

1 **VEDDER PRICE (CA), LLP**
Christopher R. Ramos (SBN 301556)
2 cramos@vedderprice.com
125 Century Park East, Suite 1900
3 Los Angeles, California 90067
T: +1 424-204-7700
4 F: +1 424-204-7702

5 **VEDDER PRICE P.C.**
Blaine C. Kimrey (to seek admission *pro hac vice*)
6 bkimrey@vedderprice.com
Jeanah Park (to seek admission *pro hac vice*)
7 jpark@vedderprice.com
222 N. LaSalle Street
8 Chicago, Illinois 60601
T: +1 312-609-7500
9 F: +1 312-609-5001

10 *Attorneys for plaintiff*
11 **KCC CLASS ACTION SERVICES, LLC**

12 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 **KCC CLASS ACTION SERVICES,
15 LLC,**

16 Plaintiff,

17 v.

18 **AETNA INC.,**

19 Defendant.

Case No. 2:18-cv-1018

COMPLAINT

(1) **Breach of Contract and the
Implied Covenant of Good Faith
and Fair Dealing;**

(2) **Negligence/Failure to Warn;**

(3) **Quantum Meruit/Goods and
Services Rendered;**

(4) **Declaratory Judgment**

Jury Trial Demanded

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23
24 KCC CLASS ACTION SERVICES, LLC (“KCC” or “Plaintiff”), by and
25 through its undersigned attorneys, brings this action against defendant AETNA
26 INC. (“Aetna” or “Defendant”) for: (1) breach of contract and the implied covenant
27 of good faith and fair dealing; (2) negligence/failure to warn; (3) quantum
28 meruit/goods and services rendered; and (4) declaratory judgment (two counts). In

1 support of its Complaint, KCC states as follows:
2

3 **NATURE OF THE ACTION**

4 1. This is a case about the negligence, carelessness, and recklessness of
5 Aetna and its agent and Business Associate, Gibson, Dunn & Crutcher LLP
6 (“Gibson”), and their failure to adequately safeguard the protected health
7 information (“PHI”) of thousands of Aetna insureds.

8 2. In 1996, Congress recognized the importance of protecting the privacy
9 of all individually identifiable health information when it enacted the Health
10 Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 300gg, 29
11 U.S.C. § 1181, *et seq.*, and 42 U.S.C. § 1320d, *et seq.*, and its associated
12 regulations, 45 C.F.R. § 160, 162 and 164 (“HIPAA”), which established a federal
13 floor of safeguards to protect the confidentiality of medical information.

14 3. Founded in 1853, Aetna is one of the country’s largest and oldest
15 health insurers. Aetna’s mission is to “build a healthier world — one person, one
16 community at a time.” According to Aetna’s website, Aetna reported earnings of
17 approximately \$63.2 billion in revenue in 2016. In December 2017, Aetna
18 announced that CVS Health had agreed to purchase Aetna for \$69 billion.

19 4. Aetna’s privacy policy claims Aetna “will safeguard member [PHI]
20 from impermissible and unauthorized use and disclosure in accordance with federal
21 and state law, the Company’s Code of Conduct, and industry standards.”

22 5. Gibson is a global law firm comprised of over 1,200 lawyers in 20
23 offices worldwide. Gibson markets itself as a sophisticated law firm with
24 experience in health law and data privacy, among other things.

25 6. Contrary to representations Aetna and Gibson have made about their
26 commitment to and expertise in health care privacy matters, Aetna and Gibson
27 caused the disclosure of the HIV/AIDS status and HIV/AIDS drug prevention use
28 of thousands of Aetna’s insureds throughout the country.

1 7. Indeed, KCC has learned from public documents that Aetna has been
2 sued in no fewer than ten lawsuits arising from this disclosure and has agreed to
3 pay over \$17 million to resolve two of those lawsuits. Public documents also
4 reveal that Aetna has agreed to pay over \$1.1 million in penalties to the State of
5 New York to resolve an investigation initiated by the New York Attorney General.

6 8. Instead of accepting responsibility for this unfortunate incident, Aetna
7 has demanded that KCC indemnify and reimburse Aetna **for any and all** losses
8 arising from the incident.

9 9. KCC is a settlement administrator that administers class action claims
10 of all types. Aetna, through Business Associate Gibson, engaged KCC to mail
11 notices relating to a settlement agreement and administer claims through that
12 agreement.

13 10. Aetna, through its agent and Business Associate Gibson, is a party to a
14 contract governing the services KCC was to provide and did provide related to the
15 mailing of the notices.

16 11. Aetna, as a Covered Entity under HIPAA, and Aetna's Business
17 Associate, Gibson, had a duty under HIPAA to institute appropriate protective
18 measures to maintain the safety and security of the PHI at issue in the mailing of
19 the notices.

20 12. In violation of this duty, Aetna and Gibson failed to institute
21 appropriate protective measures to maintain the safety and security of the PHI at
22 issue in the mailing of the notices. And Aetna and Gibson failed to inform or warn
23 KCC that they had failed to institute appropriate protective measures to ensure the
24 safety and security of the PHI of the Aetna insureds.

25 13. In the absence of appropriate protective measures and without warning
26 KCC that such measures had not been implemented, Aetna and Gibson provided
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1 the PHI of the Aetna insureds to KCC without the insureds' consent, in violation of
2 HIPAA.

3 14. Moreover, in further violation of HIPAA, Aetna and Gibson provided
4 KCC with far more PHI of Aetna insureds than was minimally necessary for KCC
5 to perform its job function.

6 15. Without Aetna and Gibson having provided the PHI of the Aetna
7 insureds, KCC would have had no direct access to or control over the PHI, which at
8 all times was provided by Aetna and Gibson.

9 16. In connection with the engagement, KCC sent all draft notices to
10 Gibson for approval, and upon receiving such approval, KCC mailed the notices.
11 KCC did not mail any notices that did not receive the prior express approval of
12 Gibson and/or Aetna.

13 17. In late July 2017, thousands of notices were sent on Aetna's behalf to
14 Aetna insureds in envelopes with a glassine window that exposed the insureds'
15 HIV/AIDS status and/or taking of HIV/AIDS preventative drugs.

16 18. Aetna and Gibson knew that windowed envelopes were being used in
17 the mailings in question. KCC provided samples of the letters to Aetna and Gibson,
18 and those letters demonstrated that windowed envelopes would be used. Aetna and
19 Gibson approved the form and content of the letters before they were transmitted.

20 19. KCC now brings this action for breach of contract and the implied
21 covenant of good faith and fair dealing, negligence/failure to warn, quantum
22 meruit/goods and services rendered, and declaratory relief arising from Aetna's and
23 Gibson's wrongful acts and carelessness.

24 **THE PARTIES**

25 20. KCC is a Delaware limited liability company with its principal place
26 of business in San Rafael, California. KCC's sole member is Kurtzman Carson
27

28

1 Consultants, Inc., a Delaware corporation with its principal place of business in El
2 Segundo, California.

3 21. Aetna is a Pennsylvania corporation with its principal place of
4 business in Connecticut.

5 **JURISDICTION AND VENUE**

6 22. The Court has subject matter jurisdiction over this action pursuant to
7 28 U.S.C. § 1332(a)(1) because the parties are citizens of different states and the
8 amount in controversy exceeds \$75,000, exclusive of interest and costs.

9 23. The Court has personal jurisdiction over Aetna because Aetna has
10 purposefully availed itself of the privilege of conducting business in California
11 insofar as Aetna currently maintains systematic and continuous business contacts
12 with this State and Aetna expressly agreed in the contract at issue that the contract
13 would be construed in accordance with the laws of the State of California.
14 Furthermore, the claims at issue in this case arose out of a contract offered, entered
15 into, and to be performed (at least in part) in California, and Aetna engaged in
16 sufficient contacts with California (including litigation and settlement of an earlier
17 related putative class action in California and the direction of resulting mailings
18 into California) to give rise to these claims in California in such a way as to
19 establish specific jurisdiction and satisfy the Due Process Clause.

20 24. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1) and
21 (2) because Aetna engaged in business in this District; has an office or agency in
22 this District; committed tortious acts within this District; breached a contract in this
23 District by failing to perform acts required by the contract to be performed in this
24 District; litigated and settled a related putative class action in this District that led to
25 this lawsuit; and/or is engaged in substantial and not isolated activity in this
26 District.

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2
3 **FACTUAL BACKGROUND**

4 **Aetna’s Public Commitment to Protect the Privacy of Its Insureds**

5 25. Aetna is a Covered Entity within the meaning of HIPAA and is thus
6 required to comply with the HIPAA federal standards that govern the privacy of
7 individually identifiable health information, or PHI.

8 26. Indeed, on Aetna’s publicly accessible Web site, Aetna acknowledges,
9 among other things, that HIPAA (in addition to other federal and state privacy
10 laws) requires health care companies like Aetna to keep patient information
11 confidential. *See Privacy FAQs*, Aetna, [https://www.aetna.com/faqs-health-](https://www.aetna.com/faqs-health-insurance/about-us-privacy-faqs.html)
12 [insurance/about-us-privacy-faqs.html](https://www.aetna.com/faqs-health-insurance/about-us-privacy-faqs.html) (last visited January 29, 2018). According to
13 Aetna’s Web site, confidential patient information would include “[a]nything your
14 doctors, nurses, and others put in your medical record.” *Id.* The Web site claims
15 that an Aetna member could “[d]ecide if you want to give your permission before
16 your information can be used or shared for certain purposes,” as well as “[g]et a
17 report on when and why your information was shared for certain purposes.” *Id.*

18 27. Acknowledging its responsibility to protect the privacy of its insureds,
19 according to Aetna’s Web site, Aetna has the responsibility to:

- 20 • Put safeguards in place to protect your information;
- 21 • Limit the use and disclosure of your information to the minimum
22 needed to accomplish our goals;
- 23 • Enter into agreements with our contractors and others to make sure
24 they use and disclose your information properly and safeguard it
25 appropriately;
- 26 • Have procedures in place to limit who can see your information; and
- 27 • Hold training programs for employees to learn how to protect your

28 information.¹

¹ *See* <https://www.aetna.com/faqs-health-insurance/about-us-privacy-faqs.html> (last visited January 29, 2018).

1 28. Aetna also claims that it has “extensive operational and technical
2 protections in place” to protect its members’ PHI and that it is “continually
3 improving and updating as part of [Aetna’s] existing commitment to information
4 privacy and compliance with legislation such as HIPAA and state privacy laws.”²

5 29. Aetna’s own policy, “Use and Disclosure of Member Protected Health
6 Information (‘PHI’),” claims that Aetna “will safeguard member PHI from
7 impermissible and unauthorized use and disclosure in accordance with federal and
8 state law, the Company’s Code of Conduct, and industry standards.”

9 **Aetna’s History of Failing to Protect the Privacy of Its Insureds**

10 30. Notwithstanding Aetna’s recognition of its obligation as a Covered
11 Entity to comply with HIPAA and protect the privacy of its insureds, Aetna
12 consistently fails to adequately safeguard the personal information and PHI of its
13 insureds.

14 31. In 2010, Aetna reported a data breach to the Office of Civil Rights for
15 the U.S. Department of Health and Human Services, which enforces HIPAA.
16 Aetna reported that the personal information of approximately 2,300 individuals
17 had been exposed because of a server breach.

18 32. In approximately November 2014, Aetna announced a policy change
19 that barred its health insurance enrollees diagnosed with HIV/AIDS or taking
20 HIV/AIDS preventative medications from filling their prescriptions at their local
21 brick and mortar pharmacy. Instead, these enrollees were required to obtain their
22 medications by mail order. (The change in policy is referred to herein as “The
23 Program.”)

24 33. Mail order delivery of medications often required refrigerated
25 containers to be delivered to a person’s home or office, thus potentially disclosing
26 the enrollee’s medical condition to third parties. The Program raised serious
27

28 ² See *Personal Health Record (PHR) FAQs*, Aetna. <https://www.aetna.com/faqs-health-insurance/personal-health-record-faqs.html> (last visited January 29, 2018).

1 privacy implications because of the social stigma that could be associated with the
2 disease.

3 34. In December 2014, a class action lawsuit was filed against Aetna
4 alleging that The Program put patients' health and privacy at risk. *See DOE v.*
5 *Aetna*, Case No. 14-cv-02986 (S.D. Ca.) (the "*Doe* Litigation").

6 35. In December 2015, another class action lawsuit was filed against one
7 of Aetna's subsidiaries, Coventry Health Care, Inc., also alleging that The Program
8 put patients' health and privacy at risk. *See DOE v. Coventry Health Plans*, No. 15-
9 cv-62685 (S.D. Fla.) (the "*Coventry* Litigation").

10 36. On July 8, 2016, the U.S. District Court for the Southern District of
11 California entered a Qualified Protective Order governing, among other things, the
12 confidential treatment and protection of PHI exchanged by the parties in connection
13 with the *Doe* Litigation. *See Doe* Litigation, D.E. 62.

14 37. On June 17, 2016, the U.S. District Court for the Southern District of
15 Florida entered a Qualified Protective Order governing, among other things, the
16 confidential treatment and protection of PHI exchanged by the parties in connection
17 with the *Coventry* Litigation. *See Coventry* Litigation, D.E. 71.

18 38. Approximately two years later, the *Doe* Litigation and the *Coventry*
19 Litigation were resolved. On or about February 27, 2017, the plaintiffs in the *Doe*
20 Litigation and *Coventry* Litigation executed a settlement agreement with Aetna (the
21 "*Doe/Coventry* Settlement Agreement").

22 39. In the *Doe/Coventry* Settlement Agreement, Aetna agreed to, among
23 other things: (1) send a notice to all affected consumers enrolled in Aetna plans
24 advising them of their right to obtain HIV/AIDS medications from a community
25 pharmacy of their choice, where privacy would be protected (the "Notice" or
26 "Notices"); and (2) send a separate notice offering certain individuals the right to
27 receive compensation for incurred out of pocket losses.
28

1 40. The *Doe/Coventry* Settlement Agreement specifically places the
2 responsibility for sending the Notice on Aetna.

3 41. On March 3, 2017, the parties in the *Coventry* Litigation filed a
4 Stipulation of Voluntary Dismissal, thereby terminating the *Coventry* Litigation and
5 the Qualified Protective Order governing PHI disclosed in connection with the
6 *Coventry* Litigation.

7 42. On March 3, 2017, the parties in the *Doe* Litigation filed a Stipulation
8 of Voluntary Dismissal. On March 6, 2017, the U.S. District Court for the
9 Southern District of California entered an Order dismissing the *Doe* Litigation and
10 terminating the Qualified Protective Order governing PHI disclosed in connection
11 with the *Doe* Litigation.

12
13 **After Allowing the Qualified Protective Orders to Terminate, Aetna Engages**
14 **KCC to Send the Notice to Aetna Insureds Taking HIV/AIDS Medications.**

15 43. Under HIPAA, a “Business Associate” is a person or entity that
16 performs functions or activities on behalf of, or provides services to, a Covered
17 Entity that involve access by the Business Associate to PHI. The HIPAA rules
18 require that Covered Entities (such as Aetna) enter into contracts with their
19 Business Associates (such as Gibson) to ensure that the Business Associates will
20 appropriately safeguard PHI.

21 44. Gibson was Aetna’s Business Associate for purposes of HIPAA and
22 performed services on Aetna’s behalf.

23 45. One of Aetna’s primary lawyers in the *Doe/Coventry* litigation and
24 settlement process, Heather Richardson, is a partner at Gibson’s Los Angeles office
25 who specializes in health care, insurance, and class action matters and has a Masters
26 of Public Health with a specialization in health services.

1 46. In April or May 2017, Aetna, through its counsel and Business
2 Associate Gibson, engaged KCC to process and carry out the Notices contemplated
3 by the *Doe/Coventry* Settlement Agreement.

4 47. On or about May 23, 2017, KCC issued a proposal in connection with
5 Aetna's request that KCC administer the mailing of the Notices (the "Proposal")
6 (A copy of the Proposal is attached hereto as Exhibit A.)

7 48. The Proposal provided that KCC would print and mail the Notices and
8 the claims forms as set forth in the *Doe/Coventry* Settlement Agreement. (*See*
9 *generally* Proposal.)

10 49. The Proposal was addressed to both Gibson and counsel for the
11 plaintiffs in the *Doe* Litigation and *Coventry* Litigation, Whatley Kallas
12 ("Whatley"). While the Proposal contained a signature line for Whatley, Whatley
13 never signed the Proposal. But by proceeding with the engagement without
14 contesting or negotiating any changes to the terms and conditions of that proposal,
15 Aetna, Gibson and Whatley agreed to and accepted the Proposal.

16 50. In connection with the engagement, KCC communicated almost
17 exclusively with Aetna's counsel, Gibson, and Whatley.

18 51. The Proposal attached and referenced KCC's standard Terms and
19 Conditions (the "KCC Agreement"), which provided that KCC would provide
20 services to "Client" as defined in the May 23, 2017 proposal. (A copy of the KCC
21 Agreement is attached hereto as Exhibit B.)

22 52. The KCC Agreement provides, "KCC agrees to provide the services
23 set forth in the Proposal attached hereto (the 'Services')." (KCC Agreement § 1.)
24 The KCC Agreement also provides that "KCC will often take direction from
25 Client's representatives, employees, agents and/or professionals (collectively, the
26 'Client Parties') with respect to the Services. **The parties agree that KCC may**
27 **rely upon, and Client agrees to be bound by, any direction, advice or**
28

1 **information provided by the Client Parties to the same extent as if provided by**
2 **the Client.”** (*Id.*) (Emphasis added.)

3 53. The KCC Agreement contains the following indemnification
4 provision:

5 Client shall indemnify and hold KCC, its affiliates, members, directors,
6 officers, employees, consultants, subcontractors and agents (collectively, the
7 “Indemnified Parties”) harmless, to the fullest extent permitted by applicable
8 law, from and against any and all losses, claims, damages, judgments and
9 expenses (including reasonable counsel fees and expenses) (collectively,
10 “Losses”) resulting from, arising out of or related to KCC’s performance of
11 Services. Such indemnification shall exclude Losses resulting from KCC’s
12 gross negligence or willful misconduct. Without limiting the generality of
the foregoing, Losses include any liabilities resulting from claims by any
third-parties against any Indemnified Party.

13 (KCC Agreement § 8.)

14 54. The KCC Agreement also provides:

15 Except as provided herein, KCC’s liability to Client or any person making a
16 claim through or under Client or in connection with Services for any Losses
17 of any kind, even if KCC has been advised of the possibility of such Losses,
18 whether direct or indirect and unless due to gross negligence or willful
19 misconduct of KCC, shall be limited to the total amount billed or billable for
20 the portion of the particular work which gave rise to the alleged Loss. In no
21 event shall KCC’s liability for any Losses, whether direct or indirect, arising
22 out of the Services exceed the total amount billed to Client and actually paid
23 to KCC for the Services. In no event shall KCC be liable for any indirect,
24 special or consequential damages such as loss of anticipated profits or other
25 economic loss in connection with or arising out of the Services. Except as
expressly set forth herein, KCC makes no representations or warranties,
express or implied, including but not limited to, any implied or express
warranty of merchantability, fitness or inadequacy for a particular purpose or
use, quality, productiveness or capacity. The provisions of this Section 8
shall survive termination of Services.

26 (*Id.*)

1 **Aetna’s and Gibson’s Carelessness Results in the Disclosure of the Fact That**
2 **Aetna Insureds Across the Country Were Taking HIV/AIDS Medications.**

3 55. Notwithstanding that Aetna’s counsel Gibson touts itself as an expert
4 in the field of data privacy and Aetna’s own privacy policy claims that Aetna “will
5 safeguard member PHI from impermissible and unauthorized use and disclosure in
6 accordance with federal and state law,” Aetna and Gibson transferred Aetna’s
7 insureds’ PHI to KCC in a reckless, careless, and negligent fashion that resulted in
8 the public disclosure of the fact that thousands of Aetna insureds were taking
9 HIV/AIDS medications.

10 56. In late July 2017, thousands of Notices were sent on Aetna’s behalf to
11 Aetna insureds who had submitted claims for HIV/AIDS medications, in envelopes
12 with a glassine window that exposed the insureds’ HIV/AIDS status or the fact that
13 the insureds were taking HIV/AIDS preventative medications.

14 57. Aetna and Gibson knew that windowed envelopes were being used in
15 the mailings in question. KCC provided samples of the letters to Aetna and Gibson,
16 and those letters demonstrated that windowed envelopes would be used. Aetna and
17 Gibson approved the form and content of the letters before they were transmitted.

18 58. Aetna’s approval of the letters and the windowed envelopes is
19 consistent with the reckless, careless, and negligent conduct of Aetna and its
20 counsel throughout the engagement.

21 59. Aetna and Gibson failed to implement appropriate protective measures
22 to ensure the protection and confidentiality of the Aetna patient information at issue
23 in the Notices. Aetna and Gibson failed to inform KCC that Aetna and Gibson had
24 not implemented appropriate protective measures to ensure the protection and
25 confidentiality of the Aetna patient information that was the subject of the Notices.

26 60. Aetna and Gibson allowed the Qualified Protective Orders in the *Doe*
27 Litigation and *Coventry* Litigation to terminate on March 3 and 6, 2017.

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1 61. Aetna — as a party in the *Doe* Litigation and *Coventry* Litigation —
2 knew that the Qualified Protective Orders in the *Doe* Litigation and *Coventry*
3 Litigation had terminated upon dismissal of the cases.

4 62. Gibson — as counsel of record for Aetna in the *Doe* Litigation and
5 *Coventry* Litigation — knew that the Qualified Protective Orders in the *Doe*
6 Litigation and *Coventry* Litigation had terminated upon dismissal of the cases.

7 63. Notwithstanding this direct knowledge that **no** Qualified Protective
8 Order was in place, Aetna and Gibson failed to inform KCC of this fact before
9 providing insured PHI to KCC. And Aetna and Gibson failed to implement any
10 protective measures similar to a Qualified Protective Order before providing the
11 PHI to KCC.

12 64. In the absence of any such protective measures (a Qualified Protective
13 Order or legally similar agreement to protect the PHI), Aetna and Gibson provided
14 PHI to KCC without the consent of all insureds whose PHI was at issue, in
15 violation of HIPAA.

16 65. On May 24, the day after KCC sent the Proposal to Aetna's counsel,
17 Gibson, Gibson partner Richardson emailed a data set of Aetna insured PHI to
18 KCC. The information shared by Richardson with KCC included the following
19 data types: MEMBER_ID, DISP_DT, NDC_CD, PRODUCT_NM, DISP_YRMO,
20 CUST_SEGMENT_DESC, SCRIPTS, PAY_ALLOW_AMT, PAY_PAID_AMT,
21 SRV_COPAY_AMT, MEMBER_COPAY, APP_TO_PER_DED_AMT,
22 MEM_NM, ADDRESS1, ADDRESS2, CITY, STATE, and ZIP_CD.

23 66. In further violation of HIPAA, Aetna and Gibson sent KCC far more
24 information than was minimally necessary to perform its job function, *i.e.*, mail
25 notices to a list of people.

26 67. Moreover, some of the insured information was **not** encrypted,
27 notwithstanding the fact that Aetna and Gibson have the technical expertise to
28

1 encrypt such information. Information specific to Coventry insureds was not
2 password protected, nor was it sent via a secure file transfer protocol. Instead,
3 Gibson simply emailed Coventry insured information in an unsecured fashion from
4 Gibson to KCC.

5 68. Aetna, as a Covered Entity under HIPAA, knew or should have known
6 that sending the Aetna insured data to KCC in an unsecure and reckless fashion
7 compromised the privacy and confidentiality of Aetna's insureds.

8 69. Aetna's Business Associate, Gibson, knew or should have known
9 better and had a duty under HIPAA to know that overdisclosing the PHI of Aetna
10 insureds and sending the Coventry patient data to KCC in an unsecure and reckless
11 fashion compromised the privacy and confidentiality of Aetna's and Coventry's
12 insureds.

13 70. In fact, the legal journal *Law360* recently named Gibson a "Privacy
14 Practice Group of the Year." See January 30, 2018 article, "Privacy Group of the
15 Year: Gibson," *Law360*, attached hereto as Exhibit C.) Given that plaudit, Gibson
16 presumably had the knowledge base to understand that without a Qualified
17 Protective Order, Gibson and Aetna should not have shared PHI with KCC.
18 Moreover, they should have known that even if there had been a Qualified
19 Protective Order, they should have shared only the data minimally necessary to
20 perform the notice function and should have password-protected and encrypted
21 every email transmission containing PHI.

22 71. Instead, Aetna and Gibson shared insured PHI without password
23 protection or encryption, shared far more data than was necessary to perform the
24 notice function, and never warned or notified KCC that the insured information
25 Aetna and Gibson provided to KCC to effectuate the mailings was being provided
26 by Aetna and Gibson in violation of their Covered Entity and Business Associate
27 obligations under HIPAA.
28

1 72. Between May 23 and approximately July 20, 2017, KCC worked with
2 Whatley and Aetna counsel Gibson to prepare the Notices and other mailings. Both
3 Gibson and Whatley provided feedback and approval on the language in the
4 Notices, but only Aetna and Gibson provided PHI and insureds' contact
5 information to KCC.

6 73. Additionally, when Whatley made suggestions to the "Frequently
7 Asked Questions" to be included in the Notices, Aetna rejected the suggestions and
8 Gibson provided the final versions that were ultimately mailed by KCC.

9 74. At no time before providing the PHI to KCC did Gibson or Aetna ask
10 KCC whether it might be willing to sign a Business Associate Agreement relating
11 to the treatment and/or protection of PHI.

12 75. In fact, only after this incident became public did Gibson ask KCC to
13 sign a Qualified Protective Order (at which time it was too late because the
14 Qualified Protective Orders had already expired in the two underlying class actions
15 that had been settled privately without court approval) or to sign a Business
16 Associate Agreement.

17 76. At no time before provision of the PHI to KCC did Gibson or Aetna
18 request that KCC enact protective measures to safeguard the PHI of the
19 Aetna/Coventry insureds.

20
21 **Multiple Lawsuits and Governmental Investigations Result From**
22 **Aetna's Carelessness and Aetna Attempts to Settle.**

23 77. From July 30, 2017 to the present, no fewer than ten lawsuits have
24 been filed against Aetna based upon the disclosure of the HIV/AIDS status of the
25 Aetna insureds, as follows:

- 26 • *Andrew Beckett v. Aetna, Inc.* et al., Case No. 2:17-cv-03864 (E.D. Pa.) (the "Beckett Litigation");
- 27 • *S.A. v. Aetna, Inc.*, Case No. BC674088 (Cal. Sup. Ct. L.A. Cty., Aug.
28 28, 2017), *removed to* U.S. District Court for the Central District of

1 California, Case No. 17-cv-7264, *transferred to* U.S. District Court for
 2 the Eastern District of Pennsylvania, related to Case No. 2:17-cv-
 3 03864 (“SA Litigation”)

- 4 • *R.H. v. Aetna Health, Inc., et al.*, Case No. 2:17-cv-04566-MMB (E.D.
 Pa.) (the “R.H. Litigation”);
- 5 • *Doe v. Aetna, Inc. et al.*, Case No. 3:17-cv-01947 (C.D. Cal.) (the
 6 “Doe 1 Litigation”);
- 7 • *Doe v. Aetna, Inc.*, Case No. 3:17-cv-5191 (N.D. Cal.) (the “Doe 2
 8 Litigation”);
- 9 • *Doe v. Aetna, Inc. et al.*, Case No. 3:17-cv-1751 (D. Conn.) (the
 10 “Connecticut Litigation”); and
- 11 • *Doe v. Aetna, et al.*, Case No. 4:17-cv-929 (W.D. Missouri) (the
 12 “Missouri Litigation”);
- 13 • *D.L. v. Aetna, Inc. et al.*, Case No. 2:17-cv-8478 (C.D. Cal.);
- 14 • *Doe v. Aetna, et al.*, Case No. 17-cv-7167 (N.D. Cal.); and
- 15 • *Smith v. Aetna, Inc. et al.*, Case No. 2:17-cv-12668 (D. N.J.).

16
 17 78. Moreover, the Office of Civil Rights of the Department of Health and
 18 Human Services, which enforces HIPAA, has opened investigations related to the
 19 incident, and various state attorneys general have opened investigations of Aetna.

20 79. For instance, the New York Attorney General commenced an
 21 investigation pursuant to New York Executive Law Section 63(12) into “certain
 22 privacy breaches by Aetna, Inc. (‘Aetna’) through its mailing of material which
 23 improperly disclosed member Protected Health Information.” (The “NY AG
 24 Action.”)

25 80. In December 2017, Aetna reached a tentative settlement agreement in
 26 the *Beckett* Litigation and *S.A.* Litigation. Aetna agreed to resolve these lawsuits,
 27 as well as the *Doe 1*, *Doe 2*, *R.H.* and Connecticut Litigation, by paying a total of
 28 \$17.16 million to the plaintiffs and providing certain non-monetary relief, including

1 implementing a “best practices” policy for use of PHI in litigation (the “Beckett
2 Settlement”). *See* Beckett Settlement, attached as Exhibit D, at ¶¶ 4.1, 5.)

3 81. KCC was not named as a party in the *Beckett* Litigation and did not
4 participate in any of the settlement discussions giving rise to the *Beckett* Settlement.

5 82. On or about January 19, 2018, Aetna reached a settlement of the NY
6 AG Action with the New York Attorney General (the “NY AG Settlement”). (A
7 copy of the January 19, 2018 NY AG Settlement is attached hereto as Exhibit E.)
8 In the NY AG Settlement, Aetna agreed to pay a penalty to the State of New York
9 totaling \$1.15 million. (Ex. E ¶ 31.)

10 83. Aetna also agreed to modify its “Standard Operating Procedures for
11 Print/Mailing Quality-Prevention of PHI/unwanted disclosures” and “Use of
12 Protected Health Information in Litigation — Best Practices Policy” (the “Standard
13 Operating Procedures”). (*Id.* ¶ 22.)

14 84. Aetna also agreed to provide the New York Attorney General with
15 copies of audit and compliance reports and submit to monitoring by an independent
16 consultant for a period of two years. (*Id.* ¶¶ 29, 30.)

17 85. Aetna’s agreement to modify its Standard Operating Procedures and
18 subject itself to audit and compliance reporting with respect to prevention of
19 unwanted disclosures of PHI and use of PHI in litigation demonstrates that the
20 procedures Aetna had in place that it used in directing KCC to mail the Notices
21 were inadequate.

22 86. Additionally, had Aetna implemented the new procedures earlier, this
23 incident almost certainly would have never occurred.

24 87. For instance, Aetna has agreed to implement production attestations,
25 procedures for making sure information is not inadvertently disclosed through an
26 envelope window, training on print mailing procedures, process and control audits,
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28

1 and other new practices and procedures, any of which could have and should have
2 been implemented before this incident occurred. (*Id.* at ¶ 22).

3 **Aetna’s Additional , Repeated Failures to Protect the Privacy of Its Insureds**

4 88. The NY AG Settlement acknowledged additional failures by Aetna to
5 adequately protect the privacy of its insureds.

6 89. In September 2017, Aetna identified 163 members residing in New
7 York to receive educational materials based on their Atrial Fibrillation (“AFib”)
8 diagnosis. On September 25, 2017, Aetna sent each of these members a mailing
9 containing such educational materials. (NY AG Settlement ¶ 16.)

10 90. Displayed on each envelope was the logo “IMPACT-AFIB,” which
11 could have been interpreted as indicating that the recipient member had an AFib
12 diagnosis. Aetna reported this incident to the OCR. (*Id.* ¶ 17.)

13 91. KCC was not involved in the AFib mailing.

14 92. Within 24 months of both of these incidents, Aetna reported **three**
15 other breaches of unsecured health information to the Department of Health &
16 Human Services (“HHS”). In total, these incidents reported by Aetna affected over
17 25,000 individuals. (*Id.* ¶ 18.)

18 93. For example, in April 2017, Aetna reported a data breach that exposed
19 the PHI, including names, identification numbers, member numbers, provider
20 information, claim payment amounts, dates of service, procedure codes, and service
21 codes of thousands of its insureds. (*See* “Aetna Error Sees PHI of 5,000 Individuals
22 Exposed Online, HIPAA JOURNAL June 27, 2017, attached as Exhibit F.)

23 94. KCC was not involved in any of the additional three incidents reported
24 to HHS.

25 95. In addition, in December 2016, Aetna Signature Administrators
26 (“ASA”) reported another incident that exposed the Social Security numbers of
27 over 18,000 insureds. In this incident, an ASA employee mailed a CD containing
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1 sensitive health plan members' information to another ASA employee and the CD
2 was lost. (See "Lost CD Contained Social Security Numbers of 18,854 Health Plan
3 Members," HIPAA JOURNAL, December 8, 2016, attached as Exhibit G.)

4 96. The CD contained birth dates, Social Security numbers, and in some
5 instances, names and addresses of Aetna insureds. (*Id.*)

6 97. KCC was not involved in the above incident, either.

7 **Aetna Demands Contribution and/or Indemnification From KCC.**

8 98. Notwithstanding the New York Attorney General's recognition that
9 Aetna failed to maintain adequate measures to protect any of the PHI that Aetna
10 and Gibson provided to KCC, Aetna has demanded contribution and/or
11 indemnification from KCC.

12 99. On October 11, 2017, Aetna, through its counsel, sent KCC's counsel
13 a letter demanding KCC to indemnify Aetna from and against "Losses" caused by
14 or relating in any way to the "Incident."

15 100. On October 17, 2017, KCC's counsel responded to Aetna's October 11
16 letter stating that KCC is **not at fault** or responsible for any "Losses" defined in the
17 October 11 letter. KCC's counsel explained in detail why Aetna as a Covered
18 Entity under HIPAA and Gibson as Aetna's BAA — not KCC — repeatedly failed
19 to carry out their responsibility to maintain the privacy and security of the PHI of
20 Aetna insureds.

21 101. For example:

- 22
- 23 • Aetna, through its counsel Gibson, provided Aetna insured PHI to
24 KCC without ensuring that a Qualified Protective Order was in place to
25 govern transfer and handing of the PHI. Unbeknownst to KCC, Aetna had
26 allowed the two Qualified Protective Orders in the two underlying putative
27 class actions to expire. Because the Qualified Protective Orders had expired,
28 Aetna and Gibson should have never provided the PHI to KCC in the first
place without additional protective measures (for which Aetna and Gibson
were responsible).

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- In the absence of such protective measures, Aetna and Gibson provided PHI to KCC without the consent of all insureds whose PHI was at issue, in violation of HIPAA.
- In addition to failing to implement appropriate protective measures, Aetna and Gibson provided KCC far more PHI than was minimally necessary for KCC to perform its job function, further evidencing Aetna’s and Gibson’s insensitivity to HIPAA throughout the process.
- Aetna and Gibson provided KCC PHI that was not encrypted in transmission, when the capabilities to encrypt were available to them, further demonstrating a lack of observation of the obligations to protect PHI under HIPAA.
- Aetna and Gibson knew that windowed envelopes were being used for all the mailings in question. KCC provided samples of the letters to Aetna and Gibson, and those letters demonstrated that windowed envelopes would be used. Aetna and Gibson approved the form and content of the letters before they were transmitted
- Neither Aetna nor Gibson ever expressed any concern to KCC about the privacy and security of the PHI in the letters or addressed special handling and mailing protocols.

102. In the October 17, 2017 letter, KCC declined Aetna’s demand for contribution and/or indemnification of the “Losses” defined in the October 11, 2017 letter.

103. In the October 17, 2017 letter, KCC demanded pursuant to Section 8 of the KCC Agreement that Aetna hold harmless, defend, and indemnify KCC and any of its affiliates against any claims, fees, expenses, losses, damages, restitution, fines, penalties, injunctions, and/or any other relief, censure, or voluntary measures arising out of or related to this matter, any related regulatory proceedings, and/or any private litigation.

104. On January 8, 2018, the plaintiffs in the putative class action in the Missouri Litigation filed a motion for leave to file an Amended Complaint. In the proposed Amended Complaint, the plaintiffs specifically name KCC as a defendant.

1 In the proposed Amended Complaint, the plaintiffs seek liquidated damages,
2 exemplary damages, attorneys' fees and court costs against KCC.

3 105. On October 23, 2017, Aetna's counsel rejected KCC's indemnity
4 demand.

5 106. Three months later, Aetna entered into the *Beckett* Settlement and the
6 NY AG Settlement.

7 107. On January 19, 2018, Aetna, through its counsel, sent KCC's counsel
8 another letter requesting indemnification, reimbursement and/or contribution from
9 KCC.

10
11 **FIRST CAUSE OF ACTION**
12 **(Breach of Contract and the Implied Covenant of Good Faith and Fair**
13 **Dealing)**

14 108. KCC incorporates Paragraphs 1 through 107 by reference as if fully set
15 forth herein.

16 109. Aetna, through its agent and Business Associate Gibson, entered into a
17 valid and legally enforceable Agreement with KCC.

18 110. The KCC Agreement and the indemnification provisions therein are
19 valid and enforceable.

20 111. In exchange for its commitment to indemnify and hold KCC harmless
21 for any Losses (as defined in the KCC Agreement), Aetna received adequate and
22 sufficient consideration, including the Services provided by KCC in printing and
23 mailing the Notices and administering the settlement claims provided for in the
24 *Doe/Coventry* Settlement Agreement.

25 112. Aetna has breached the KCC Agreement by refusing to indemnify
26 KCC and by making a demand that KCC indemnify Aetna for losses relating to the
27 July and August 2017 mailings.

28 113. The foregoing breaches and continuing breaches have directly and
proximately caused and will continue to cause KCC damages, including, but not

1 limited to, KCC's cost of defending the Missouri Litigation and defending against
2 Aetna's spurious demand for indemnification. Aetna has committed an egregious
3 breach of the implied covenant of good faith and fair dealing attendant to any
4 contract through Aetna's attempt to improperly shift to KCC penalties imposed on
5 Aetna.

6 **SECOND CAUSE OF ACTION**
7 **Negligence/Failure to Warn**
8 **(in the alternative to the First Cause of Action)**

9 114. KCC incorporates Paragraphs 1 through 107 by reference as if fully set
10 forth herein.

11 115. Aetna, as a Covered Entity under HIPAA, owed a duty to provide
12 KCC with PHI of the Aetna insureds who were to receive the Notices in a secure
13 fashion with sufficient protective measures to maintain the security and privacy of
14 the PHI of Aetna's insureds.

15 116. Aetna owed a duty to KCC because harm was foreseeable to KCC
16 resulting from Aetna's and Gibson's mishandling of the PHI and failure to properly
17 monitor the mailing.

18 117. Aetna also owed a duty to KCC because it was certain KCC would
19 suffer, and KCC did in fact suffer and will continue to suffer, monetary and
20 reputational injury insofar as KCC was not compensated for its Services, Aetna has
21 improperly shifted blame to KCC, KCC was named in the proposed Amended
22 Complaint in the Missouri Litigation, and KCC's name has appeared in negative
23 media coverage about the Aetna mailing.

24 118. Aetna also owed a duty to KCC because there is a close connection
25 between Aetna's conduct and KCC's injury insofar as KCC would not have been
26 injured but for Aetna's mishandling of the PHI and violations of HIPAA.

27 119. Additionally, Aetna owed a duty to KCC because the moral blame
28 attached to Aetna's malfeasance is high.

1 20. Aetna also owes a duty to KCC because there is a strong public policy
2 in preventing Aetna from behaving in such a reckless, careless and negligent
3 fashion and further preventing Aetna from shifting blame to others not responsible
4 and offsetting penalties paid (including but not limited to the penalties paid
5 pursuant to the NY AG Settlement).

6 21. Aetna further owes a duty to KCC because the burden on Aetna is
7 minimal and the consequences in the community are positive as a result of
8 imposing a duty on Aetna under these circumstances. Indeed, HIPAA already
9 imposes a duty on Aetna to institute appropriate protective measures to maintain the
10 safety and security of PHI.

11 22. Aetna also owes a duty to KCC because, upon information and belief,
12 there is insurance available for this risk. Aetna, which reported revenues in excess
13 of \$63 billion in 2017 and recently announced its sale to CVS for \$69 billion, can
14 afford any damages awarded by the trier of fact.

15 23. Aetna, as a Covered Entity under HIPAA, knew or reasonably should
16 have known that sending Aetna insureds' PHI to KCC without consent from the
17 Aetna insureds and without instituting appropriate protective measures were
18 violations of HIPAA.

19 24. Aetna and Gibson knew that all of the recipients of the Notices had
20 been diagnosed with HIV and/or AIDS or were taking medicine to help prevent
21 HIV and/or AIDS.

22 25. Gibson and Aetna approved the form of the notices that KCC prepared
23 at Gibson's and Aetna's direction, including the use of the windowed envelopes
24 that exposed the HIV/AIDS drug information of the Aetna insureds.

25 26. Aetna knew or reasonably should have known that transmitting the
26 PHI of the Aetna insureds — including their HIV/AIDS medication consumption
27 — would cause harm to KCC if the PHI was disclosed publicly.
28

1 127. Through the NY AG Settlement, by agreeing to modify its “Standard
2 Operating Procedures for Print/Mailing Quality-Prevention of PHI/unwanted
3 disclosures” and “Use of Protected Health Information in Litigation — Best
4 Practices Policy,” Aetna recognizes that Aetna’s procedures for printing and
5 mailing PHI and using PHI in litigation were deficient and substandard.

6 128. Indeed, Aetna and Gibson failed to warn KCC of at least the
7 following:

- 8 • That the Qualified Protective Orders in the *Doe* Litigation and
9 *Coventry* Litigation had expired on March 3 and March 6, 2017;
- 10 • That Aetna and Gibson had failed to enact appropriate protective
11 measures to ensure that the safety and security of the PHI that was the
12 subject of the mailings would be maintained;
- 13 • That in the absence of such protective measures, Aetna and Gibson
14 provided PHI to KCC without the consent of all of the insureds whose PHI
15 was at issue;
- 16 • That Aetna and Gibson had provided KCC far more PHI than was
17 minimally necessary for KCC to perform its job function;
- 18 • That KCC should independently take any protective measures to
19 ensure that the safety and security of the PHI of the insureds at issue would
20 be maintained.

21 129. Aetna’s misconduct is an instance of misfeasance because Aetna
22 created the risk by, *inter alia*, allowing the Qualified Protective Orders in the *Doe*
23 Litigation and *Coventry* Litigation to expire, failing to enact appropriate protective
24 measures in place of the Qualified Protective Orders, and failing to warn KCC that
25 appropriate protective measures were not in place.

26 130. Aetna’s breaches of its duty to warn and duty of due care directly and
27 proximately caused and will continue to cause KCC damages in an amount to be
28 proven at trial and, including, but not limited, KCC’s cost of defending the

1 Missouri Litigation, responding to governmental investigations and inquiries, and
2 defending against Aetna's demand for indemnification.

3 131. Aetna's conduct, in disregard of the rights of KCC, is part of an overall
4 scheme and conspiracy, has been deliberate, willful, oppressive and malicious, is a
5 clear effort by Aetna to avoid or offset any financial penalties or repercussions
6 arising out of Aetna's and Gibson's violations of HIPAA and entitles KCC to
7 exemplary damages pursuant to Section 3294(a) of the California Civil Code.

8 **THIRD CAUSE OF ACTION**
9 **(Quantum Meruit/Goods and Services Rendered)**
10 **(In the Alternative to Count I)**

11 132. KCC incorporates Paragraphs 1 through 107 by reference as if fully set
12 forth herein.

13 133. Aetna and its agent, Gibson, requested that KCC provide services for
14 the benefit of Aetna relating to the Notices.

15 134. Aetna agreed to pay KCC for the above services.

16 135. KCC provided the services to Aetna as requested by Aetna.

17 136. Aetna has failed to compensate KCC for the services it provided in
18 connection with formatting and mailing the Notices.

19 **FOURTH CAUSE OF ACTION**
20 **(Declaratory Judgment pursuant to 28 U.S.C. § 2201(a))**

21 137. KCC incorporates Paragraphs 1 through 107 by reference as if fully set
22 forth herein.

23 138. KCC has a tangible legal interest in the prompt resolution of this
24 matter because it has incurred and continues to incur significant fees relating to its
25 defense of Aetna's demand for indemnification, defense in the Missouri Litigation,
26 and other claims and investigations.

27 139. The indemnification provision in the KCC Agreement is a valid and
28 enforceable contract that requires Aetna to indemnify and hold KCC harmless for

1 any Losses (as defined in the KCC Agreement) relating to the July and August
2 2017 mailing that resulted in exposing the HIV/AIDS status of the Aetna insureds.

3 140. Aetna, through its agent Gibson, is a party to the KCC Agreement, and
4 KCC took direction from and relied upon Gibson as a Client Party.

5 141. Aetna has rejected KCC's request for indemnity pursuant to the KCC
6 Agreement and has demanded that KCC indemnify and/or contribute to Aetna's
7 "Losses" as specified in the October 11, 2017 letter.

8 142. These circumstances present an actual and justiciable controversy
9 between the parties that is not advisory, moot or premature. An immediate and
10 definitive determination of the application and enforceability of the indemnification
11 provision in the KCC Agreement is necessary to resolve the controversy and,
12 thereby, clarify and settle the legal relations between the parties and afford relief
13 from the uncertainty that has arisen from the controversy.

14 WHEREFORE, KCC respectfully requests the Court to enter judgment in its
15 favor on Count IV pursuant to Federal Rule of Civil Procedure 57, 28 U.S.C.
16 § 2201(a), and award the following relief:

- 17 (i) a declaratory judgment that the indemnification provision in the
18 KCC Agreement is valid and enforceable;
- 19 (ii) a declaratory judgment that Aetna is a party to the KCC
20 Agreement;
- 21 (iii) a declaratory judgment that KCC performed its obligations
22 under the KCC Agreement;
- 23 (iv) a declaratory judgment that Aetna is obligated to indemnify and
24 hold KCC, its affiliates, members, directors, officers,
25 employees, consultants, subcontractors and agents harmless
26 from and against any and all losses, claims, damages, judgments
27 and expenses (including reasonable counsel fees and expenses)
28 resulting from, arising out of or related to KCC's performance
of Services relating to the mailing of the Notices pursuant to the
Doe/Coventry Settlement Agreement.

1 (v) costs and expenses incurred in pursuing this action, including
2 reasonable attorneys' fees to the extent permitted by law; and

3 (vi) such other relief as the Court deems just and proper.

4
5 **FIFTH CAUSE OF ACTION**
6 **(Declaratory Judgment Pursuant to 28 U.S.C. § 2201(a))**

7 143. KCC incorporates Paragraphs 1 through 107 by reference as if fully set
8 forth herein.

9 144. KCC has a tangible legal interest in the prompt resolution of this
10 matter because it has incurred and continues to incur significant fees relating to its
11 defense of Aetna's demand for indemnification, defense in the Missouri Litigation,
12 and other claims and investigations.

13 145. The indemnification provision in the KCC Agreement is a valid and
14 enforceable contract that requires Aetna to indemnify and hold KCC harmless for
15 any Losses (as defined in the KCC Agreement) relating to the July and August
16 2017 mailing that resulted in exposing the HIV/AIDS status of the Aetna insureds.

17 146. Aetna, through its agent Gibson, is a party to the KCC Agreement, and
18 KCC took direction from and relied upon Aetna as a Client Party.

19 147. Aetna has rejected KCC's request for indemnity pursuant to the KCC
20 Agreement and has demanded that KCC indemnify and/or contribute to Aetna's
21 "Losses" as specified in the October 11, 2017 letter.

22 148. Instead, Aetna demanded that KCC indemnify, reimburse and/or
23 contribute to Aetna relating to, among other things, the \$17.16 million payment
24 Aetna is obligated to make in connection with the *Beckett* Settlement, the
25 \$1,150,000 penalty Aetna is obligated to make in connection with the NY AG
26 Settlement, and potential damages, penalties and fees relating to the remaining
27 putative class actions and "open investigations" Aetna's counsel referred to in the
28 January 19, 2018 letter.

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149. These circumstances present an actual and justiciable controversy
between the parties that is not advisory, moot or premature. An immediate and
definitive determination of the application and enforceability of the indemnification
provision in the KCC Agreement is necessary to resolve the controversy and,
thereby, clarify and settle the legal relations between the parties and afford relief
from the uncertainty that has arisen from the controversy.

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WHEREFORE, KCC respectfully requests the Court to enter judgment in its
favor on Count V pursuant to Federal Rule of Civil Procedure 57, 28 U.S.C. §
2201(a), and award the following relief:

- (vii) a declaratory judgment that KCC has no obligation to provide indemnity, contribution and/or reimbursement to Aetna under any circumstances;
- (viii) costs and expenses incurred in pursuing this action, including reasonable attorneys' fees to the extent permitted by law; and
- (ix) such other relief as the Court deems just and proper.

PRAYER FOR RELIEF

(All Claims)

WHEREFORE, KCC respectfully requests the Court to enter judgment in its
favor on all Causes of Action and award KCC the following relief:

- A. Compensatory, consequential, incidental, punitive and/or special damages, in an amount to be determined at trial and in an amount sufficient to have a deterrent effect on Aetna;
- B. Exemplary damages pursuant to Section 3294(a) of the California Civil Code;
- C. Pre-judgment and post-judgment interest;
- D. Costs of suit incurred herein, including reasonable attorneys' fees and expenses;

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- E. Declaratory judgments as set forth above; and
 - F. Such other and further relief as the Court deems just and proper.
- KCC hereby demands a trial by jury.

Dated: February 6, 2018 KCC CLASS ACTION SERVICES, LLC

By: /s/ Christopher R. Ramos
Christopher R. Ramos

VEDDER PRICE (CA), LLP
Christopher R. Ramos (SBN 301556)
cramos@vedderprice.com
125 Century Park East, Suite 1900
Los Angeles, California 90067
T: +1 424-204-7700
F: +1 424 204-7702

VEDDER PRICE P.C.
Blaine C. Kimrey (to seek admission *pro hac vice*)
bkimrey@vedderprice.com
Jeanah Park (to seek admission *pro hac vice*)
jpark@vedderprice.com
222 N. LaSalle Street
Chicago, Illinois 60601
T: +1 312-609-7500
F: +1 312-609-5001