on the face of the envelope Plaintiffs' and Class Members' CMI violated Plaintiffs' and Class Members' rights. Plaintiffs are entitled to prove through discovery that class certification is appropriate here and Defendant's motion to strike should be denied.

II. BACKGROUND INFORMATION

Plaintiffs seek to hold Gilead accountable for its public dissemination of their CMI. They assert claims for violations of the California Confidentiality of Medical Information Act, Cal. Civ. Code § 56, *et seq*. ("CMIA"), the California Unfair Competition Law, Cal. Bus. Code § 1720, *et seq*. ("UCL"), common law claims for negligence, negligence per se, breach of contract, invasion of privacy, unjust enrichment, and violations of the Missouri AIDS Law provision at Mo. Rev. Stat. § 191.656, which prohibits the disclosure of protected information about an individual's HIV infection status, and the Missouri Merchandising Practices Act, Mo. Stat. § 407.010, *et seq*. In their Complaint, Plaintiffs seek to certify the following classes (collectively, the "Class"):

Nationwide Class: All persons who received Gilead's HIV Prevention Team Letter at their mailing address.

Alabama Class: All persons who received Gilead's HIV Prevention Team Letter at their Alabama mailing address.

Indiana Class: All persons who received Gilead's HIV Prevention Team Letter at their Indiana mailing address.

[3] To an unusual degree, Gilead's arguments in its Motion to Strike depend upon its flawed arguments on the adequacy of Plaintiffs' merits pleading. (*See* Gilead's Memorandum of Law in Support of Its Demurrer to Plaintiffs' Complaint.) Gilead's arguments on demurrer are wrong and are fully addressed in Plaintiffs' Memorandum in Opposition to Defendant's Demurrer filed concurrently herewith.

Missouri Class: All persons who received Gilead's HIV Prevention Team Letter at their Missouri mailing address.

Plaintiffs allege that Gilead violated the law because it "carelessly, recklessly, negligently, and impermissibly revealed [CMI] of patients who were prescribed Gilead medications, including to their family, friends, roommates, landlords, neighbors, mail carriers, and complete strangers." (Compl. ¶ 10.) Plaintiffs seek redress against Gilead for its illegal exposure of Class Members' CMI, including injunctive and declaratory relief.

The heart of this case is whether Gilead's mailing of the envelope with "**HIV Prevention Team**" and the consumer's name and address violates Plaintiffs' and Class Members' rights and applicable law. The Complaint sets forth numerous common questions of law and fact that predominate over individualized issues including "whether Gilead violated applicable confidentiality of medical information statutes," "whether Gilead had a duty to use reasonable care to safeguard such Class Members' private information," whether Gilead breached that duty, and "whether Gilead breached its contractual promise to safeguard Class Members' medical information." (Compl. ¶ 56.) Because the outcome of all these questions can be determined with common proof and can be determined on a classwide basis, Defendant's motion should be denied.

III. ARGUMENT

The California Supreme Court "has clearly recognized the substantial benefits inherent in consumer class actions." *Tucker v. Pac. Bell Mobile Servs.*, 208 Cal. App. 4th 201, 214 (2012). Despite the benefits of class actions, Gilead asks the Court to cut off any possibility that the victims of Gilead's unlawful release of Plaintiffs' and Class Members' CMI can obtain classwide injunctive or monetary relief *before* the benefit of discovery and *without* the required analysis to determine whether the Class should be certified. Plaintiffs are entitled to discovery on their class claims so they can present their claims on a full record through a motion for class certification. Gilead should not be allowed to evade scrutiny of its conduct through this Motion to Strike.

A. Courts Disfavor Striking Class Allegations Prior to Discovery

California courts rarely grant motions to strike class allegations and only do so in exceptional cases. Indeed, in California there is a long-standing judicial policy disfavoring such motions. "Judicial policy in California has long discouraged trial courts from determining class sufficiency at the pleading stage and directed that this issue be determined by a motion for class certification." *Gutierrez v. California Commerce Club, Inc.*, 187 Cal. App. 4th 969, 976 (2010); *see also Beckstead v. Superior Court*, 21 Cal. App. 3d 780, 783 (1971) (noting "judicial policy of

allowing potential class action plaintiffs to have their action measured on its merits to determine whether trying their suits as a class action would bestow the requisite benefits upon the litigants and the judicial process to justify class action litigation").

"[A]ll that is normally required for a complaint to survive demurrers to the propriety of class litigation is that the complaint allege facts that tend to show: (1) an ascertainable class of plaintiffs, and (2) questions of law and fact which are common to the class." *Arce v. Kaiser Found. Health Plan, Inc.*, 181 Cal. App. 4th 471, 487 (2010) (citation and quotation marks omitted). "Where there is a 'reasonable possibility' that the plaintiff in a class action can establish a community of interest among class members, 'the preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation.'" *Canon U.S.A., Inc. v. Superior Court*, 68 Cal. App. 4th 1, 5 (1998) (quoting *Rose v. Medtronics, Inc.*, 107 Cal. App. 3d 150, 154 (1980)); *see also Blakemore v. Superior Court*, 129 Cal. App. 4th 36, 53 (2005) (stating same). "A demurrer to class allegations may be sustained . . .only if it is clear there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and the individual issues predominate over common questions of law and fact." *Gutierrez*, 187 Cal. App. 4th at 975 (internal quotation omitted). "Absent strong factual showings in the complaint that negate the possibility of a community of interest, determination of the propriety of a class action should be deferred until a time when [the court] may better make the decision." *Blakemore*, 129 Cal. App. 4th at 59 (internal quotations and citations omitted).

As noted by California appellate courts, the "wisdom" of not dismissing class allegations at the pleadings stage "is elementary":

> The wisdom of allowing survival is elementary. Class action litigation is proper whenever it may be determined that it is more beneficial to the litigants and to the judicial process to try a suit in one action rather than in several actions.... It is clear that the more intimate the judge becomes with the character of the action, the more intelligently he [or she] may make the determination. If the judicial machinery encourages the decision to be made at the pleading stages and the judge decides against class litigation, he [or she] divests the court of the power to later alter that decision.... Therefore, because the sustaining of demurrers without leave to amend represents the earliest possible determination of the propriety of class action litigation, it should be looked upon with disfavor.

Arce, 181 Cal. App. 4th at 487–88 (quoting *Beckstead*, 21 Cal. App. 3d at 783)).

The policy against deciding class certification without discovery is embodied in the California Rules of Court which require the court to account for discovery when determining the propriety of class certification:

> A motion for class certification should be filed when practicable. In its discretion, the court may establish a deadline for the filing of the motion, as part of the case conference or as part of other case management proceedings. ***Any such deadline must take into account discovery proceedings that may be necessary to the filing of the motion***.

CRC 3.764 (emphasis added). Here, in line with CRC 3.764, the Court should permit discovery before deciding any motions for class certification.

B. Plaintiffs Have Satisfied Their Pleading Burden

To prevail on its motion to strike Plaintiffs' class allegations, Gilead must show that "the invalidity of the class allegations is revealed on the face of the complaint." *Canon U.S.A.*, 68 Cal. App. 4th at 5. Gilead falls far short of meeting this high standard.

Rather than focusing on the "invalidity" of Plaintiffs' class action allegations, Gilead's motion largely repeats arguments set forth in its demurrer regarding the requirements of the CMIA and whether Plaintiffs will be able to establish liability. But whether Plaintiffs will succeed on the merits is not a consideration for determining whether Plaintiffs' class allegations are adequate. *See Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004) (holding that "[t]he certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious'").

Plaintiffs have sufficiently alleged each requirement for class certification. Under governing law, a class action is "authorized 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court ....'" *Sarun v. Dignity Health*, 41 Cal. App. 5th 1119, 1130 (2019) (quoting Cal. Civil Code § 382), *review denied* (Feb. 26, 2020) (quoting *Brinker Rest. Corp. v. Super. Court*, 53 Cal. 4th 1004, 1021 (2012)). "The party seeking class certification must establish (1) 'the existence of an ascertainable and sufficiently numerous class'; (2) 'a well-defined community of interest'; and (3) 'substantial benefits from certification that render proceeding as a class superior to the alternatives.'" *Id.* To plead a community of interest, a plaintiff must allege "three factors: '(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.* (quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000)).

Plaintiffs' Complaint sufficiently alleges there are identifiable and numerous Class Members (Compl. ¶ 55); various common questions of law or fact that predominate over individualized issues (*id.* ¶ 56); class representatives with claims or defenses that are typical of the class (*id.* ¶ 57); class representatives who can adequately represent the class (*id.* ¶ 58); and that a class action is superior to other alternatives (*id.* ¶¶ 59-62). These allegations are sufficient at this stage.

Defendant ignores these allegations and instead argues that Plaintiffs' CMIA and non-CMIA claims cannot be certified. For the reasons explained below, Defendant is wrong.

1. Plaintiffs' CMIA Claims Are Amenable to Class Treatment

The CMIA provides that "an individual may bring an action against a person or entity who has negligently released confidential information or records concerning him or her." Cal. Civ. Code § 56.36. Defendant argues that the CMIA claim is not amenable to class treatment because 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 a letter (the 'Mailer')" as the CMIA requires. (Mot. Strike at 6-9.)

As discussed in detail in Plaintiffs' opposition to Defendant's demurrer, Defendant has significantly overstated Plaintiffs' burden. Plaintiffs need only show facts "that could give rise to the inference that their medical information has been viewed by an unauthorized third-party." *In re Solara Med. Supplies, LLC Customer Data Sec. Breach Litig.*, 2020 WL 2214152, at *7 (S.D. Cal. May 7, 2020). Plaintiffs' Complaint clearly alleges (and shows) that they can meet their burden on each of the elements of their CMIA claim on a classwide basis. Plaintiffs have alleged that unauthorized persons viewed *every* Class Member's envelope, which included CMI and the Class Member's name and address. (Compl. ¶¶ 10, 44.) Any mass mailing process exposes the face of an envelope to a myriad of third parties beyond just the sender and the recipient of the envelope, including the people who prepared the mailing, the mail sorters, transporters, and carriers who work at the United States Postal Service, and anyone who lives or works in the vicinity of where the mail is delivered. Plaintiffs allege that any number of unauthorized persons actually viewed the identical mailer sent to every Class Member, including family, friends, roommates, landlords, neighbors, mail carriers, and complete strangers. (*Id.* ¶ 10.) The circumstances surrounding the breach show that there is a reasonable possibility that Plaintiffs will be able to establish a well-defined community of interest at the class certification stage.

Gilead characterizes Plaintiffs' allegations as "unusual," but unfortunately, privacy

violations involving HIV information and the mail are not unusual, and courts have certified classes involving such violations. As alleged in the Complaint, both *Beckett v. Aetna, Inc.*, No. 2:17-CV-3864-JS (E.D. Pa.), and *Doe One, et al. v. CVS Health Corp.*, No. 2:18-cv-00238 (S.D. Ohio), involved companies illegally disclosing HIV information discernible on or through envelopes delivered through the mail because the applicable mailing procedures were inadequate to protect the privacy of consumers. (Compl. ¶¶ 29-32.) Both of these cases were resolved as class actions providing relief to thousands of consumers and with courts finding that "questions of law or fact common to class members predominate over any questions affecting only individual members" as required for class certification under Fed. R. Civ. P. 23(b)(3).

Tellingly, Gilead cites no cases striking class allegations at the pleading stage for CMIA claims. That is because CMIA claims are amenable to class treatment. At least one court has denied a motion to strike class allegations involving CMIA claims at the pleading stage. *See, e.g., Falkenberg v. Alere Home Monitoring, Inc.*, No. 13-00341, 2015 WL 800378, at *5 (N.D. Cal. Feb. 23, 2015) (denying motion to strike class allegations). Numerous other courts have approved class action settlements for cases alleging CMIA claims. *See, e.g., Rodriguez v. NDCHealth Corp.*, 2011 WL 13124037, at *1 (C.D. Cal. Oct. 17, 2011) (noting that CMIA class action settlement had been approved); *Johansson-Dohrmann v. Cbr Sys., Inc.*, 2013 WL 3864341, at *1 (S.D. Cal. July 24, 2013) (granting final approval of class action settlement involving CMIA claims); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 305 (N.D. Cal. 2018) (granting final approval of class-wide settlement wherein CMIA claims had been alleged).

In *Anthem*, Judge Koh found "the parties have identified legal and factual issues common to the underlying claims that are susceptible to class-wide determination. In particular, the Settlement Class Members suffered the same injury—namely, their personal information was stored on the same Anthem data warehouse that was breached by hackers." *Id*. at 308. Judge Koh further held that, "[t]he extensiveness and adequacy of Anthem's security measures lie at the heart of every claim. Moreover, the answer to those questions does not vary from Settlement Class Member to Settlement Class Member." *Id*. Like *Anthem*, Plaintiffs' CMIA claims rest on a common course of conduct by Gilead, involving a common mailer sent to every Class Member. Whether Gilead breached the CMIA can be proven with common evidence and will not vary from Class Member to Class Member.

2. Gilead Relies on Inapposite Caselaw

Gilead relies on *Eisenhower Med. Ctr. v. Superior Court*, 226 Cal. App. 4th 430, 434

(2014), but this reliance is misplaced. *Eisenhower* does not involve either a motion to strike class allegations or a motion to certify or decertify a class. *Eisenhower* involves a motion for summary judgment and discusses whether the defendant had violated the CMIA. Gilead argues that *Eisenhower* holds that "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." (Mot. Strike at 6.) Gilead misstates the holding in *Eisenhower*. The court held that there was no CMIA violation because "a prohibited release by a health care provider must include more than individually identifiable information but must also include information relating to medical history, mental or physical condition, or treatment of the individual, which did not occur." *Id*. at 437. Here, Plaintiffs allege both a release of individually identifiable information and information relating to Plaintiffs' HIV-related treatment.

The facts in *Eisenhower* distinguish it as well. Unlike here, where Plaintiffs allege that countless persons viewed the CMI on the mailer, in *Eisenhower* **no one** saw the allegedly confidential medical information – a computer was stolen that "included each person's name, medical record number (MRN), age, date of birth, and last four digits of the person's Social Security number (SSN)." *Id*. at 432. The computer stored **no** protected medical information. As such, *Eisenhower* offers no support to Gilead, because Plaintiffs will be able to show that *every* Class Member's CMI was released in precisely the same fashion, *i.e.*, because of Gilead's uniform act of recklessness.[4] Plaintiffs allege that the mailers released every Class Member's CMI to public view, and was seen.[5]

Tellingly, the court in *Eisenhower* made a point of commenting that "in some cases the very fact that a person is or was a patient of certain health care providers, such as an AIDS clinic, is more revelatory of the nature of that person's medical condition, history, or treatment. We are

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[4] Gilead's reliance on footnote 3 in *Regents of University of California v. Superior Court*, 220 Cal. App. 4th 549 (2013), also misses the mark. (Mot. Strike *passim*.) *Regents* held a plaintiff need only plead that the "confidential nature of the plaintiff's medical information was breached as a result of the health care provider's negligence." *Id.* at 570. The *Regents*' plaintiff did not make this crucial allegation. Plaintiffs here allege Gilead released every Class Member's confidential medical information when it sent mailers which included "**HIV Prevention Team**" in the return address. (Compl. ¶ 10.) In addition, in *Regents* there were no allegations that any unauthorized person viewed the medical records at issue.

[5] *Sutter Health v. Super Ct.*, 227 Cal. App. 4th 1546, 1557-1558 (2014), serves Gilead no better. It merely holds that there was no CMIA violation because, like *Eisenhower*, there was no allegation that anyone viewed the confidential medical information that was allegedly released.

not presented with, and express no opinion concerning, such a situation." *Eisenhower*, 226 Cal. App. 4th at 436 n.4. Although that was not the case before the court in *Eisenhower*, it is precisely what happened here. The envelope reveals something about each recipient's medical condition or treatment. *Eisenhower* strongly supports Plaintiffs' contention that a mailer that includes both a recipient's name and address and the return address notation of "**HIV Prevention Team**," coupled with an allegation that every Class Member received the mailer, would adequately plead a class under the CMIA.

Because Plaintiffs have included "specific allegations that the Plaintiffs' confidential information was in fact viewed by an unauthorized third party," Gilead's motion to strike the class allegations from Plaintiffs' CMIA claim fails. In accordance with California's preferred policy, the case should be allowed to proceed to discovery, where a full record can be developed for the Court to review a properly briefed motion for class certification. While the Court will ultimately have to determine the merits issue, whether including "**HIV Prevention Team**" on envelopes mailed to Class Members is, as a matter of law, a prohibited release of Plaintiffs' and Class Members' confidential medical information, at this stage, Plaintiffs need only allege that the proof of Gilead's liability is susceptible to classwide proof and that they can show, with discovery, that every Class Member's private medical information, name and address, were viewed by an unauthorized person. Plaintiffs have clearly made that showing.[6]

3. Plaintiffs' Non-CMIA Claims Raise Common Questions

Regarding the non-CMIA claims, Gilead asserts 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" making class treatment inappropriate because the Court would have to engage in individual analyses to determine whether each Class Member was entitled to damages. (Mot. Strike at 14.) In Gilead's view, because some of Plaintiffs' claims require proof of damages or injury in order to recover damages, class treatment is inappropriate because entitlement to damages, as

[6] In a footnote, Gilead argues that the Court should also strike Plaintiffs' class allegations under the UCL, for negligence *per se*, and invasion of privacy claims for the same reasons it should strike Plaintiffs' CMIA claim. (Mot. Strike at 13 n. 5.) This argument is not properly presented in a footnote and should be disregarded. *Alexander v. Exxon Mobil*, 219 Cal. App. 4th 1236, 1260 (2013) (argument raised only in footnote disregarded and not considered). In any event, for the same reasons set forth above with respect to Plaintiffs' CMIA claim, the Court should also deny Gilead's motion to strike those class allegations.

opposed to calculation of damages, will be an individualized issue. Gilead's arguments miss the mark.

Here, whether Gilead violated Plaintiffs' and Class Members' rights by mailing letters in envelopes that, on their face, disclose CMI, is not an individualized issue. Whether Defendant violated common law, contractual, or statutory duties owed to Plaintiffs and Class Members by sending the mailer, thereby injuring Class Members, is a common question that does not depend on individualized factual circumstances. The Court can determine Gilead's liability in one fell swoop, and each Class Member's right to recovery will turn on an assessment of Gilead's uniform conduct. As set forth above, Gilead has identified no facts to contradict Plaintiffs' position that they will be able to show that they have been harmed using common evidence. Plaintiffs have adequately alleged that Defendant's unlawful mailing injured all Class Members by disclosing their CMI.

Furthermore, individualized damage issues are not an overriding concern that would prevent class certification. First, for the CMIA and Mo. Rev. Stat. § 191.656 claims, liquidated damages are available. Cal. Civil Code § 56.36(b)(1) (providing for nominal damages of $1,000); Mo. Rev. Stat. § 191.656 (providing for liquidated damages of $1,000 for negligent violations and $5,000 for willful violations). Second, for the California claims, nominal damages are available. Cal. Civil Code § 3360 ("When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."). Third, Plaintiffs seek punitive damages which can be determined on a classwide basis. Finally, Plaintiffs also request injunctive relief, which does not implicate issues of individualized damages. (Compl. at p. 20 (requesting "appropriate injunctive relief, including cessation of the HIV Prevention Team Letters and implementation of appropriate policies and procedures to protect the confidentiality of HIV-related information").)

But even if there may be individualized issues of damages, that does not preclude class treatment. "The law unequivocally provides that each class member may establish damages independently without threatening the integrity of the class action." *Blakemore*, 129 Cal. App. 4th at 57 (citing *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) and *Reyes v. Board of Supervisors*, 196 Cal. App. 3d 1263, 1278 (1987) ("the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate")). "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Duran v. U.S. Bank Nat'l Assn.*, 59 Cal. 4th 1, 28 (2014) (internal quotation omitted). Further, "[i]f the issues of liability are genuinely common issues, and the damages of individual class members can

be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). Finally, the Court has the power to certify only certain issues as a class action: "[W]hen appropriate, an action may be maintained as a class action limited to particular issues." CRC 3.765.

Defendant relies heavily on *Newell v. State Farm Gen. Ins. Co.*, 118 Cal. App. 4th 1094 (2004), but that case bears little resemblance to the case here. In *Newell*, the plaintiffs alleged that two insurance companies had engaged in a pervasive scheme to limit liability on property damage claims stemming from an earthquake. *Id.* at 1097-98. The plaintiffs' proposed class included policyholders "who were denied benefits based upon the contention that the damages were below the class member's deductible." *Id.* at 1098. The court found that individualized issues included "individual assessment of his or her property, the damage sustained and the actual claims practices employed." *Id.* at 1103. In particular, the court noted that even if the insurers had engaged in an illegal scheme, to determine whether that scheme itself had violated a particular policyholder's rights would still need to be determined. *See id.* ("Even if State Farm and Farmers adopted improper claims practices to adjust Northridge earthquake claims, each putative class member still 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.").

In contrast to *Newell*, here, whether Defendant's actions violated Plaintiffs' rights (thus affording them an entitlement damages), can be determined by common evidence. All Class Members were mailed the same "**HIV Prevention Team**" envelope that Plaintiffs allege unlawfully disclosed and revealed their CMI. As such, this is a prototypical case for class certification.

The other cases cited by Defendant (Mot. Strike at 15-16) were decided on motions for class certification after discovery and involve far different factual situations than those present here. None of the courts denied class certification or dismissed class allegations where there had been no discovery. In *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, (2009), *as modified* (Oct. 26, 2009), after discovery and full class certification briefing, the court held that there was no uniform policy that applied equally to every putative class member. The challenged policies emanated from independent insurance agents. In this case, Plaintiffs have alleged uniform conduct/policy stemming from a single source – Gilead. Likewise, *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 923 (2001), *as modified on denial of reh'g* (July 3, 2001), involved very different facts regarding faulty home foundations. It was also decided after discovery

and after the parties fully briefed class certification. In *Wilens v. TD Waterhouse Grp., Inc.*, 120 Cal. App. 4th 746, 756 (2003), the court denied class certification because there was "substantial evidence that individual issues would predominate over the common ones." There too, the court only rendered this decision on a motion for class certification and a complete record and briefing. In *Silva v. Block*, 49 Cal. App. 4th 345, 352 (1996), the court struck class claims after the plaintiffs spent two and a half years conducting discovery for the purpose of amending their class complaint.

Finally, Defendant cites the Missouri AIDS Law at § 191.656(1)(1) which provides a cause of action for disclosure of information "concerning an individual's HIV infection status or the results of any individual's HIV testing," and blithely concludes that the statute does not apply to Missouri Doe. (Mot. Strike at 16.) This is a merits issue, not a class certification issue. As explained in Plaintiffs' response to Defendant's demurrer, Defendant's envelope did reveal information about Plaintiff Missouri Doe's infection status, just as it did for every Missouri subclass member. In any event, the determination of whether the envelope revealed an infection status is a common question of law and fact that can be decided on a classwide basis. This determination will not turn on any individual differences. Dismissing Missouri Doe's claims at this time would be premature.

IV. CONCLUSION

For all the foregoing reasons, this Court should deny Defendant's Motion to Strike in its entirety.

Respectfully submitted,

Dated: November 17, 2020

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