



May 22, 2018

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Re: *John Doe, et al. v. Aetna, Inc., et al.*
Contra Costa Superior Court Case No. MSC17-02082
Motion to Disqualify and Other Threatened Retaliation

Dear Mr. Kanny:

We write on behalf of Consumer Watchdog and Whatley Kallas LLP. In *Doe v. Aetna Inc. et al*, Case No. 3:14-cv-02986-LAB (“Aetna Privacy Breach #1”), effective February 27, 2017, we reached a Settlement Agreement confirming Aetna would not mandate that any person must obtain their HIV medications by mail order, which among other issues violated HIV patients’ privacy.

We were compelled to sue the company a second time on behalf of one of the four John Doe plaintiffs in the first action because, astoundingly, in the process of notifying certain Aetna members of the settlement of that action, Aetna exposed those same enrollees’ personal health information through the use of an envelope with an oversized glassine window that revealed each recipient’s HIV status (“Aetna Privacy Breach #2”). An example is attached to the Complaint filed in this action.

You’ve advised us that Aetna will attempt to disqualify Consumer Watchdog and Whatley Kallas LLP from their continuing representation of John Doe in the Aetna Privacy Breach #2 litigation. You have also threatened to file suit against us. This letter responds to those threats.

The Local Rules of this Court require that Aetna meet and confer in good faith with lawyers for Consumer Watchdog and Whatley Kallas LLP before bringing a motion to disqualify counsel and deprive our client, John Doe, of his selected representation. For the reasons discussed below, Aetna’s threatened motion to disqualify would be in bad faith.

Since Aetna and its various outside counsel first suggested in August 2017 that lawyers for Consumer Watchdog and Whatley Kallas LLP were somehow responsible for its most recent privacy breach, we have emphatically disputed both the factual and legal basis for this assertion, citing communications with Aetna in our and your possession as well as documents from KCC unequivocally establishing that Aetna and its outside counsel are solely responsible for the breach. On multiple separate occasions, we have requested Aetna provide any evidence in its possession

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pertaining to such a claim, and we have explained how the factual bases for such claims are demonstrably false.

In our telephonic conferences on May 9 and May 16, we again pressed you to provide any evidence that lawyers for Consumer Watchdog and Whatley Kallas LLP were responsible in any way for this disclosure. Aetna has repeatedly refused to provide such information, even as it accepted responsibility for the second privacy breach in an agreement with the Office of the New York Attorney General, dated January 25, 2018. Aetna also quickly entered into a settlement of a national class action brought by other Aetna members (*Beckett v. Aetna, Inc. et al.* (Case No. 2:17-cv-03864 (JS) (E.D. Pa., filed Aug. 28, 2017)). Information concerning the breach obtained through discovery, if any, in that matter remains confidential.

Your unsatisfactory responses to our request for information has been nothing more than a vague assertion that Consumer Watchdog and Whatley Kallas LLP were “partly or completely responsible” for Aetna’s second privacy breach because, according to Aetna:

(1) Consumer Watchdog and Whatley Kallas LLP lawyers insisted as part of the settlement of Aetna Privacy Breach #1 that Aetna *issue notices* to its customers informing them of the benefits of the settlement (which was necessary since Aetna repeatedly refused our requests to voluntarily provide notice of the changes in its practices, but did not make us legally responsible for how Aetna delivered the notices to its own customers);

(2) Consumer Watchdog and Whatley Kallas LLP lawyers *recommended* Aetna employ the settlement administrator (KCC) (based on that company’s prior experience as the settlement administrator in similar settlements; Aetna and its counsel made the final decision to employ KCC and remained responsible for ensuring that its customers’ personal health information—in Aetna’s and not our possession—was properly handled in accordance with orders entered in Aetna Privacy Breach #1);

(3) Lawyers for Consumer Watchdog and Whatley Kallas LLP reviewed and edited the *text* of the notices (even though neither Aetna, its counsel, nor KCC ever shared with us the form of the envelope to be used in connection with the notices, and we never received nor handled Aetna’s customers’ personal health information); and,

(4) A retainer agreement for KCC, which proposed the use of an envelope with *no window*, contained a signature line for an attorney for Whatley Kallas LLP (which was never signed by him, since that was an agreement between Aetna and KCC, not counsel, and in any event gave no reason to believe customers’ personal health information would be visible).

We do not hesitate to repeat our incredulity at these arguments, which, far from evidencing some “smoking gun” that we were otherwise unaware of, did not even put Consumer Watchdog and Whatley Kallas LLP lawyers at the scene of Aetna’s crime.

We have also pointed out that Aetna’s attempt to blame lawyers from Consumer Watchdog and Whatley Kallas LLP directly conflicts with communications from Aetna in our possession and with the allegations set forth in Aetna’s lawsuit against KCC and in its defense of claims brought by KCC. They are also contradicted by extensive findings made by the Attorney General of New

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York in his enforcement action against Aetna. Furthermore, neither Consumer Watchdog nor Whatley Kallas LLP lawyers ever possessed Aetna's members' personal health information. The personal health information was in Aetna's sole custody, and Aetna cannot shift to its opposing counsel its statutory and court-ordered responsibility to handle that information properly or avoid liability for failing to do so. To the extent Aetna claims it somehow relied on lawyers for Consumer Watchdog or Whatley Kallas LLP to protect that information, that would be a concession that Aetna failed to fulfill its legal responsibilities and is solely responsible for any lack of oversight.

As a gesture of our good faith, during our last meet and confer call we once again proposed a complete exchange of all information and communications possessed by both the parties and their counsel concerning the dissemination of the settlement notices. It is quite telling that, once again, both Aetna and you have failed to take advantage of that offer.

It is clear Aetna has absolutely no evidentiary support for its spurious claim against lawyers for Consumer Watchdog and Whatley Kallas LLP. Nor is there any reasonable basis for Aetna to argue that such evidence would be developed through discovery (especially when we have offered to exchange the relevant evidence now). We've carefully reviewed everything in our possession and there is nothing to support Aetna's claims. To the contrary, it demonstrates that lawyers for Consumer Watchdog and Whatley Kallas LLP bear no responsibility for Aetna's use of an oversized glassine window in disseminating the settlement notices.

We have also reviewed the few cases you cited during our discussion. Based on these and our additional research, it is clear the legal contentions upon which Aetna bases its threatened claims are neither warranted under existing law nor do they constitute a non-frivolous argument that the law should be modified in some way.

Based upon the complete dearth of factual and legal support for Aetna's claims, we have concluded Aetna's principal strategy is to concoct a series of unsubstantiated allegations to both tarnish the credibility of lawyers who have excelled in holding Aetna accountable for a variety of unlawful anti-consumer practices over the years and to prevent us from prosecuting Aetna for Aetna Privacy Breach #2. Aetna's strategy will not succeed. We will hold Aetna accountable for its latest serial breach of its patients' privacy and for its threats to harass counsel and cause unnecessary delay or needlessly increase the cost of litigation.

Aetna's antipathy towards plaintiffs' lawyers, civil juries and the civil justice system is well known and longstanding. Aetna's machinations are part of its pattern and practice of engaging in an improper attempt to intimidate and undermine those who would dare challenge its misconduct. We do not believe the Court will permit Aetna to abuse the judicial process in this manner, defame counsel, or allow Aetna to deprive our client, John Doe, of the benefit of uniquely expert representation in these matters based on such frivolous claims.

One week ago, you presented us with a tolling agreement, and yesterday you informed us that unless we signed it, Aetna would file a lawsuit against lawyers for Consumer Watchdog and Whatley Kallas LLP tomorrow. As Aetna has failed in all respects to establish any basis for a lawsuit, or to conduct itself in good faith with respect to addressing its baseless allegations, we decline Aetna's request. Once again, we can only conclude that Aetna's purpose in bringing such

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a lawsuit is to attack the integrity of lawyers who have the temerity to challenge the company's illegal practices and to bootstrap its proposed frivolous disqualification motion.

If Aetna believes that an attack on lawyers for Consumer Watchdog and Whatley Kallas LLP will be a cost-free exercise in retaliation, it is deeply mistaken. Should Aetna proceed on its frivolous claims or move to disqualify us, we will seek sanctions under C.C.P. Sections 128.5 and /or 128.7. Moreover, by suggesting that lawyers for Whatley Kallas LLP and Consumer Watchdog are responsible for Aetna's egregious misconduct, Aetna and its counsel have slandered and defamed us and attempted to harm our reputations and interfere with our work. It is already apparent from your previous correspondence that statements were made during the *Beckett* case that constitute actionable slander and defamation.

Should Aetna persist and pursue these defamatory claims, we will file and prosecute all available claims for damages, fees, and costs against both Aetna and your firm. Moreover, the traditional litigation privileges that might otherwise apply with respect to statements made in judicial proceedings are not likely to be applied when the lawsuit itself is baseless, constitutes an abuse of process and is undertaken for the purpose and with the intent to harm. And Aetna's contemplated attack is clearly an infringement on our client's rights of petition and free speech within the meaning of C.C.P. 425.16.

Aetna would be well advised to focus on remediation of its privacy practices on a nationwide basis as we are seeking in this action, instead of pursuing abusive and retaliatory tactics that seek to evade liability for its own failings and suggest that Aetna still does not take responsibility for ensuring that its customers' private medical information is protected.

Sincerely,

/s/ Harvey Rosenfield

Harvey Rosenfield

/s/ Joe R. Whatley

Joe R. Whatley