

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EMMA GOIDEL, ILANA LEE, MADELEINE  
LEE, And LESLEY BROWN, On Behalf of  
Themselves and All Others Similarly Situated,

*Plaintiffs,*

- against -

AETNA LIFE INSURANCE COMPANY,

*Defendant.*

Case No. 1:21-cv-07619 (VSB)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION  
FOR FINAL APPROVAL OF SETTLEMENT AND FOR ATTORNEYS' FEES**

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## INTRODUCTION

Emma Goidel, Ilana Lee, Madeleine Lee, and Lesley Brown—for themselves and the Class Members they represent (“Plaintiffs” or “Class Members”)—and Defendant Aetna Life Insurance Company (“Defendant” or “Aetna”) (together, the “Parties”) settled this class action lawsuit in April 2024. This Court preliminarily approved the Settlement Agreement, ECF No. 94-1, on October 10, 2024, *see* ECF No. 98. The Parties filed a joint request to minorly amend the Agreement, *see* ECF No. 101, which the Court preliminarily approved on November 4, 2024, *see* ECF No. 102. The reaction to the settlement has been overwhelmingly positive: no Class Members submitted objections or requests for exclusion. Plaintiffs now seek final approval of the Amended Settlement Agreement, *see* Ex. 1<sup>1</sup> (the “Settlement” or “Settlement Agreement”), and ask the Court to enter the proposed Final Approval Order, Ex. 2, which Aetna has approved, and the proposed Judgment, Ex. 3.

Plaintiffs alleged that Aetna discriminated against them and other individuals with uteruses in LGBTQ+ relationships in requiring them to establish “infertility” for insurance coverage reasons by failing to become pregnant after 6 or 12 cycles of intrauterine insemination, depending on age (the “Definition of Infertility”). *See* Ex. 1 ¶ 30. Aetna required that such individuals pay thousands of dollars for these cycles out-of-pocket before accessing their plans’ coverage for these same treatments. By contrast, people with uteruses in heterosexual couples were immediately eligible for their plan benefits after representing they could not conceive after 6 or 12 months of heterosexual sexual intercourse, without having to undergo any cycles of intrauterine insemination nor incur any associated out-of-pocket costs. The Parties were able to identify 111 Damages Class Members—most of the class—through discovery, prior to the

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<sup>1</sup> All exhibits are to the Declaration of Zoe Salzman, filed herewith (“Salzman Decl.”). All defined terms have the same meaning as they do in the Settlement Agreement, unless otherwise defined herein. Salzman Decl., Ex. 1.

claims process beginning. To date, an additional 32 people<sup>2</sup> have submitted valid documentation rendering them eligible Class Members.

Under this Settlement, Aetna has agreed to provide significant injunctive and monetary relief to Class Members. On the injunctive side, Aetna agreed to and has: changed the definition of infertility used in its Clinical Policy Bulletin #327 (“CPB 327”) to inform fertility-related insurance coverage decisions<sup>3</sup>; made artificial insemination a standard medical benefit in its fully insured health benefits plans and for self-funded plan sponsors,<sup>4</sup> subject to a plan sponsor’s request for deviation, *see* Ex. 1 ¶¶ 57, 123 (Aetna’s “New IUI Policy”); and changed its policy to ensure that individuals in an Eligible LGBTQ+ Relationship<sup>5</sup> need not undergo any unnecessary IUI or ICI cycles to qualify for in vitro fertilization (“IVF”) coverage.

As to monetary compensation, all told, Aetna has agreed to pay at least \$4,011,600 in the aggregate, which includes: (1) a common fund of \$2,000,000 (the “Common Fund”); (2) aggregate Dollars for Benefits payments in the amount of at least \$326,600, to be paid separate from the Common Fund; (3) attorneys’ fees and costs in the amount of \$1,625,000, to be paid separate from the Common Fund; and (4) incentive payments totaling \$60,000, to be paid separate from the Common Fund (collectively, the “Class Fund”).

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<sup>2</sup> Aetna is currently evaluating a 33rd potential Class Member for eligibility as a Category C Class Member and expects to complete this review ahead of the Fairness Hearing. *See* Salzman Decl. ¶ 36.

<sup>3</sup> Aetna Clinical Policy Bulletin No. 0327 (Infertility), [https://www.aetna.com/cpb/medical/data/300\\_399/0327.html](https://www.aetna.com/cpb/medical/data/300_399/0327.html) (quoting Practice Committee of the American Society for Reproductive Medicine, *Definitions of Infertility: A Committee Opinion* (Dec. 1, 2023)).

<sup>4</sup> Aetna, *Expanding Access to IUI Easier Family Planning*, <https://www.aetna.com/individuals-families/womens-health/iui-intrauterine-insemination-coverage.html> (“Our industry-leading policy change expands coverage of IUI, without an infertility diagnosis and regardless of a member’s sexual orientation or partner status. We cover IUI without precertification or the need for extra fertility benefits. Before this update, most health plans had to purchase extra fertility benefits to include IUI. And IUI was covered only when infertility was diagnosed. . . . As an Aetna member, IUI coverage becomes available on a rolling basis for qualifying plans starting September 1, 2024.”).

<sup>5</sup> An “Eligible LGBTQ+ Relationship” is a relationship consisting of two individuals who self-identify as “LGBTQ+,” where at least one of whom has a uterus and whose partner was incapable of producing sperm due to having been assigned the female sex at birth, being intersex, or being assigned the male sex at birth and having transitioned or having been in the process of transitioning to the opposite gender.

First, all Damages Class Members will receive a default payment of \$10,000 (the “Default Common Fund Amount”), paid out of the \$2,000,000 Common Fund, totaling \$1,430,000. Salzman Decl. ¶ 31. All Damages Class Members were also entitled to submit claims for miscellaneous harms and additional out-of-pocket expenses; 20 Damages Class Members submitted out-of-pocket expense claims and 15 Damages Class Members submitted miscellaneous harms claims, and the Special Master will decide whether to allocate payments for them out of the remaining \$570,000 in the Common Fund pursuant to the Allocation Plan. *Id.* ¶ 32; *see also* Ex. 1, Appendix B. To the extent such payments do not exhaust the \$570,000 remaining in the Common Fund, all Damages Class Members will receive a second, pro rata payment. Salzman Decl. ¶ 32. This significant financial relief is in addition to the \$2,300 Dollars for Benefits Payment that all Damages Class Members will receive for their reprocessed insurance claims, except for one, whose insurance claim Defendant had already reprocessed. *Id.* ¶ 29. Six Damages Class Members also submitted information seeking a higher payment for Greater Covered Care, up to the limit of their plan’s coverage; Aetna will evaluate whether these members will receive more than the \$2,300 Dollars for Benefits Payment and expects to complete this review prior to the Fairness Hearing. *Id.* ¶ 30; *see also* Ex. 1 ¶ 66(c). In sum, all Damages Class Members except for one will receive a minimum of \$12,300, and possibly more, to the extent the Common Fund is not exhausted after the Special Master’s awards, resulting in a second pro rata payment.

Separate from and in addition to the Common Fund and Dollars for Benefits, Aetna will pay for the costs of the settlement administrator and Special Master and, subject to the Court’s approval, Class Representative service awards of \$15,000 each or \$60,000 total, and Class Counsel’s attorneys’ fees and costs of \$1,625,000, which does not include any multiplier on

Class Counsel’s lodestar—in fact, Class Counsel’s current lodestar is approximately 18 percent *higher* than the requested fee award.

Taken together, the litigation efforts of Class Counsel, the meaningful Settlement terms, widespread notice, and a simplified claims process have yielded a historic outcome for Class Members. Because the Settlement satisfies the criteria set forth in the Federal Rules of Civil Procedure and this Court’s precedent, Plaintiffs respectfully request that the Court grant final approval of the Settlement between the Parties dated November 4, 2024, and enter the proposed final approval order approved by the parties. *See* Ex. 2.

## **BACKGROUND**

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

#### **A. Factual Background**

The facts of this case, initially filed on September 13, 2021, Compl., ECF No. 1, are well documented in various Court submissions. *See, e.g.*, Am. Compl., ECF No. 20; Am. Answer to Am. Compl., ECF No. 28; Mem. of Law in Supp. of Pls.’ Mot. for Prelim. Approval of Settlement, ECF No. 93. Plaintiffs represent a class of individuals who want to have children but cannot conceive through sexual intercourse with their partners due to their sex, including their sexual orientation and/or gender identity, and rather can become pregnant only with medical assistance, such as fertility treatments like intrauterine insemination (“IUI”), intracervical insemination (“ICI”), intravaginal insemination (“IVI”) (together, “artificial insemination”), and IVF. Plaintiffs alleged that Defendant issued, designed, marketed, and administered health benefits plans containing a Definition of Infertility, as defined above, that, on its face, discriminated against LGBTQ+ (lesbian, gay, bisexual, transgender, queer, intersex, or non-binary) individuals with uteruses in accessing health benefits based on their sex, in violation of federal law and New York State and City law.

## B. Complaint and Answer

Before filing the Complaint, Class Counsel thoroughly investigated the underlying claims and collected significant factual background in pre-suit research and data gathering, including conducting: detailed interviews of the Named Plaintiffs and other similarly situated individuals about their experiences; extensive legal research concerning the application of Section 1557 of the Patient Protection and Affordable Care Act to advance claims for the denial of coverage for reproductive health care on the basis of sex, including sexual orientation and gender identity, and against the third-party administrator of self-funded health benefits plans as well as the insurer of fully-insured plans; and research concerning the medical standards for the provision of artificial insemination and advanced reproductive technologies, including as to women in same-sex relationships. Salzman Decl. ¶ 7; Declaration of Michelle Banker (“Banker Decl.”) ¶¶ 13–14.

The initial Complaint was filed by Emma Goidel, then a member of a fully insured Aetna student health plan, on behalf of herself and a putative class. ECF No. 1 ¶ 18. On November 4, 2021, Plaintiffs filed an amended complaint adding Ilana Lee, Madeleine Lee, and Lesley Brown as Named Plaintiffs. ECF No. 20. Ilana and Madeleine Lee are spouses and members of a fully insured Aetna employee health plan. *Id.* ¶¶ 20–22. Lesley Brown was a member of a self-funded Aetna employee health plan. *Id.* ¶ 23. On April 18, 2022, the Parties stipulated and the Court so-ordered the substitution of Aetna Inc. for Aetna Life Insurance Company as Defendant. ECF No. 32. Each Named Plaintiff’s Aetna health plan provided coverage for the diagnosis and treatment of infertility, including coverage for artificial insemination services. ECF No. 20 ¶¶ 39–43 (Emma Goidel); ¶¶ 97–102 (Ilana and Madeleine Lee); ¶¶ 132–33 (Lesley Brown). Each Named Plaintiff or her spouse had been denied precertification for coverage for artificial insemination services because she or her spouse did not meet Aetna’s Definition of Infertility, and each Named Plaintiff paid out-of-pocket to access the needed care. *Id.* ¶¶ 53–81 (Emma Goidel);

¶¶ 106–24 (Ilana and Madeleine Lee); ¶¶ 136–42 (Lesley Brown). The Plaintiffs alleged that Aetna’s Definition of Infertility violated Section 1557. *Id.* ¶ 179. Additionally, Named Plaintiff Emma Goidel asserted claims under New York State and City law. *Id.* ¶¶ 187, 195.

### **C. Discovery and Information Exchange**

During discovery, Class Counsel diligently propounded discovery requests to obtain information regarding Plaintiffs’ claims, reviewing approximately 77,400 pages of documents. Salzman Decl. ¶ 8. Class Counsel’s discovery requests sought relevant policies, practices, and directives of Aetna; electronic and hard copy data regarding the design and implementation of CPB 327; staff training materials related to coverage for infertility treatment; electronic communications between Aetna personnel regarding the design and implementation of CPB 327; and information about, and examples of, the denial or approval of infertility benefits for LGBTQ+ individuals. *Id.* Class Counsel met-and-conferred with Aetna’s counsel on numerous occasions to identify the data to identify class members, through searches of multiple different databases and multiple rounds of negotiating search terms and parameters. *Id.* Class Counsel consulted with experts on infertility treatments and insurance industry practices to determine the appropriate injunctive relief, to identify the best methods of compensating class members, and to identify who should be compensated. *Id.* ¶ 9. The Parties also engaged in extensive discovery meet-and-confers and sought the Court’s intervention when the Parties reached an impasse. ECF No. 41. After settlement negotiations began to intensify, the Court stayed discovery to allow the Parties to focus on settlement. ECF Nos. 59, 61, 67, 71, 73.

### **D. Negotiation of the Settlement**

After preliminary settlement conversations, negotiations picked up in earnest in May 2023. Salzman Decl. ¶ 10. The Parties identified a settlement framework and agreed to pause further fact discovery, except as it related to discovering the individuals who might be Class

Members. *Id.* Class Counsel conducted significant data analysis for the purpose of settlement negotiations. *Id.* ¶ 11. For example, Class Counsel estimated, in conjunction with opposing counsel, the number of individuals in Eligible LGBTQ+ Relationships within Aetna's records who may have sought, been approved for (after incurring out-of-pocket expenses), or been denied coverage for artificial insemination or IVF within the Class Period; assessed individual damages incurred by each Named Plaintiff and the likely average damages incurred by Class Members; analyzed expert medical research studies; researched the relevant insurance codes associated with the fertility procedures at issue; and consulted with industry experts, physicians, and medical personnel with firsthand knowledge of the fertility treatment process. *Id.*

The Parties had multiple in-person negotiation sessions and video conferences amongst themselves between May and September 2023 regarding the terms of the Settlement Agreement. *Id.* ¶ 12. After extensive discussion about the proposed scope and size of the class and the structure of any settlement, the Parties agreed in principle as to the structure of Category A, B, and C Class Members; the Default Dollars for Benefits Amount of \$2,300; a common fund to pay the Default Common Fund Amount and other damages; and that any settlement-related costs, including administration, notice, class representative service awards, and attorneys' fees and costs, would be paid separately and in addition to the Common Fund and Dollars for Benefits. *Id.* ¶ 13. The Parties first negotiated a term sheet as to these key terms before moving on to a comprehensive settlement agreement. *Id.* ¶ 14. The Parties agreed on the scope of the Category A Class Members, and Defendant agreed to coordinate with Class Counsel to determine the best way to identify potential Category B Class Members within Aetna's system and to ensure potential Category C Class Members received proper notice of the settlement. *Id.*

The Parties extensively negotiated the manner, extent, and nature of notice to potential Class Members. *Id.* ¶ 15. Specifically, it was imperative to Plaintiffs that the settlement administration and notice regime ensure that they could identify and reach as many potential Class Members as possible. *Id.* In addition to providing a direct mailing to potential Class Members identified in Aetna’s system, the Parties agreed to issue a publication notice via an agreed-upon set of publications and social media sites. *Id.* On September 22, 2023, the Parties informed the Court that a settlement term sheet had been signed, *see* ECF No. 75, but the Common Fund amount and several other material terms had not yet been agreed upon. *Id.* ¶ 16.

From November 2023 to April 2024, the Parties exchanged multiple drafts of the settlement agreement and engaged in multiple in-person and video meetings to negotiate the outstanding terms. *Id.* ¶ 17. On December 5, 2023, the Parties participated in a mediation with the Honorable Steven M. Gold (retired) to resolve the open terms of the settlement agreement. *Id.* ¶ 18. The Parties first reached agreement during the mediation that Defendant would deposit \$2,000,000 into the Common Fund. *Id.* The Parties then agreed during the mediation that Aetna would pay class service awards of \$15,000 each for the Named Plaintiffs and an attorneys’ fees and costs award of \$1,625,000, separate and apart from the \$2,000,000 Common Fund. *Id.* ¶ 19. These amounts were negotiated and agreed to independently of, and only after the Parties had already agreed to, the \$2,000,000 amount for the Common Fund. *Id.* The Parties continued negotiations over the next few months to finalize the settlement terms. *Id.* ¶¶ 20-21. On February 21, 2024, the Parties held a meeting with Judge Gold, who agreed to serve as the Special Master to assist in issuing compensation from the Common Fund. *Id.* ¶ 22. On March 20, 2024, the Parties held another meeting with Judge Gold, who reviewed, gave input on, and ultimately approved the Allocation Plan to administer the Common Fund. *Id.*

The Parties reached an agreement on all terms and executed the Settlement Agreement on April 18, 2024, ECF No. 94-1, which the Court preliminarily approved on October 8, 2024. ECF No. 97. On November 4, 2024, the Parties requested minor amendments to the Settlement to account for a small additional group of potential class members whose insurance claims had been denied but approved shortly thereafter, which had no effect on class relief. ECF No. 101. The Court preliminarily approved the Amended Settlement Agreement the same day. ECF No. 102.

## **II. THE SETTLEMENT AGREEMENT**

### **A. The Settlement Classes**

Pursuant to Fed. R. Civ. P. 23(e)(2), Plaintiffs seek final approval of a Fed. R. Civ. P. 23(b)(2) injunctive settlement class (the “Injunctive Settlement Class”) and a Fed. R. Civ. P. 23(b)(3) damages settlement class (the “Damages Settlement Class”). The Injunctive Settlement Class is the same as preliminarily approved: all individuals in an Eligible LGBTQ+ Relationship, who are currently covered by a Commercial Plan provided or administered by Aetna in New York, and who currently or will in the future want to obtain coverage for IUI or IVF treatments. Ex. 1 ¶ 55. The Damages Settlement Class is comprised of, collectively, the categories of Class Members preliminarily approved by the Court in its October 8, 2024, decision, ECF No. 97, as well as the additional category preliminarily approved by the Court on November 4, 2024, ECF No. 102. These categories include:

- A. Category A Class Members: the people identified through discovery (111 individuals total) whom the Parties agree sought and were denied coverage due to the Definition of Infertility and were in an Eligible LGBTQ+ Relationship during the Class Period;
- B. Category B Class Members: the individuals whom the Parties agree sought and were denied coverage due to the Definition of Infertility during the Class Period, and who

submitted an attestation certifying that at the time they sought coverage, they were in an Eligible LGBTQ+ Relationship (the “Attestation”);

C. Category C Class Members: individuals who submitted an Attestation, were members of a New York Aetna plan during the Class Period, who submitted a Claim Form Submission evidencing out-of-pocket expenses for artificial insemination services they received that would have been covered by their Aetna plan, and either:

1. Never sought coverage for any fertility services during the Class Period, or
2. Never sought coverage for IUI or ICI during the Class Period, but sought and received approval for IVF, or were denied coverage for IVF due to the Definition of Infertility; and

D. Category D Class Members: people whom the Parties agree sought and were denied coverage for IUI or ICI due to the Definition of Infertility during the Class Period, but whose claim was approved within 90 days or otherwise paid by Aetna, and who submitted a Claim Form Submission evidencing out-of-pocket expenses for artificial insemination services that would have been covered by their Aetna plan, and:

1. D-A: Members of Category D who the Parties agree were in an Eligible LGBTQ+ Relationship during the Class Period, and
2. D-B: Members of Members of Category D who submitted an attestation certifying that at the time they sought coverage, they were in an Eligible LGBTQ+ Relationship.

Ex. 1 ¶¶ 27, 65(a)–(d).

## **B. Injunctive Relief**

The Settlement Agreement’s injunctive relief ensures that current and future New York Aetna commercial health benefits plan members in an Eligible LGBTQ+ Relationship will not be

subject to more costly, time-consuming, and onerous prerequisites to access infertility benefits than those in a heterosexual relationship. To this end, Aetna revised its Definition of Infertility in CPB 327 to include the definition published by the American Society for Reproductive Medicine (“ASRM”) in 2023,<sup>6</sup> such that the criteria for determining whether a person is considered infertile include the need for medical intervention in order to achieve a successful pregnancy, including the use of donor gametes, which will allow individuals with a uterus in an Eligible LGBTQ+ Relationship to qualify as “infertile” without the need to undergo any cycles of artificial insemination. Ex. 1 ¶ 58. Aetna also revised CPB 327 such that individuals with a uterus in an Eligible LGBTQ+ Relationship are not required to undergo unnecessary IUI or ICI cycles before qualifying for IVF. *Id.* ¶ 59(a). Aetna will also apply its policies to allow for a treating physician to have peer-to-peer input regarding whether any attempts at pregnancy prior to qualifying for IVF coverage (applicable to those in an Eligible LGBTQ+ Relationship and those in a heterosexual relationship) need to be medicated versus unmedicated. *Id.* ¶ 59(b).

On June 1, 2024, Aetna also began the implementation of a new policy regarding the administration of artificial insemination benefits, making artificial insemination a standard medical benefit in all of the fully insured commercial plans that it issues and incorporating artificial insemination as a standard medical benefit in the model self-funded plans that Aetna offers to administer (the “New IUI Policy”). *Id.* ¶ 57. Should any new or renewing self-funded plan sponsors request to deviate from the New IUI Policy or request a plan that does not conform to the changes to CPB 327 outlined above, Aetna will request an indemnification clause in the contracts, such that the self-funded plan sponsor would be required to indemnify Aetna for any costs incurred to defend against any claims brought in connection with that self-funded plan

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<sup>6</sup> See *supra* n.2; see also Practice Committee of the American Society for Reproductive Medicine, *Definitions of Infertility: A Committee Opinion* (Dec. 1, 2023).

sponsor requiring individuals with a uterus in an Eligible LGBTQ+ Relationship to pay more for fertility services than individuals with a uterus and a sperm-producing partner. *Id.* ¶ 123. Aetna has implemented all necessary programming changes and provided public and internal education and training to implement these policy changes. *Id.* ¶ 61; Salzman Decl. ¶ 26.

### **C. Monetary Relief**

All told, Aetna has agreed to pay at least \$4,011,600 in the aggregate, which includes: (1) the Common Fund of \$2,000,000; and separate from the Common Fund, (2) aggregate Dollars for Benefits payments in the amount of at least \$326,600; (3) attorneys' fees and costs in the amount of \$1,625,000; and (4) incentive payments totaling \$60,000. *Id.* ¶ 27.

### **D. Class Member Award Amounts**

Damages Class Members will receive meaningful and substantial compensation under the Settlement. First, Aetna has confirmed that all Damages Class Members except one (whose insurance claim had already been reprocessed) will receive a Default Dollars for Benefits Amount of at least \$2,300, as their claims have not yet been reimbursed for treatments that would have been covered but for the Definition of Infertility. Ex. 1 ¶¶ 66(a)–(b). Damages Class Members may receive a Dollars for Benefits Amount higher than \$2,300 if they submitted a Proof of Greater Covered Care submission evidencing costs that would have resulted in reimbursement exceeding \$2,300 under their plan terms, as determined by Aetna. *Id.* ¶ 66(c). Damages Class Members whose claims were already reimbursed and who submitted a valid Proof of Greater Covered Care submission may receive the difference between the prior reimbursement and the amount in their submission, as determined by Aetna. *Id.*

Damages Class Members will also receive a Default Common Fund Amount of approximately \$10,000 as compensation for additional damages suffered, *id.* ¶ 67(a); Appendix B ¶ 5 (Allocation Plan), amounting to \$1,430,000 out of the \$2,000,000 Common Fund for the

143 Class Members, Salzman Decl. ¶ 31. The \$570,000 remaining in the Common Fund following this payment will first be used to compensate Damages Class Members for additional out-of-pocket expenses arising from the denial of fertility coverage by Aetna due to the Definition of Infertility; 20 Damages Class Members have submitted claims for such expenses, Salzman Decl. ¶ 32, which the Special Master will determine pursuant to the Allocation Plan. *Id.* ¶¶ 67(b)-(d); Appendix B ¶¶ 9–10 (Allocation Plan). Funds remaining after this process will be used to compensate Class Members for miscellaneous harms, such as extenuating circumstances rendering infertility procedures traumatic; extreme delay or total loss of the ability to become pregnant due to Aetna’s challenged policy; and medical complications, such as miscarriage, associated with having to undergo certain infertility procedures. Ex. 1 ¶ 67(d); Appendix B ¶ 12. 15 Damages Class Members have submitted claims for such miscellaneous harms, which the Special Master will also evaluate. Salzman Decl. ¶ 32. Finally, to the extent such payments do not exhaust the \$570,000 remaining in the Common Fund, the Administrator will divide the remaining funds equally among all Damages Class Members in a second, additional pro rata payment. Ex. 1 ¶ 67(e); Appendix B ¶ 13. If the Administrator determines that the remaining funds are administratively infeasible to redistribute, the Parties have agreed to ask the Court’s approval to donate the remaining funds to an agreed-upon charity serving the LGBTQ+ community. *Id.* ¶ 67(e); Appendix B ¶ 14.

**E. Class Members with Confirmed Eligibility**

There were four ways Damages Class Members could establish eligibility for the Default Common Fund Amount: Categories A, B, C, and D. Category A Class Members are entitled to the Default Common Fund Amount upon verification of their address by the Parties, and do not need to take any action to receive a check for the Default Common Fund Amount. *Id.* ¶¶ 65, 66(d)(ii). 111 Category A Class Members were confirmed eligible. Salzman Decl. ¶ 34. Category

B Class Members are eligible to receive the Default Common Fund Amount upon their timely submission of the Attestation. Ex. 1 ¶¶ 12, 33, 65(b), 66(d)(iii). 19 Category B Class Members submitted the Attestation and were confirmed eligible. Salzman Decl. ¶ 35. Category C Class Members are eligible to receive the Default Common Fund Amount upon the timely submission of the Attestation and of the Claim Submission Form, including evidence that they underwent one or more cycles of IUI or ICI during the Class Period, allowing them to receive the Default Common Fund Amount even though they did not seek coverage for IUI services during the Class Period. *Id.* ¶¶ 15, 36, 65(c), 66(d)(iv). Seven Category C Class Members submitted the Attestation and the Claim Submission Form with valid documentation and were confirmed eligible.<sup>7</sup> Salzman Decl. ¶ 36. Finally, Category D Class Members (*i.e.* people whose insurance claims Aetna initially denied but then approved within 90 days) are eligible to receive the Default Common Fund Amount upon the timely submission either of both the Attestation and Claim Submission Form, or of just the latter, depending on whether the Parties already agreed that they were in Eligible LGBTQ+ Relationships (Category D-A Class Members; Claim Submission Form only) or were not (Category D-B Class Members; both forms). Six confirmed Category D-A Members and no Category D-B Members submitted the necessary documentation.

Aetna has also determined that all Damages Class Members except for one are eligible for the Default Dollars for Benefits Amount, totaling an aggregate monetary benefit of at least \$326,600, and potentially higher after Aetna determines the amounts to pay the six Class Members who submitted evidence of Greater Covered Care. Salzman Decl. ¶¶ 29–30.

Finally, for untimely claims received by the Administrator within two months of the Bar Date (by October 27, 2025), the Settlement Agreement also permits Class Counsel to instruct the

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<sup>7</sup> Aetna is currently evaluating a 33rd potential Class Member for eligibility as a Category C Class Member and expects to complete this review ahead of the Fairness Hearing. *See* Salzman Decl. ¶ 36.

Administrator to pay such claims if the claimant establishes “good cause” for their untimely submission, to be determined in Class Counsel’s discretion. Ex. 1 ¶ 68. As of the date of filing, the Administrator has received five requests to submit such untimely claims. Declaration of Bryn Bridley (“Bridley Decl.”) ¶ 26.

#### **F. Releases**

Class Members who did not opt out of the settlement will be deemed to have knowingly and voluntarily waived, released, discharged, and dismissed all claims or causes of action that were or could have been raised by the Named Plaintiffs or any Class Member against Aetna or any of the Released Parties based on the factual allegations in the Complaint and/or the Amended Complaint, including but not limited to claims under 42 U.S.C. § 18116(a), N.Y. Exec. Law § 296(2)(a), N.Y.C. Admin. Code § 8-107(4), and/or 20 U.S.C. § 1681 *et seq.*, and 42 U.S.C. § 2000e *et seq.*, including any discrimination laws or regulations incorporated thereunder, for discrimination on the basis of sex, sexual orientation, and gender identity during the Class Period. Ex. 1 ¶ 122. To the extent a self-funded plan or plan sponsor deviates from Aetna’s New IUI Policy or does not conform its plan to the changes to the CPB, Class Members will not be barred from pursuing claims against Aetna, the self-funded plan, or the plan sponsor. *Id.*

#### **G. Attorneys’ Fees and Service Awards**

Attorneys’ fees and service awards were mediated with the assistance of former Judge Gold separately from and after the Parties had already agreed on the other monetary relief to be included in the Settlement, including the amount of the Common Fund. Salzman Decl. ¶ 19. Defendant has agreed to pay Class Counsel attorneys’ fees and costs in the amount of \$1,625,000—which is 18% lower than Class Counsel’s lodestar—subject to the Court’s approval, separate and apart from the money used to fund the Common Fund. Ex. 1 ¶¶ 96–97. The Parties have also agreed—subject to Court approval—that each of the Named Plaintiffs will

receive a fifteen-thousand-dollar (\$15,000) service award for their efforts and time devoted on behalf of the class. *Id.* ¶ 104. Defendant agreed to pay the service awards separate and apart from the Common Fund as well. *Id.*

#### **H. Administrative Costs**

Finally, Defendant has agreed to pay all administrative costs, separate from the Common Fund, to administer the Settlement and provide notice to potential Class Members. *Id.* ¶¶ 85–98.

### **III. SETTLEMENT ADMINISTRATION**

#### **A. Notice to the Class**

The Court appointed Atticus Consulting LLC (“Atticus”) as the Administrator. ECF No. 98 ¶ 11. Atticus undertook a robust notice program, including direct and publication notice. *See* Bridley Decl. ¶¶ 5–12. Atticus implemented the notice program and claims process to ensure simplicity and efficiency and worked with Class Counsel to review multiple drafts of the direct notice (initial and reminder notice), claim form (hard-copy and online), and advertisements in newspapers. *Id.*; Salzman Decl. ¶ 41. For example, Atticus published notice to various news outlets, including publications most likely to reach potential Class Members like *Gay Parent* and *The Parents Magazine*. Bridley Decl. ¶ 10. The settlement website is available in English ([www.InfertilityInsuranceSettlement.com](http://www.InfertilityInsuranceSettlement.com)), and the Notice Packet was available in English and Spanish to better reach Class Members who face language barriers. Bridley Decl. ¶ 8, Ex. D.

Atticus worked with the Parties to identify the best address match for potential Class Members, based initially on the addresses Defendant had on file. *Id.* ¶ 9. Undeliverable Notice Packets were returned to an Atticus post office box address and were remailed to new addresses obtained through a professional third-party tracing vendor. *Id.* For potential Class Members for whom Defendant did not have an address on file, and for whom the standard trace process did not return results, Atticus performed enhanced searches via an additional record search service,

IDI Core. *Id.* Atticus launched a settlement website, toll-free number with live customer service representatives during business hours, and after-hours interactive pre-recorded messages, all to deliver information to potential Class Members, offer a way to request claim forms, and permit online claims filing on the website. *Id.* ¶¶ 13–14. Atticus and Class Counsel have responded to questions through mail, email, and telephone inquiries. *Id.* ¶¶ 15–18; Salzman Decl. ¶ 42. Atticus will continue to work with the Parties on administration issues, including issuance and re-issuance of checks; processing untimely claims; and reviewing deficient and untimely claims. Ex. 1 ¶ 84, Appendix A; Salzman Decl. ¶ 43.

### **B. Class Members' Response**

As of the date of this filing, 32 valid claims have been received from eligible Damages Class Members. Salzman Decl. ¶ 44. Due to the records maintained by Aetna, the majority of Damages Class Members were identified through discovery, prior to the notice period—*i.e.*, the 111 Category A Class Members. *Id.* ¶ 45. The claims process identified these 32 additional Damages Class Members. *Id.* Notice was sent to the widest possible audience to ensure that all potential Damages Class Members received notice of the Settlement. *Id.* Atticus received 463 total form submissions from 227 unique individuals. Bridley Decl. ¶ 21. The Parties had anticipated that most people who got notice were not in Eligible LGBTQ+ Relationships, *see* ECF No. 94 ¶ 5, and indeed, out of the 204 who submitted an Attestation, 122 of them indicated they were not in an Eligible LGBTQ+ Relationship and therefore not Class Members. Bridley Decl. ¶ 22.

The deadline for requests for exclusion and objections was August 26, 2025, 45 days before the scheduled Fairness Hearing. No Class Members requested exclusion; eight individuals who were not Class Members submitted exclusion requests, Bridley Decl. ¶ 19, which are a nullity, as they all stemmed from the Category C notice class, and none of them submitted the

documentation necessary to be eligible Class Members (*i.e.*, an Attestation and Claim Form Submission). Salzman Decl. ¶ 46. One objection has been filed, but that is also a nullity because it was submitted by a non-Class Member on the basis that the Settlement does not include single heterosexual women (like the objector), a group of individuals not within the scope of this Class. Salzman Decl. ¶ 47, Ex. 4 (“Non-Class Member Objection”). The lack of any objections or exclusion requests from Class Members, and the number of Class Members identified through discovery and notice, underscore both the extraordinary nature of the relief obtained and the fairness of the Settlement as a whole.

## ARGUMENT

### **I. THE SETTLEMENT SHOULD BE FINALLY APPROVED BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE.**

The Court should grant final approval of the Settlement for the same reasons it granted preliminary approval and based on the successful notice process and the reaction of the Class.

Factors relevant to final approval under Rule 23(e)(2) are: (1) the adequacy of representation; (2) the existence of arms'-length negotiations; (3) the adequacy of relief; and (4) the equitableness of treatment of class members. Fed. R. Civ. P. 23(e)(2). Where applicable, courts also consider the nine factors in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), which, prior to the 2018 amendments to Rule 23, governed whether a settlement was “fair, reasonable, and adequate.” *See In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020) (“*Namenda*”). In its decision granting preliminary approval, this Court found that these factors weighed in favor of preliminary approval. *See* ECF No. 98, at 3–4. The Court should grant final approval for substantially the same reasons.

**A. The Settlement Is Procedurally Fair.**

A settlement that complies with Rule 23(e)(2)(A)–(B) is procedurally fair. *See Namenda*, 462 F. Supp. 3d at 311. Where, as here, the settlement “is reached by experienced counsel after arm’s-length negotiations, [then] great weight is accorded to counsel’s recommendation.” *Id.* (internal citations omitted). Class Counsel and the Named Plaintiffs, in litigating and securing a Settlement with significant and meaningful monetary and non-monetary terms, have provided “adequate representation” to the Class.

**1. Named Plaintiffs Have Adequately Represented the Class.**

Named Plaintiffs Emma Goidel, Ilana Lee, Madeleine Lee, and Lesley Brown have adequately represented the Class because they share common interests with the other Class Members. *See Whelan v. Diligent Corp.*, 349 F.R.D. 79, 85 (S.D.N.Y. 2025) (in measuring the adequacy of class representatives, courts consider “whether . . . the representative plaintiffs’ interests are antagonistic to the interests of other members of the class”). The Named Plaintiffs each have suffered the same general injury as the rest of the Class—they were subject to more onerous requirements to access coverage for fertility treatments in their health plans based on their and their partners’ sex, including sexual orientation or gender identity, because of Aetna’s Definition of Infertility. *See* ECF No. 20 ¶¶ 5–6; *Zimmerman v. Paramount Global*, No. 23-CV-2409 (VSB) & 22-CV-9355 (VSB), 2025 WL 763734, at \*4 (S.D.N.Y. Mar. 11, 2025) (preliminarily approving settlement where “Plaintiffs and unnamed class members alike each suffered the same injury”). And they each seek the same relief as the other Class Members: damages for the denial of coverage and policy change. Given their common injuries and the common remedies sought, the Named Plaintiffs have an “interest in vigorously pursuing the claims of the class” that meets the requirements of adequate representation. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (“*GSE Bonds*”).

## 2. Class Counsel Have Adequately Represented the Class.

Class Counsel in this matter are “qualified, experienced, and able to conduct the litigation,” *Whelan*, 349 F.R.D. at 85, including by assessing the strengths and weaknesses of the case and negotiating a first-of-its-kind settlement here. As described *supra*, over more than two years, Class Counsel sought and obtained tens of thousands of pages of data in order to document how Aetna’s Definition of Infertility was being implemented in practice and to identify individuals within Aetna’s files whose records reflected denials of fertility benefits for failure to meet the Definition of Infertility’s discriminatory requirements. Salzman Decl. ¶ 8. After obtaining this data, Class Counsel identified and retained consulting experts in infertility treatments and conducted analysis of massive datasets that were crucial for prosecuting the merits of the case and for supporting Plaintiffs’ position in the settlement negotiations. *Id.* ¶ 9.

Class Counsel are experienced attorneys with strong reputations and expertise in civil rights law. *See id.* ¶¶ 68–82; Banker Decl. ¶¶ 45–61. In *Wise v. Kelly*, 620 F. Supp. 2d 435, 445 (S.D.N.Y. 2008), the court took “judicial notice of [ECBAWM]’s high reputation . . . finding it to be one of the most competent, successful, and reputable civil rights firms practicing in this Court.” In *Harvey v. Home Savers Consulting Corporation*, No. 07 Civ. 2645 (JG), 2011 WL 4377839, at \*4 (E.D.N.Y. Aug. 12, 2011), the court stated that it had “taken into account the excellent reputation of [ECBAWM] among attorneys specializing in civil rights cases,” and in *Vilkhu v. City of New York*, the court noted ECBAWM’s exceptional “collective experience [and] success rate.” No. 06 Civ. 2095 (CPS), 2009 WL 1851019, at \*3 (E.D.N.Y. June 26, 2009), *vacated on other grounds by* 372 F. App’x 222 (2d Cir. 2010).<sup>8</sup>

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<sup>8</sup> *See also Rosenfeld v. Lenich*, No. 18 Civ. 6720 (NGG) (PK), 2021 WL 508339, at \*5 (E.D.N.Y. Feb. 11, 2021) (describing ECBAWM as “well regarded and highly capable”); *Scott v. Quay*, 338 F.R.D. 178, 189 (E.D.N.Y. 2021) (finding ECBAWM to have a “wealth of experience handling complex class actions”); *Betances v. Fischer*, 304 F.R.D. 416, 428 (S.D.N.Y. 2015) (ECBAWM is a “preeminent civil rights law firm”); *Brown v. Kelly*, 244 F.R.D.

The National Women’s Law Center (“NWLC”) is a national non-profit legal advocacy organization that fights for gender justice, working across issues central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women and families. *See* Banker Decl. ¶¶ 18–43. Since its founding in 1972, NWLC has worked to advance health and reproductive rights, educational opportunities, workplace justice, and income security in legislatures, before administrative agencies, and in the courts, including before Courts of Appeals and the U.S. Supreme Court. *Id.* ¶¶ 21–40. This work has included participating in multiple class actions to ensure that rights and opportunities are not restricted based on sex.<sup>9</sup> NWLC has represented the putative class since the case was filed and has provided significant subject matter expertise and litigation support throughout the case. *Id.* ¶¶ 8–18, 44–60. Based on Class Counsel’s demonstrated skill in effectively litigating this matter, as well as their prior results and experience, Rule 23(e)(2)(A)’s adequacy of representation prong weighs in favor of final approval. *See Zimmerman*, 2025 WL 763734, at \*4.

### 3. The Settlement Was Negotiated at Arm’s Length.

The Settlement also meets the requirement of procedural fairness under Rule 23(e)(2)(B) because “the settlement reached in arm’s-length negotiations” aided by an experienced, privately retained mediator, retired Judge Gold. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).<sup>10</sup>

Negotiations between the Parties—which began in earnest only after Plaintiffs engaged in substantial discovery—were lengthy, complex, and vigorously contested. As set forth in more

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222, 233 (S.D.N.Y. 2007), *aff’d in part, vacated in part on other grounds*, 609 F.3d 467 (2d Cir. 2010) (same); *Parks v. Saltsman*, No. 20-CV-6384-FPG, 2024 WL 4440994 (W.D.N.Y. Oct. 8, 2024) (granting ECBAWM attorneys’ fees at out-of-district rates).

<sup>9</sup> *See, e.g., Borders v. Walmart Stores, Inc.*, No. 17 Civ. 506, 2020 WL 13190099 (S.D. Ill. 2020); *Cmtys. for Equity v. Mich. High Sch. Athletics Ass’n*, 192 F.R.D. 568 (W.D. Mich. 1999).

<sup>10</sup> *See also Zimmerman*, 2025 WL 763734, at \*4 (citing *Lea v. Tal Educ. Grp.*, No. 18-CV-5480, 2021 WL 5578665, at \*8 (S.D.N.Y. Nov. 30, 2021)).

detail above, the Parties engaged in extensive pre-negotiation discovery, including Plaintiffs' pre-filing investigation, and then multiple rounds of document discovery seeking the relevant policies, practices, staff training materials, and directives of Aetna; electronic data maintained by Aetna regarding its processing of fertility benefits claims; and electronic communications between Aetna personnel regarding the implementation of CPB 327. Salzman Decl. ¶¶ 7–9. Settlement negotiations intensified once the Parties believed document discovery was complete or very close to complete, *id.* ¶ 10, at which point “the parties had a full opportunity to acquaint themselves with the strength of the case.” *Zimmerman*, 2025 WL 763734, at \*4. Thereafter, the Parties engaged in more than eleven months of protracted settlement negotiations among themselves and participated in a mediation and follow-up conferences with Judge Gold to resolve key settlement terms, including the Common Fund amount to be funded by Aetna. *See* Salzman Decl. ¶¶ 11–24; *cf. D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (finding that a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”). The Parties exchanged multiple draft settlement proposals; discussed terms in detail in person, by video conference, and over email; and negotiated significant issues, such as the definition of the Damages Class Member categories, the scope and method of class notice, the scope and timeline of the implementation of the injunctive relief, the structure and timing of payment of individual awards, the amount Aetna would deposit into the Common Fund, and many others. Salzman Decl. ¶¶ 11–24. Notably, the Parties negotiated attorneys’ fees and costs, as well as service awards for the Named Plaintiffs, only after the Parties had agreed on the other non-monetary terms to be included in the Settlement and the amount of the Common Fund. *Id.* ¶¶ 18–19. The Parties’ vigorous litigation of the case and the significant settlement terms demonstrates the lack of collusion here. *See*

*Gordon v. Vanda Pharms., Inc.*, No. 19 Civ 1108, 2022 WL 4296092, at \*4 (E.D.N.Y. Sept. 15, 2022).

**B. The Relief Provided Is Adequate.**

As Rule 23(e)(2)(C) requires, weighing the (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3), the relief provided for the class here is adequate. *See GSE Bonds*, 414 F. Supp. 3d at 693.

**1. The Relief Provided Is Adequate in Light of the Costs, Risks, and Delay of Trial and Appeal.**

By reaching a favorable settlement prior to resolution of dispositive motions or trial, and even prior to depositions, Plaintiffs will avoid significant expense, risk, and delay and ensure recovery for the class. “Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.” *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff’d sub nom. D’Amato*, 236 F.3d at 78. This case is no exception. With a class period dating back to 2017, significant amounts of data requiring analysis, and complex, cutting-edge, and evolving issues of law and fact, this case is extraordinarily complex. Salzman Decl. ¶ 52. Further litigation here would cause additional, significant expense and delay. No depositions have been taken so far, including of high-level executives and other key employees of Aetna, or of any of the Named Plaintiffs. *Id.* ¶ 53. Similarly, expert discovery in this case would be extensive, including the exchange of reports and depositions. *Id.*

Even after completing discovery, the Parties envision summary judgment and class certification motions could raise many technical and emerging issues of law, such as whether Defendant’s policy discriminates on the basis of sex under Section 1557 of the ACA, whether Defendant can be held liable under the ACA for its role as a third-party administrator of self-funded plans, and whether Defendant would challenge the suitability of class certification under Federal Rule of Civil Procedure 23. While Plaintiffs believe the Class would be certified and summary judgment granted in their favor, both motions present legitimate risks to the Class. *Id.* ¶ 54. Further, considerable time and resources would likely be expended on appeals of the Court’s decisions on class certification and summary judgment. *Id.* ¶¶ 54-55.

If Plaintiffs succeed in certifying the class and obtaining summary judgment, a fact-intensive trial would likely be necessary to determine damages—and, depending on the outcome of summary judgment motions, for certain liability issues. *Id.* A trial would be lengthy and complex. While Plaintiffs believe that they could ultimately establish both liability and damages, this would require significant factual development, requiring hundreds of additional hours of discovery, plus the time and resources required to litigate dispositive motions and prevail at trial, and then prevail again on appeal. *Id.* Class Members would not obtain relief for years—and could potentially continue to be denied coverage for the fertility treatments they need to build their families, without monetary support to pay out-of-pocket for such time-sensitive care. *Id.* ¶ 56. This settlement, on the other hand, makes monetary and injunctive relief available to Class Members in a prompt and efficient manner. *Id.*; *see also Lea*, 2021 WL 5578665, at \*9 (class settlement appropriate where it ended litigation “that could have lasted several more years and cost hundreds of thousands of dollars in attorneys’ fees and expenses and brings immediate relief to the class”).

Further, although Plaintiffs believe their case is strong, it is not without risk. “Litigation inherently involves risks.” *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) (“*PaineWebber*”). Defendants could defeat class certification, win a dispositive motion, or obtain a favorable verdict—in those situations, Class Members would be left with no relief at all. Even if Plaintiffs win a favorable verdict and an award of damages, the verdict or damages award could be reversed or reduced on appeal. In contrast, “[t]he proposed settlement benefits each plaintiff in that he or she will recover a monetary award immediately, without having to risk that an outcome unfavorable to the plaintiffs will emerge from a trial.” *Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at \*6 (S.D.N.Y. June 25, 2007).

Class Counsel are experienced and realistic, and they understand that the resolution of liability issues, the outcome of the trial, and potential appeals are inherently uncertain, both in terms of outcome and duration. Salzman Decl. ¶¶ 52–56. The proposed settlement alleviates these uncertainties and serves the time-sensitive healthcare needs of this Class. Therefore, Rule 23(e)(2)(C)(i), the first *Grinnell* factor (the complexity, expense, and likely duration of the litigation), the fourth *Grinnell* factor (the risks of establishing liability), the fifth *Grinnell* factor (the risks of establishing damages), and the sixth *Grinnell* factor (the risks of maintaining the class action through the trial) all weigh in favor of approval.

## **2. The Settlement Provides for an Effective Method of Class Payment.**

Rule 23(e)(2)(C)(ii) requires courts to examine “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.” While the claims processing method “should deter or defeat unjustified claims, . . . the court should be alert to whether the claims process is unduly demanding.” *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 40 (E.D.N.Y. 2019) (“*Payment Card*”) (citing Fed. R. Civ. P. 23 advisory committee’s note to 2018 amendment).

“To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate. . . . [a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.” *Id.* at 40 (citing *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (“*WorldCom*”).<sup>11</sup>

The allocation of settlement awards to Damages Class Members here is equitable. First, all validated Damages Class Members are entitled to at least \$2,300—the Default Dollars for Benefits Amount—for care that would have been covered by the Member’s health plan but for the Definition of Infertility, to the extent that the Class Member’s claim has not yet been reimbursed by Aetna for the same. Class Members can also receive an additional Dollars for Benefits Amount if they demonstrated, through appropriate documentation, that they would have been reimbursed by Aetna under their health plan for an amount greater than \$2,300 but for the Definition of Infertility. All Class Members except for one (whose insurance claim was already reprocessed, *see supra* Background Section II.D.) will receive the Default Dollars for Benefit Amount at a minimum; six Class Members submitted additional documentation, which Aetna is evaluating for possible greater Dollars for Benefit.

Further, the Default Common Fund Amount of \$10,000 to each eligible Damages Class Member is equitable, as is the potential second pro rata payment that each eligible Damages Class Members may receive. *See supra* Background Section II.D.

The claims processing method used by the Parties was also a well-established, effective procedure for receiving, processing, and validating claims. *See Lea*, 2021 WL 5578665, at \*11

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<sup>11</sup> *See also Zimmerman*, 2025 WL 763734, at \*5 (quoting *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014)) (“When formulated by competent and experienced class counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis.”).

(claims processing procedure “well-established” and “effective” where Administrator processed claims under Lead Counsel’s guidance, allowed claimants to cure claim deficiencies, and mailed authorized claimants their pro rata share of the settlement fund after final approval).

Category A Class Members did not need to submit any claims forms to access the benefits of the settlement. Ex. 1 ¶ 76(a). The other categories of Class Members got notice. As described *infra*, the Administrator distributed hard-copy Claim Form Packages via direct notice by first-class mail to thousands of potential Damages Class Members. *Id.* ¶ 75. Notice to potential Class Members also included electronic links to the settlement website, where Damages Class Members were able to submit the applicable claims forms electronically. *Id.* ¶ 84. And on the settlement website, the Administrator also made the Claim Form Package available for potential publication notice Class Members. Bridley Decl. ¶¶ 14–15. Category B and D-A Class Members were only required to submit an Attestation because Aetna did not have any records regarding whether they were in an Eligible LGBTQ+ Relationship. Only Category C and Category D-B Class Members—members for whom Aetna did not have records regarding their history of IUI or ICI nor their relationship status at the time of undergoing such care—were required to submit both an Attestation and a Claim Form Submission documenting their medical treatment. Ex. 1 ¶¶ 76(b)–(d).

The claims process also ensured that Damages Class Members are not disadvantaged by failing to meet the claims form deadline if they have good cause. Damages Class Members can submit untimely claims upon a showing of good cause (as determined by Class Counsel) until October 26, 2025 (two months after the Bar Date). *Id.* ¶ 68.

If the Court grants Final Approval, the Administrator will distribute checks to the confirmed Damages Class Members. *Id.* ¶¶ 66(d), 67(g). If any of those checks is returned to the

Administrator, the Administrator will conduct additional address searches and re-issue and resend checks. *Id.* at ¶¶ 71–72.

Overall, this effort to inform potential Damages Class Members of the settlement and allocate the benefits of the settlement to eligible Damages Class Members has effectively deterred and defeated unjustified claims while ensuring that deserving claimants were not unduly burdened by the claims process. It therefore met the adequacy standard of Rule 23(e)(2)(C)(ii).

### 3. The Attorneys’ Fees and Costs Will Not Diminish Class Relief.<sup>12</sup>

Rule 23(e)(2)(C)(iii) requires courts to examine “the terms of any proposed award of attorneys’ fees, including timing of payment.” *See also Moses v. N.Y. Times Co.*, 79 F.4th 235, 246 (2d Cir. 2023). Here, Judge Gold mediated an attorneys’ fees and expenses award of \$1,625,000. Ex. 1 ¶ 96. These fees and costs will not be deducted from the Common Fund; instead, Defendant agreed to pay Class Counsel’s attorneys’ fees and costs separate and apart from the Common Fund. *Id.* ¶ 97. The amount agreed to for attorneys’ fees and costs was negotiated separately and only *after* the Parties had already agreed to the amount for the Common Fund. Salzman Decl. ¶ 19. And the negotiation for attorneys’ fees and costs was mediated by Judge Gold, following his review of Class Counsel’s billing records. *Id.* This approach to attorneys’ fees and costs further weighs in favor of settlement approval. *See Sow v. City of N.Y.*, No. 21 Civ. 00533, 2024 WL 964595, at \*6 (S.D.N.Y. Mar. 5, 2024) (“Because the attorneys’ fees and costs in this case are not paid from a common fund, i.e., the ‘money paid to the attorneys is entirely independent of money awarded to the class,’ . . . ‘the Court’s fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between

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<sup>12</sup> Plaintiffs have briefed further the appropriateness of the fee award and the benefit of Class Counsel’s representation to the class below, in Section III.

attorneys and class members.’ . . . Moreover, “[t]he negotiation of fee agreements is generally encouraged.”) (internal citations omitted).<sup>13</sup>

#### **4. No Agreements Require Disclosure Under Rule 23(e)(3).**

Rule 23(e)(2)(C)(iv) requires courts to consider “any agreement required to be identified under Rule 23(e)(3),” that is, “any agreement made in connection with the proposal.” Other than the minor amendments to the Settlement that the Court also preliminarily approved—and which had no effect on the relief obtained, only creating an additional category of potential Class Members, *see supra* Background Section I.D.—the Parties have not entered into any agreements other than the Settlement that has been submitted for approval.<sup>14</sup> Accordingly, this factor poses no obstacle to final approval. *See Rosenfeld*, 2021 WL 508339, at \*7.

#### **C. The Settlement Treats All Class Members Equitably.**

Rule 23(e)(2)(D) requires class action settlements to “treat[ ] class members equitably relative to each other.” Here, Class Members are treated equitably relative to each other in that each will receive the same default amounts, unless their claims have already been reimbursed or if they provide proof of entitlement to greater reimbursement. *See PaineWebber Ltd.*, 171 F.R.D. at 135 (pro rata distribution provides “a straightforward and equitable nexus for allocation”).

The structure of the settlement allows each Damages Class Member to be eligible for at least \$2,300 as the Default Dollars for Benefits reimbursement for infertility treatments during the Class Period that Aetna has determined would have been covered but for Aetna’s Definition of Infertility, to the extent their claim has not already been reimbursed. All Damages Class

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<sup>13</sup> *Contra Moses*, 79 F.4th at 246 (expressing concerns as to fairness of settlement where the fee awards were “intimately intertwined with the settlement,” *i.e.*, due to there being “effectively an inverse correlation between the amount of attorneys’ fees and incentive payment awarded and the cash available for *pro rata* distribution to class members that opt for cash”).

<sup>14</sup> The Parties’ September 22, 2023, Term Sheet was non-binding and thus not an “agreement made in connection with the proposal.” *See Reyes v. Summit Health Mgmt.*, No. 22 Civ. 9916, 2024 WL 472841, at \*5 (S.D.N.Y. Feb. 6, 2024).

Members except for one who was already reimbursed will receive the Default Dollars for Benefit Amount at a minimum; six Class Members submitted Proof of Greater Covered Care, which Aetna is evaluating to determine whether they are entitled to receive additional reimbursement up to the limit of their Aetna healthcare plan. This ensures equity by entitling Damages Class Members who suffered greater monetary losses to a form of greater relief.

Damages Class Members will also receive the Default Common Fund Amount of \$10,000, and subject to the Special Master's additional compensation awards, may receive a second pro rata payment from the Common Fund. *See supra* Background Section II.D. Category A Class Members will be eligible for this payment automatically; Category B Class Members must submit an Attestation to be eligible; Category C and D-B Class Members must submit an Attestation and Claim Form Submission; and Category D-A Class Members must submit a Claim Submission Form only. Salzman Decl. ¶¶ 33–37. Given that Aetna's records only indicate which members sought and were denied coverage for infertility benefits due to the discriminatory Definition of Infertility, and do not account for members who underwent fertility treatments but did not submit a claim for benefits, the categorization of the Damages Class Members allows for streamlined and structured identification process for the Parties, puts no burden on the majority of Damages Class Members (Category A) to submit any documents and minimal burden on the remaining Damages Class Members, and allows for the most inclusive possible Damages Settlement Class, while simultaneously ensuring that unjustified claims are filtered out. *Id.* ¶¶ 50–51. And the pro rata nature of these payments reflects the harms suffered by *all* Class Members beyond their out-of-pocket expenses—the experience of discrimination, the added stress of being denied coverage during the already anxious family-building process,

and the costs involved in seeking artificial insemination than in attempting to conceive via heterosexual sexual intercourse.

As part of this factor, the Court must also consider the incentive payments proposed in the Settlement. *See Reyes*, 2024 WL 472841, at \*6.<sup>15</sup> “The guiding standard in determining an incentive award is broadly stated as being the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and, of course, the ultimate recovery.” *Kurtz v. Kimberly-Clark Corp.*, No. 14 Civ. 1142 & 15 Civ. 2910, 2024 WL 184375, at \*4 (E.D.N.Y. Jan. 17, 2024), *vacated and remanded on other grounds*, 142 F.4th 112, 120 n.5 (2d Cir. 2025). “Rule 23(e)(2)(D) does not forbid incentive awards.” *Moses*, 79 F.4th at 245. Rather, the Rule requires courts to reject incentive awards that are “excessive compared to the service provided by the class representative or that are unfair to the absent class members.” *Id.* Courts in this District have approved service awards for individual representative plaintiffs that range from \$1,000 to \$85,000. *See Reyes*, 2024 WL 472841, at \*6 n.5 (gathering cases).

The Parties have agreed on a proposed \$15,000 service award for each Named Plaintiff. Ex. 1 ¶ 104. Each Named Plaintiff bravely underwent personal risk in this case by publicly identifying herself as in an LGBTQ+ relationship and in need of infertility treatments to build her family. Salzman Decl. ¶ 39. Each Named Plaintiff also dedicated dozens of hours to assisting with the prosecution of this litigation, including by producing substantial personal information and correspondence at the demand of Defendant and working with Class Counsel throughout

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<sup>15</sup> Plaintiffs have briefed further the appropriateness of the service awards and the benefit of Named Plaintiffs’ representation to the class below, in Section III.

discovery and settlement negotiations. *Id.* Further, each exposed her private medical records and other intimate information to discovery and scrutiny. *Id.* Because of the Named Plaintiffs' service, all other Class Members will not need to publicly disclose their LGBTQ+ or family-building status, nor will Category A, B, or D-A Class Members need to produce any medical records to receive the Default Common Fund and Default Dollars for Benefits Amounts. Thus, the requested incentive awards for the Named Plaintiffs are reasonable in light of the particular circumstances of this case.

The service awards, like attorneys' fees and costs, will also be paid separate and apart from the Common Fund, Ex. 1 ¶ 104, further weighing in favor of approving the settlement, as the Court need not be concerned that incentive awards could decrease "the cash available for *pro rata* distribution to class members." *Moses*, 79 F.4th at 246.

#### **D. The *Grinnell* Factors Also Support Final Approval.**

While largely duplicative of the requirements of Rule 23(e)(2), the *Grinnell* factors, adopted by the Second Circuit to guide the evaluation of a class action settlement, also favor final approval.<sup>16</sup>

##### **1. Reaction of the Class to the Settlement: No Objections or Exclusions.**

The reaction of the Class to the Settlement favors final approval because no Class Members filed exclusion requests or objections. Salzman Decl. ¶¶ 46–47. The one objection, Ex. 4, by a non-Class Member who has no standing to object, is on the basis that the Settlement does not include relief for single heterosexual women also subject to Aetna's Definition of

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<sup>16</sup> These factors are: "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463.

Infertility—a group of individuals not within the ambit of the Complaint. Being a non-Class Member single heterosexual woman herself—*i.e.*, not being in an Eligible LGBTQ+ Relationship qualifying her to be a Class Member—this individual has no standing to object to the settlement. *See Guardians Ass’n of N.Y.C. Police Dep’t v. Civ. Serv. Comm’n of City of N.Y.*, 527 F. Supp. 751, 756 (S.D.N.Y. 1981) (“Not being members of the class . . . , the [objectors] have no standing to object to the settlement.”).<sup>17</sup> This person is free to pursue any claims she may have against Defendant, as the releases in the Settlement do not apply to her. *See* Ex. 1 ¶ 121; *see also Melito*, 2017 WL 6403883, at \*2 (“Because they are not members of the Settlement Class, Ms. Brooke Bowes and Mr. Mierzwicki are not bound by this Final Approval Order And Judgment or by the Settlement Agreement. Thus, to the extent that they believe they have claims against AEO, they are free to assert such claims against AEO.”).

## 2. Stage of the Proceedings and Discovery Completed.

The third *Grinnell* factor—the stage of the proceedings and the amount of discovery completed—also favors final approval. The relevant inquiry “is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement.” *GSE Bonds*, 414 F. Supp. 3d at 699 (quoting *In re AOL Time Warner, Inc.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at \*10 (S.D.N.Y. Apr. 6, 2006)). As described *supra*, Plaintiffs obtained significant discovery from Defendant and conducted extensive expert discovery. Plaintiffs used this information to assemble proof of Defendant’s policies and practices and to understand the strengths and weaknesses of their liability and damages claims. Courts often grant final approval of class settlements in cases

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<sup>17</sup> *Melito v. Am. Eagle Outfitters, Inc.*, No. 1:14-CV-02440-VEC, 2017 WL 6403883, at \*2 (S.D.N.Y. Sept. 8, 2017) (“This Court finds that [objectors] are not class members . . . . As a result, they each lack standing to object to the Settlement.”); *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 754 (S.D.N.Y. 1985), *aff’d*, 798 F.2d 35 (2d Cir. 1986) (“Therefore, these objectors are not class members and have no standing to object to the settlement.”).

where the parties conducted far less discovery than in this case.<sup>18</sup> Here, Plaintiffs had enough information about the merits of their claims to assess Defendant’s position in settlement negotiations. Salzman Decl. ¶ 8.

### **3. Ability of Defendants to Withstand a Greater Judgment.**

The seventh *Grinnell* factor—the ability of the defendants to withstand a greater judgment—does not preclude final approval. Defendant, as a nationally managed health care company, may certainly be able to withstand a greater judgment. Nevertheless, courts have determined “the amount of the settlement, however, when considered with the other *Grinnell* factors, does not alone render the settlement unfair.” *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005).

### **4. Range of Reasonableness of the Settlement.**

The eighth *Grinnell* factor—the range of reasonableness of the settlement in light of the best possible recovery—and the ninth *Grinnell* factor—the range of reasonableness of the settlement to a possible recovery in light of all the attendant risks of litigation—both favor final approval. These factors are “often combined for the purposes of analysis.” *Payment Card*, 330 F.R.D. at 47–48. “In considering the reasonableness of the settlement fund, a court must compare the terms of the compromise with the likely rewards of litigation.” *Id.* at 48 (internal quotations omitted). The range of reasonableness for a settlement is “a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Wal-Mart Stores*, 396 F.3d at 119.

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<sup>18</sup> See, e.g., *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214, 2011 WL 6268216, at \*5 (S.D.N.Y. Dec. 13, 2011) (granting final approval where parties engaged in informal information exchange with no depositions because “Plaintiffs obtained sufficient discovery to weigh the strengths and weaknesses of their claims” and “[t]he parties’ participation in a day-long mediation allowed them to further explore the claims and defenses”); *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08 Civ. 8713 (PGG), 2010 WL 2399328, at \*5 (S.D.N.Y. Mar. 3, 2010) (the parties’ “efficient, informal exchange of information” enough discovery to recommend settlement approval).

Here, the settlement amount falls within the range of reasonableness in light of the best possible recovery. Awards for sex discrimination are often in the thousands of dollars.<sup>19</sup> An average baseline award of \$12,300—as well as a possible second pro rata payment, and with a subset of Class Members whose claims for additional payment will be evaluated by the Special Master and/or Aetna, *see supra* Background Sections II.D.–E.—is reasonable, especially considering that courts frequently approve class settlements even where the benefits represent only “a fraction of the potential recovery.” *In re Initial Pub. Offering Secs. Litig.*, 671 F. Supp. 2d 467, 483–85 (S.D.N.Y. 2009) (approving settlement that provided only a “miniscule” 2% of defendants’ maximum possible liability and observing that “[t]he Second Circuit has held that a settlement amount of even a fraction of the potential recovery does not render a proposed settlement inadequate”); *Hall v. Children’s Place Retail Stores, Inc.*, 669 F. Supp. 2d 399, 402 n.30 (S.D.N.Y. 2009) (approving settlement that amounted to 5–12% recovery of provable damages).

Finally, there are significant risks of litigation that would result in Class Members receiving no recovery at all. Salzman Decl. ¶¶ 52–56. As compared to the best possible recovery in light of the risks of litigation, the Settlement provides better recovery to Class Members. *See Frank*, 228 F.R.D. at 186 (determination of whether a settlement amount is reasonable “does not involve the use of a ‘mathematical equation yielding a particularized sum’”).

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<sup>19</sup> *See, e.g., Suarez Castaneda v. F&R Cleaning Servs. Corp.*, No. 17-CV-7603 (SJ) (PK), 2019 WL 5693768, at \*1 (E.D.N.Y. July 8, 2019) (affirming damages of \$16,122.15 and \$31,442.98 for two plaintiffs, respectively); *Setty v. Synergy Fitness*, No. 17-CV-6504 (NGG) (SMG), 2019 WL 1292431, at \*7 (E.D.N.Y. Mar. 21, 2019) (affirming damages of \$35,000 and \$25,000 for emotional-distress for sex discrimination claims); *Ortiz-Del Valle v. Nat’l Basketball Ass’n*, 42 F. Supp. 2d 334, 343 (S.D.N.Y. 1999) (remittitur of emotional damages for sex discrimination to \$20,000) (collecting cases); *Evans v. Metro. Transp. Auth.*, No. 16-CV-4560 (FB) (VMS), 2018 WL 4636804, at \* 1 (E.D.N.Y. Sept. 27, 2018) (excluding lost wages award, affirming verdicts of \$25,000 in non-economic damages and \$7,500 in punitive damages for sex discrimination claim).

## II. THE NEGOTIATED SERVICE PAYMENTS PROPOSED FOR THE NAMED PLAINTIFFS ARE FAIR AND REASONABLE.

In accordance with the Settlement Agreement, Plaintiffs respectfully request that the Court approve service awards for the Named Plaintiffs. The parties have agreed to grant each of the Named Plaintiffs service awards in the amount of \$15,000 each, for a total of \$60,000 in recognition of the services they rendered on behalf of the Class. *See* Ex. 1 ¶ 104. These services included: participating in active litigation for over four years, assisting with discovery, communicating regularly with Class Counsel, providing Class Counsel documents and information, and, in the interest of the case, exposing their private and highly-sensitive medical records and intimate fertility-related information to discovery and scrutiny. Salzman Decl. ¶ 39.

Service awards in class actions compensate “for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.” *McLaughlin v. IDT Energy*, No. 14-cv-4107, 2018 WL 3642627, at \*6 (E.D.N.Y. July 30, 2018).<sup>20</sup>

### A. Significant Risks

The requested service awards are reasonable in light of the risks that the Named Plaintiffs assumed in serving the interests of the class. These individuals bore significant risks above those of unnamed class members by virtue of the public nature of their complaint and their willingness to participate in discovery. *See* Salzman Decl. ¶ 39; *see also Guippone v. BHS & B Holdings, LLC*, No. 09 Civ. 21029 (CM), 2011 WL 5148650, at \*7 (S.D.N.Y. Oct. 28, 2011) (“Today, the fact that a plaintiff has filed a federal lawsuit is searchable on the internet and may become

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<sup>20</sup> *See also Berkson v. Gogo LLC*, 147 F. Supp. 3d. 123, 133 (E.D.N.Y. 2015) (“The guiding standard in determining an incentive award is broadly stated as being the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and, of course, the ultimate recovery.”).

known to prospective employers when evaluating the person.”); *Sykes v. Harris*, No. 09 Civ. 8486 (DC), 2016 WL 3030156, at \*18 (S.D.N.Y. May 24, 2016) (“Incentive awards are appropriate when considering the sacrifice of Plaintiffs’ anonymity.”) (internal quotations omitted). Here, the Named Plaintiffs bore significant risks to their right to privacy in revealing publicly their most sensitive and intimate fertility-related information, which was scrutinized by Defendant in discovery. Salzman Decl. ¶ 39. Because of the Named Plaintiffs’ service, all other Class Members will not need to publicly disclose their LGBTQ+ or family-building status. *Id.*

### **B. Significant Time and Effort**

The requested service awards are also reasonable in light of the time and effort expended by the Named Plaintiffs. These individuals contributed significant time and effort to the investigation and prosecution of the case by dedicating dozens of hours in producing substantial personal information and engaging in consistent correspondence, as well as in working with Class Counsel throughout discovery and settlement negotiations. *See* Salzman Decl. ¶ 39; *Calibuso v. Bank of Am. Corp.*, 2:10-cv-01413 (PKC), 2013 WL 12370127, (E.D.N.Y. Dec. 27, 2013) (approving service awards of \$35,000 each for five Named Plaintiffs and \$7,500 to one Named Plaintiff); *McBean v. City of New York*, 233 F.R.D. 377, 391 (S.D.N.Y. 2006) (approving service awards between \$25,000 and \$35,000 from a \$2.8 million settlement fund).

### **C. Ultimate Recovery**

The service awards requested here of \$15,000 for each Named Plaintiff are reasonable, particularly in view of the range of those approved by courts in this Circuit. *See McBean*, 233 F.R.D. at 391 (approving service awards ranging from \$25,000 to \$35,000 and finding that “when compared to incentive awards given generally to named plaintiffs across a variety of class actions,” such awards “fall solidly in the middle of the range”).

The requested service awards are also reasonable in light of the recovery available to all Class Members and the total amount of the Class Fund of \$4,011,600, particularly given that the incentive awards are to be paid separate and apart from, and without diminishing, the damages payments to Class Members. Ex. 1 ¶ 104. Each service award for the Named Plaintiffs represents only 0.37% of the total Class Fund. *See Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (granting incentive awards in part because they were “small in relation to the . . . fund from which the awards will be made”); *Manley v. Midan Rest. Inc.*, No. 14 Civ. 1693, 2017 WL 1155916, at \*13 (S.D.N.Y. Mar. 27, 2017) (“The \$15,000.00 service award represents approximately 1.64% of the \$912,500.00 settlement fund. This is well within the range of service awards recently approved in this District.”). The Named Plaintiffs’ requests for service awards—which are small in light of the total Class Fund—should be granted for the services they rendered to the class and the risks they took being publicly named as plaintiffs.

### **III. THE COURT SHOULD AWARD THE REQUESTED ATTORNEYS’ FEES AND COSTS.**

Pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), Class Counsel seeks a fee award in the agreed-upon amount of \$1,625,000, to be paid separate and apart from the Common Fund. *Id.* ¶¶ 96–97.

Determining “[w]hat constitutes a reasonable fee is properly committed to the sound discretion of the district court.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts are guided by the six *Goldberger* factors in assessing reasonableness: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Id.* at 50.

Here, the attorneys' fees and costs are reasonable for at least five reasons: (1) Judge Gold mediated the fees amount after mediating the Common Fund amount and after reviewing Class Counsel's billing records, *see supra* Background Section II.G.; (2) the amount mediated by Judge Gold is 18 percent *less* than Class Counsel's lodestar, *see infra* Section III.B.; (3) public policy favors lodestar fee awards in fee-shifting cases, such as this one, *see infra* Section III.A.6.; (4) Class Counsel achieved significant results over four years of litigation in the face of a high risk of no recovery, *see supra* Section I.B.1.; and (5) attorneys' fees will be paid entirely separately from, and without diminishing, the monetary compensation to Damages Class Members, *see infra* Section III.B.5.

Finally, even considering a proportional comparison of the fees requested versus the Class Fund, as the Second Circuit recently required, *see Kurtz*, 142 F.4th at 117, the requested fee award is securely within the range of reasonable awards. *See infra* Section III.A.5.

#### **A. The Goldberger Factors Support Class Counsel's Fee Application**

Examination of the six *Goldberger* factors demonstrates that Class Counsel's requested fee of \$1,625,000 is reasonable.

##### **1. Class Counsel's Time and Labor**

Class Counsel has been investigating and litigating this case for over four years. *See Salzman Decl.* ¶ 62. This includes investigating and drafting the complaint and amended complaint, responding to and propounding discovery requests, reviewing approximately 77,400 pages of documents produced by Defendant, analyzing complex to identify Class Members, consulting experts, engaging in extensive discovery-related meet-and-confers, engaging in a protracted, eleven-month-long settlement negotiation process, including a mediation and follow-up conferences with Judge Gold, negotiating policy changes as part of an injunctive settlement, preparing Plaintiffs' motion for preliminary approval of the Settlement, overseeing

administration of the Notice and Claim process, and preparing this motion. *See generally* Salzman Decl. ¶¶ 7–24; Banker Decl. ¶¶ 8, 12–17. Class Counsel will also conduct future work on behalf of the Class, including: (1) evaluating late claimants; (2) working with Aetna and the Special Master in their evaluation of claims for additional compensation; (3) preparing for the forthcoming Fairness Hearing and (4) if final approval is granted, overseeing the distribution of settlement funds to the Class, including working with the Administrator on issuing payments and determining if second pro rata payments will be made to all Class Members or that a cy pres payment is necessary (and if so, applying to the Court for the same). Collectively, Class Counsel has spent approximately 2,888 hours so far for a total combined lodestar of \$1,949,315.05, a number that will increase. Salzman Decl. ¶¶ 58–61; Banker Decl. ¶¶ 2–4.

## **2. Magnitude and Complexities of the Litigation**

As detailed *supra*, and in the accompanying Class Counsel declarations, *see generally* Salzman Decl. ¶¶ 7–24, 52–56; Banker Decl. ¶¶ 8, 12–17, this litigation has been extensive and complex. This case involved many technical and emerging issues of law, such as whether Defendant’s policy discriminates based on sex under Section 1557 of the ACA and whether Defendant can be held liable under the ACA for its role as a third-party administrator of self-funded plans. And, as reflected in the nearly year-long settlement negotiation process, resolving this case while ensuring that all potentially affected Class Members were included in the notice process was incredibly complex and labor-intensive. *See supra* Background Section I.D. This litigation took years and required extensive resources by Class Counsel.

## **3. Risk of Litigation**

While all factors are important, the Second Circuit has made clear that the risk of litigation is “‘perhaps the foremost factor’ to be considered in determining” the reasonableness of an attorneys’ fees request. *Goldberger*, 209 F.3d at 54. Here, given the novel issues of law at

play, summary judgment and class certification motion practice—and potential appeals of the Court’s decisions on both fronts—presented legitimate risks to the Class. *See supra* Section I.B.1. Until the Parties agreed to settle this case, there was substantial risk that Named Plaintiffs and the Class might recover nothing. Because Class Counsel litigated this case on a fee-shifting basis, a loss would have resulted in no fee recovery at all. *See* Salzman Decl. ¶¶ 73–74; Banker Decl. ¶ 5. This uncertainty militates in favor of approval of the requested fee award. *See In re Beacon Assocs. Litig.*, No. 09 Civ. 777 (CM), 2013 WL 2450960, at \*13 (S.D.N.Y. May 9, 2013) (“[A]ll of these matters were taken on contingency, so in view of the novelty of the issues there was some possibility that counsel would recover nothing at all.”).

#### 4. Quality of Representation

“The results achieved through Class Counsel’s efforts are a critical element in determining the appropriate fee to be awarded, and the settlement here will undoubtedly have widespread benefits to the class.” *Hart v. BHH, LLC*, No. 15 Civ. 4804, 2020 WL 5645984, at \*11 (S.D.N.Y. Sept. 22, 2020) (internal quotations and citation omitted). Despite the high risk of no recovery, Class Counsel obtained a significant settlement for Class Members. In addition to significant injunctive relief, a monetary award of at least \$12,300 per Class Member is more than reasonable, especially considering that, as noted, courts frequently approve class settlements even where the benefits represent only “a fraction of the potential recovery.” *In re Initial Pub. Offering Secs. Litig.*, 671 F. Supp. 2d 467, 483–85 (S.D.N.Y. 2009). Moreover, in large part due to Class Counsel’s efforts to analyze Aetna’s complex data systems, the Parties were able to identify the vast majority of Class Members prior to the claims process, allowing for settlement negotiations that ensured a Common Fund valuable enough to provide meaningful monetary compensation for each Class Member. *See supra* Section III.B. The quality of the lawyers involved in this case also heavily supports this factor. As explained *supra* Section I.A.2., Class

Counsel consists of experienced attorneys with a strong reputation in the legal community, specific subject matter expertise, and significant class action experience.

### 5. Fee in Relation to Settlement

In its recent decision in *Kurtz v. Kimberly-Clark Corp.*, the Second Circuit directed district courts to consider, as one factor regarding reasonableness, “the allocation of recovery between class counsel and the class before approving a settlement.” 142 F.4th at 117. Notably, the concerns in *Kurtz*—that “[a]ttorney’s fees and class recovery are inevitably intertwined: parties often negotiate the two simultaneously, and defendants, who pay both fees and class recovery, must be expected to think of the two payments in tandem as they negotiate,” *id.* at 120—are not present here. First, the fee negotiation was mediated with the assistance of Judge Gold—who reviewed Class Counsel’s billing records—and only after the Common Fund amount and other components of monetary compensation was agreed upon. *See supra* Background Section II.G. Further, given that Plaintiffs’ claims are fee-shifting, the early settlement of this case (*i.e.*, prior to depositions even commencing) inures to the benefit of the Class, per the logic in *Kurtz*, as the longer the case went on, the higher the attorneys’ fees would have been. The fee-shifting nature of Plaintiffs’ claims bolsters the reasonableness of Class Counsel’s fee request pursuant to public policy considerations, *see infra* Section III.A.6., particularly given that Class Counsel is seeking an award *lower* than the lodestar, *see infra* Section III.B.

In any case, the requested fees are reasonable even when compared strictly proportionally with the total class relief, as they are equivalent to approximately 40% of the Class Fund. Such a fee award is reasonable. “The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit.” *Velez v. Novartis Pharms. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at \*21 (S.D.N.Y. Nov. 30, 2010) (collecting cases);

*see also Hart*, 2020 WL 5645984, at \*11 (granting fees representing “51.75% of the total benefit inured to the class,” which the court found “reasonable in light of the structure of the settlement, Class Counsel’s efforts, and the benefit the class will receive”). The requested fee award is thus reasonable according to a comparison of “the proportion of the total recovery going to attorney’s fees with the proportion going to the class.” *Kurtz*, 142 F.4th at 119.

Finally, courts have emphasized that “great” weight should be given to the fact here that the “fee amount is not to be paid from a common fund” and was “negotiated at arm’s length between sophisticated counsel after the substantive terms of a settlement have been agreed.” *Allred on behalf of Aclaris Therapeutics, Inc. v. Walker*, No. 19-CV-10641 (LJL), 2021 WL 5847405, at \*5 (S.D.N.Y. Dec. 9, 2021) (collecting cases).<sup>21</sup> Defendant’s agreement to pay attorneys’ fees separate and apart from the Common Fund and the Dollars for Benefits payments further bolsters the reasonableness of the fee request. “An award of the full amount of the requested fees and costs will not deprive any plaintiffs of their potential settlement amounts, and therefore also counsels in favor of approval.” *Brack v. MTA N.Y.C. Transit*, No. 18 Civ. 846, 2019 WL 8806149, at \*4 (E.D.N.Y. Apr. 26, 2019); *see also id.* (“This is not a case where the percentage of the fund claimed by plaintiffs is small and less than 10% of the fund amount, while the fees recovered are grossly disproportional and exceed the plaintiffs’ recovery.”).

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<sup>21</sup> *See also Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 67 (S.D.N.Y. 2003) (“[U]nlike common fund cases, where attorneys’ fees can erase a considerable portion of the funds allocated for settlement, the fees were negotiated separately and after the settlement amount had been decided, thus considerably removing the danger that attorneys’ fees would unfairly swallow the proceeds that should go to class members.”); *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666, at \*18–19 (S.D.N.Y. Mar. 24, 2014) (reasonableness where “the requested Attorneys’ Fee Payment [] not being paid from the Class Settlement Fund” where defendant “agreed to pay a separate Attorneys’ Fees Payment to Co-Lead Counsel, as a result of arms-length negotiations, conducted separate from and subsequent to the Class Settlement Amount agreement”); *Millien v. Madison Square Garden Co.*, No. 17-CV-4000 (AJN), 2020 WL 4572678 (S.D.N.Y. Aug. 7, 2020) (similar).

## 6. Public Policy Considerations

Public policy considerations support Class Counsel’s fee request. As the Second Circuit in *Goldberger* recognized, “[t]here is [] commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.” *Goldberger*, 209 F.3d at 51. “In order to attract well-qualified plaintiffs’ counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.” *WorldCom*, 388 F. Supp. 2d 319 at 359. Here, Class Counsel took on a significant risk by representing Plaintiffs on a fee-shifting basis. This lawsuit also serves the public interest in advancing the equal rights of LGBTQ+ people in their family-building journeys, and Class Counsel negotiated significant injunctive relief that makes Defendant an industry-leader in equitable fertility-related insurance benefits. *See supra* Background Section II.B. The requested fee amount does not result in a “windfall to class counsel to the detriment of the plaintiff class,” which would not serve public policy. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 130 (S.D.N.Y. 2009). Instead, it provides a financial incentive for attorneys to undertake cases even when compensation is not guaranteed at the outset.

Indeed, such public policy considerations are particularly pronounced in fee-shifting cases like this one.<sup>22</sup> As the court in *Hall* noted regarding fee awards in Fair Labor Standards Act fee-shifting cases, “the attorneys’ fees need not be proportional to the damages plaintiffs recover,” *Hall*, 2016 WL 1555128, at \*16 (citation omitted), as “[a] rule of proportionality would make it difficult, if not impossible, for individuals with meritorious . . . claims but

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<sup>22</sup> *See* 42 U.S.C. § 18116(a) (incorporating the “enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act” including 42 U.S.C. § 1988(b), providing for fee-shifting); N.Y. Exec. Law § 297(10) (fee-shifting for claims brought under New York State Human Rights Law); N.Y.C. Admin. Code § 8-502(g) (fee-shifting for claims brought under New York City Human Rights Law).

relatively small potential damages to obtain redress from the courts,” *id.* (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986)). “[B]y enacting fee-shifting provisions in certain categories of cases, . . . ‘Congress intended to ensure that plaintiffs be able to secure competent counsel.’” *Hall v. ProSource Techs., LLC*, No. 14-CV-2502 (SIL), 2016 WL 1555128, at \*16 (E.D.N.Y. Apr. 11, 2016) (quoting *Dajbabic v. Rick’s Café*, 995 F. Supp. 2d 210, 212 (E.D.N.Y. 2014)) (collecting cases). As in cases like *Hall* (where the court approved a lodestar multiplier in a Fair Labor Standards Act class action settlement), granting Class Counsel’s fee request here “‘encourages the vindication of Congressionally identified policies and rights.’” *Id.* (quoting *Allende v. Unitech Design, Inc.*, 783 F. Supp. 2d 509, 511 (S.D.N.Y. 2011)).

### **B. The Lodestar Crosscheck Supports the Requested Award**

Comparing the requested amount with the lodestar supports the fee request’s reasonableness. The lodestar is calculated by multiplying the number of hours expended on the litigation by counsel’s hourly rate. *See Wal-Mart Stores*, 396 F.3d at 121. The Second Circuit has made clear that in cases where the lodestar is “used as a mere cross-check,” the district court does not need to “exhaustively scrutinize[]” the hours documented by counsel or engage in “the cumbersome, enervating, and often surrealistic process of lodestar computation.” *Goldberger*, 209 F.3d at 49–50 (internal quotation marks omitted). Instead, “the reasonableness of the claimed lodestar can be tested by the court’s familiarity with the case[.]” *Id.* at 50. The crosscheck is solely a “rough indicator of the propriety of a fee request.” *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011).

Here, the negotiation for attorneys’ fees and costs was mediated by Judge Gold, following his review of Class Counsel’s billing records. Salzman Decl. ¶ 19. As of the date of filing, the current total combined lodestar for Class Counsel is \$1,949,315.05; the amount Judge Gold mediated, \$1,625,000, is approximately 18 percent *lower* than the lodestar. *See Salzman*

Decl. ¶ 58; Banker Decl. ¶ 2. The hourly attorney rates used to calculate ECBAWM’s lodestar (between \$500 and \$1,000) are the current rates that the firm charges clients who pay hourly, which are regularly approved by courts in the Southern District of New York. Salzman Decl. ¶¶ 58–59, 68–76.<sup>23</sup> And the hourly rates used to calculate NWLC’s lodestar (between \$258 and \$1,141) align with current Laffey Matrix rates.<sup>24</sup> Banker Decl. ¶ 2. Class Counsel do not seek a multiplier on their fees—and in fact seek less than their lodestar—even though “multipliers of between 3 and 4.5 have become common.” *Wal-Mart Stores*, 396 F.3d at 123; *see also In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (discussing empirical evidence that the median multiplier in class action settlements is around two and describing a multiplier of five as “large, but not unreasonable”); *Hart*, 2020 WL 5645984, at \*11 (awarding Class Counsel attorneys’ fees at a multiplier of 1.5 the lodestar, equivalent to “51.75% of the total benefit inured to the class”).

### C. Class Counsel’s Expenses Should Be Reimbursed

Class Counsel’s request for fees also includes costs incurred in litigating this case. In class-action settlements, “[c]ourts typically allow counsel to recover their reasonable out-of-pocket expenses.” *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 624 (S.D.N.Y.

<sup>23</sup> *See Fair Hous. Just. Ctr. v. Pelican Mgmt., Inc.*, No. 18 CIV. 1564 (ER), 2025 WL 965129 (S.D.N.Y. Mar. 31, 2025) (granting fees at ECBAWM’s full attorney rates); *Rosenfeld v. Lenich*, No. 18 Civ. 6720, 2022 WL 2093028, at \*4 (E.D.N.Y. Jan. 19, 2022) (ECBAWM’s rates “reflect rates . . . regularly accepted in this Circuit and well within the range of reasonableness”); *T.E. v. Pine Bush Cent. Sch. Dist.*, No. 12 Civ. 2303 (S.D.N.Y. 2015) (awarding ECBAWM partner and associate their full requested hourly rates); *Short v. Manhattan Apartments, Inc.*, 286 F.R.D. 248, 255–57 (S.D.N.Y. 2012) (awarding ECBAWM partner her full hourly rate); *Short v. Manhattan Apartments, Inc.*, No. 11 Civ. 5989, 2013 WL 2477266, at \*8 (S.D.N.Y. June 10, 2013) (awarding over \$500,000 in fees at then current hourly rates for ECBAWM and its co-counsel); *Harvey v. Home Savers Consulting Corp.*, No. 07 Civ. 2645, 2011 WL 4377839, at \*3, \*6 (E.D.N.Y. Aug. 12, 2011) (awarding two ECBAWM partners and one associate their full requested rates); *Rodriguez v. Pressler & Pressler, L.L.P.*, No. 06 Civ. 5103, 2009 WL 689056 (E.D.N.Y. Mar. 16, 2009) (awarding ECBAWM partner his full requested rate); *Wise v. Kelly*, 620 F. Supp. 2d 435, 447–49 (S.D.N.Y. 2008) (awarding ECBAWM partner \$425 per hour, associates \$250–\$300 per hour).

<sup>24</sup> The Laffey Matrix is a fee schedule used by U.S. Courts to determine reasonable hourly rates for attorneys engaged in complex federal litigation in the District of Columbia. *See, e.g., D.L. v. District of Columbia*, 924 F.3d 585, 587 (D.C. Cir. 2019).

2012). Courts recognize that in cases where expenses are incurred without guarantee of recovery, there is a “strong incentive to keep them at a reasonable level,” as Class Counsel did here. *See In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12 Civ. 8557 (CM), 2014 WL 7323417, at \*19 (S.D.N.Y. Dec. 19, 2014). The requested reimbursement is for \$32,214.08 in necessary expenses that were actually incurred by Class Counsel. Salzman Decl. ¶¶ 89–95 (detailing \$29,301.15 in expenses); Banker Decl. ¶¶ 61–62 (detailing \$2,912.93 in expenses). These expenses include costs for filing fees, service of process, discovery management, expert or consultant fees, attorney travel costs, and legal research. *Id.* ¶¶ 90, 92–93; Banker Decl. ¶¶ 61–62. These expenses are reasonable, particularly in light of the length and complexity of this litigation, and should be reimbursed, as permitted by the Agreement and the fee-shifting claims at issue.<sup>25</sup>

#### **IV. FINAL CERTIFICATION OF THE RULE 23 SETTLEMENT CLASS IS APPROPRIATE.**

This Court preliminarily certified an Injunctive Settlement Class and a Damages Settlement Class in its preliminary approval order, and in its supplemental preliminary approval order following the Parties’ minor amendments to the Settlement. ECF Nos. 97 at 14–15; 98 ¶ 4; 102; 103 ¶ 1. The Injunctive Settlement Class and Damages Settlement Class meet all of the legal requirements for class certification for settlement purposes under Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3) for the reasons set forth in Plaintiffs’ Memorandum of Law in support of Motion for Preliminary Approval. *See* Pl.’s Memo. of Law in Supp. of Mot. for Preliminary Approval, at 40–44, ECF No. 93. For the reasons set out in that brief and found by the Court in its Preliminary Approval Decision and Orders, the Settlement Class should be finally certified

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<sup>25</sup> *See In re Arakis Energy Corp. Sec. Litig.*, No. 95 Civ. 3431 (ARR), 2001 WL 1590512, at \*17 (E.D.N.Y. Oct. 31, 2001) (granting over \$400,000 in expenses and finding “given the scope and complexity of this litigation, the expenses requested by plaintiffs’ counsel are reasonable”); *Chambery v. Tuxedo Junction Inc.*, No. 12 Civ. 06539, 2014 WL 3725157, at \*10 (W.D.N.Y. July 25, 2014) (approving award of litigation costs and finding that “the costs do not appear unreasonable based on the Court’s understanding that the costs were actually incurred”).

for settlement purposes. *See Hezi v. Celsius Holdings, Inc.*, No. 1:21 Civ. 09892 (JHR), 2023 WL 2786820, at \*2 (S.D.N.Y. Apr. 5, 2023).

### CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiffs' motion for final approval of the Settlement Agreement and enter the proposed approval order and judgment. Salzman Decl., Exs. 2–3.

Dated: September 25, 2025  
New York, New York

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