UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN HANKS, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

THE LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK; VOYA RETIREMENT INSURANCE AND ANNUITY COMPANY, formerly known as Aetna Life Insurance and Annuity Company,

Defendants.

Civil Action No. 16-cv-6399 (PKC)

PLAINTIFF HANKS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON BEHALF OF HERSELF AND THE CERTIFIED CLASS

[REDACTED]

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TABLE OF DEFINED TERMS

"1998 Transaction"	The 1998 indemnity reinsurance transaction between Aetna and Lincoln
"ASOP"	Actuarial Standard of Practice
"Aetna"	Voya Retirement Insurance and Annuity Company, formerly known as Aetna Life Insurance and Annuity Company
"Aetna Opp."	Defendant Voya Retirement Insurance and Annuity Company's Memorandum of Law in: 1. Further Support of Its Motion for Summary Judgment; and 2. In Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment (Dkt. 148)
"Aetna Resp. to Pltf. SUMF"	Defendant Voya Retirement Insurance and Annuity Company's Responses to Plaintiff Helen Hanks's Rule 56.1 Statement of Undisputed Material Facts (Dkt. 149)
"Aetna SJ Mot."	Aetna's Memorandum of Law in Support of its Motion for Summary Judgment (Dkt. 134)
"Aetna SUMF"	Aetna's Southern District of New York Local Rule 56.1 Statement of Undisputed Material Facts on Motion for Summary Judgment (Dkt. 135)
"Ard Decl."	Declaration of Seth Ard in Support of Cross-Motion for Partial Summary Judgment by Plaintiff Helen Hanks on Behalf of Herself and the Certified Class and Opposition to Defendant Voya Retirement Insurance and Annuity Company's Motion for Summary Judgment (Dkt. 143)
"COI"	Cost of Insurance
"Depo."	Deposition
"Ex."	Exhibits attached to the Ard Decl. or the Supp. Ard Decl.
"Hause Report"	Expert Report of Christopher Hause, served on March 1, 2018 by Plaintiff and attached as Ex. 2 to the Ard Decl.
"Hause Rebuttal Report"	Expert Rebuttal Report of Christopher Hause, served on June 2, 2018 by Plaintiff and attached as Ex. 3 to the Ard Decl.
"Lincoln"	The Lincoln Life & Annuity Company of New York

"Mills Report"	Expert Report of Robert Mills, served on March 1, 2018 by Plaintiff and attached as Ex. 4 to the Ard Decl.
"NYDFS"	New York Department of Financial Services
"Pltf. SUMF"	Plaintiff Helen Hanks' Southern District of New York Local Rule 56.1 Statement of Undisputed Material Facts on Motion for Summary Judgment (Dkt. 138)
"Pltf. X-Mot."	Memorandum of Points and Authorities in Support of Cross-Motion for Partial Summary Judgment by Plaintiff Hanks on Behalf of Herself and the Certified Class and Opposition to Defendant Voya Retirement Insurance and Annuity Company's Motion for Summary Judgment (Dkt. 141)
"Pfeifer Report"	Expert Report of Timothy Pfeifer, served on May 1, 2018 by Aetna and attached as Exhibit 8 to the Declaration of Motty Shulman (Dkt. 136-8)
"Purchase Assumptions"	"Expectations of the go-forward profitability" of the Aetna block of policies commissioned from Milliman by Lincoln in connection with the 1998 Transaction and excepted at Ex. 84 to the Supp. Ard Decl.
"Resp. to Aetna SUMF"	Plaintiff Helen Hanks' Response to Aetna's Local Rule 56.1 Statement of Undisputed Material Facts on Motion for Summary Judgment (Dkt. 139)
"Supp. Ard Decl."	Supplemental Declaration of Seth Ard in Support of Plaintiff Hanks' Reply Memorandum of Law in Further Support of Motion for Partial Summary Judgment, filed concurrently herewith

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I. INTRODUCTION

Plaintiff Helen Hanks owns a life insurance policy that requires Aetna to make any "adjustments" to COI rates on both a "class" and "uniform" basis. When it announced the COI rate increase in May 2016, Aetna classed all policies *by product line,* an undisputed fact.[1] There were 57,273 of these policies classed in that way. But Aetna ultimately only increased COI rates on 46,918 policies, including Ms. Hanks' policy. The remaining 10,355 policies (or 18%) were issued in New York and did not receive a COI adjustment whatsoever.[2] Instead, for that subset, Aetna "postponed" the COI increase indefinitely. That is a straightforward breach of the uniformity clause because all of the policies that Aetna classed together did not have their COI rates adjusted uniformly. The plain meaning of "uniform" does not mean "everywhere but New York." As a result, summary judgment on liability against Aetna should be granted.

Aetna's lead-off defense is that Plaintiff's interpretation of the uniformity requirement "strains credibility" because it was not alleged with enough particularity in the Complaint. Aetna Opp. 3. That desperate argument is meritless. The NYDFS rejected the COI increase *after* this lawsuit was filed.[3] Federal Rule of Civil Procedure 8 only requires notice pleading, the NYDFS's objections to the COI increase were unearthed in discovery, and it was thoroughly addressed in depositions, expert reports, and the Court's order granting class certification. Dkt. 110 (Class Cert

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[1] *See, e.g.*, Aetna SJ Mot. 14 ("[T]he adjustment was done on a class basis, with the classes defined as all policyholders owning a given product[.]"); Dkt. 94 (Aetna's Class Cert. Opp.) at 7 ("Each product was treated as its own policy class.").

[2] Ex. 4 (Mills Report) ¶ 19; Ex. 2 (Hause Report) Appendix F. Exhibits 1–75 are attached to the Declaration of Seth Ard (Ard Decl.), and Exhibits 76–84 are attached to the Supplemental Declaration (Supp. Ard Decl.).

[3] This lawsuit was filed on August 11, 2016, and NYDFS' initial rejection of the COI increase occurred on October 14, 2016. Ex. 49 (10/14/16 NYDFS Letter). During discovery and as a result of her public records request, Plaintiff learned that Aetna had failed to produce certain communications between it and the NYDFS. When confronted about these missing documents, Aetna apologized for its discovery misconduct, blaming a "coding issue." Ex. 76 (Email chain between Plaintiff's counsel and Voya's counsel ending on October 11, 2017).

Order), available at 330 F.R.D. 374, 378-80 (S.D.N.Y. 2019). Aetna's resort to the long-ago abolished "theory of the pleadings" doctrine should be rejected.[4]

If the Court somehow finds that "uniform" can mean "everywhere but New York," then summary judgment should still be granted against Aetna for using product-wide groupings in the first instance, which violates the "class basis" requirement. Aetna *admits* that the policies required at pricing that COI rates be determined using three factors set forth in the "Cost of Insurance" section of the policies: sex, age, and premium class. Aetna also admits that the only other reference to "class" in the policies is the term "premium class," and admitted to the NYDFS that defining "class basis" by reference to premium class is "consistent with Policy language."[5] As stated by the NYDFS: "By giving the words their natural meaning, 'class basis' plainly refers to the three factors identified only five sentences above in the policy."[6]

Yet Aetna now contends that "class basis" does not refer to anything in the policy, and instead offers *three* constantly-changing, inconsistent definitions of the phrase: (i) first stating in its Rule 56.1 Statement that "class basis" means adjustments "consistent with § 2.6 and § 3.4 of the Actuarial Standards of Practice (ASOP) 2," Aetna SUMF ¶ 19; but (ii) then, in an about face, claims that ASOP 2 "need not" be considered to construe "class basis," Aetna Opp. 34; but (iii) then, in the context of its attempted uniformity defense, claims that classes are actually defined by reference to specific states depending on whether any object to the COI increase. The fact that Aetna cannot even pick a coherent definition confirms the infirmity of its position. The starting point for contractual interpretation is the four corners of the contract, and the policies themselves

[4] *See also* 5 C. Wright & A. Miller, *et al.*, Fed. Prac. & Proc. Civ. § 1219 (3d ed. 2019) ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine[.]"); *U.S. Bank Nat. Ass'n as securities intermediary v. PHL Variable Ins. Co.*, 2015 WL 4610894, at *2 (S.D.N.Y. July 30, 2015) (COI increase case; denying motion in limine to exclude theory of breach not specifically alleged in the complaint).
[5] Ex. 37 (9/23/16 Aetna Ltr. to NYDFS) at LN_HANKS00001769.
[6] Ex. 49 (10/14/16 NYDFS Ltr.) at LN_HANKS00156809.

dictate the classes that must be used in any COI adjustment, and none permit what Aetna did: treating the entire product as a single class.

Finally, the contract requires any adjustment be based on "Aetna's estimates for future cost factors," but Aetna tries to insert another term into the contract that is not there, claiming it requires use of a "current" estimate alone, without comparing it to a baseline estimate. The interpretation is also unreasonable as a matter of law, and summary judgment on liability for that breach should be granted as well.

II. AETNA'S EVERWHERE-BUT-NEW YORK COI INCREASE VIOLATED THE CONTRACT'S "UNIFORM BASIS" REQUIREMENT (BREACH #1)

The "uniform basis" contract provision, which provides that "[a]ny adjustment will be made on a uniform basis," required Aetna to "apply any COI adjustment equally within each class." Pltf. X-Mot. 14. Aetna's opposition brief agrees, stating the uniformity clause "work[s] in tandem" with the "class basis" requirement such that for any COI adjustment, Aetna must "**adjust everyone within each group or class in the same manner**." Aetna Opp. 25.[7] That admission proves that the COI increase is unlawful as a matter of law because (a) Aetna's Rule 30(b)(6) witness admitted that "class" for purposes of the COI increase is "product-wide across jurisdictions," rather than, as it now argues in litigation, a bespoke mix of product followed by a gerrymandered New York carve-out, *see* Pltf. SUMF ¶ 26; and (b) COI rates were not "adjust[ed]" for everyone in the across-jurisdiction classes, but rather for everyone except New York, *see id.* ¶ 39.

Aetna nominally claims that it disputes Plaintiff's SUMF ¶¶ 26 & 39, but submits no evidence to support affixing the "Disputed" tag to these material facts, *see* Aetna Resp. to Pltf.

[7] All emphasis is added unless otherwise noted.

SUMF ¶¶ 26, 39, and the statements should be deemed admitted.[8] Nor could it dispute them because Aetna concedes that the following testimony from its Rule 30(b)(6) witness is accurate: "[T]he class for each product would be product-wide across jurisdictions" and its witness agreed that "the class for each of these 18 products would include New York policies."[9] Aetna's other witnesses all agree,[10] as does Aetna's actuarial expert,[11] Aetna's class certification opposition brief,[12] and Aetna's summary judgment briefs:

> the adjustment based on future cost factors of the Aetna block; **(ii) the adjustment was done on a class basis, with the classes defined as all policyholders owning a given product;** and (iii) it was on

Aetna's SJ Mot. 14.

Aetna elsewhere cites to its SUMF ¶ 17 for the following proposition: "Plaintiffs also agree that policies were grouped by common characteristics into classes, organized by product line and by jurisdictions that did not object to the COI increase." Aetna Opp. 26. But Aetna's SUMF ¶ 17

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[8] *See Lorterdan Properties at Ramapo I, LLC v. Watchtower Bible & Tract Soc'y of New York, Inc.*, No. 11-CV-3656 CS, 2012 WL 2873648, at *1 n.1 (S.D.N.Y. July 10, 2012) (defendant's failure to submit "admissible evidence in support of its statements denying Plaintiff's statements of material fact" violates Fed. R. Civ. P. 56 and Local Rule 56.1 and accordingly "Plaintiff's statements will be deemed admitted" (citing cases)).

[9] *See* Aetna Resp. to Pltf. SUMF ¶ 26 ("Agreed as to the accuracy of the quotations.").

[10] *See, e.g.,* [redacted] Dkt. 136-8 (Pfeifer Report) ¶ 56 (Aetna's testifying expert opining that the "classes" that Aetna defined during the increase were "**all insureds for a given product**.).

[11] *See* Dkt. 136-8 (Pfeifer Report) ¶ 88 ("treating each product as its own class was the most credible action available"); *see also id.* ¶ 56 ("Indeed, in the insurance industry, it is not uncommon to refer to a 'class' of insureds as all policyholders who purchase a particular policy generation or series.").

[12] *See* Dkt. 94 (Aetna's Class Cert. Opp.) at 7 ("Each product was treated as its own policy class."); *id.* 21 ("The actual increase, as determined by Defendants following their decision to consider all Universal Life 83 policies as a single class, was 35%."); *see also* Aetna Opp. 39 (admitting that Aetna "intended to implement" the COI increase "in all 50 states").

says nothing of the sort; in fact, it makes clear that the only class Aetna established for the COI increase was product-wide and included all policyholders across the country. *See* Aetna SUMF ¶ 17 ("The COI Rate Increase was not a singular, across-the-board increase in the same amount for all the Policies. Rather, the COI Rate Increase was differentiated **by product**[.]"). The COI increase was imposed everywhere but New York, and not even Aetna contends that any particular state constitutes a policy class. Ex. 78 (Brantzeg Depo.) at 319:13–320:2 [redacted] [redacted].[13]

When Aetna raised COI rates, it ultimately did not do so "product-wide across jurisdictions," "by product," nor for "all policyholders." Instead, Aetna adjusted it only on non-New Yorkers; New York owners of the same product were spared. As a result, non-New York policyholders (82% of owners) pay higher COI rates than New York policyholders (18% of owners), in amounts that will be proven at the damages trial that exceeded [redacted] [redacted], and will overall exceed [redacted].[14] While Aetna suggests that because it analyzed the COI increase nationwide, its COI adjustment to non-New Yorkers might have been the same without the New York exception, that is wrong and irrelevant: it is like a company arguing in a sex discrimination case that women were not harmed by being paid less than men because the company could have just paid men less.

Aetna later states that "uniform" actually means "uniform as to those who received an adjustment." Aetna Opp. 37. But that proposed definition is a sleight-of-hand that contradicts Aetna's agreement that the uniform clause has to work in "tandem" with the class basis

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[13] *See also* Ex. 16 (Aetna 30(b)(6) Depo. (Brantzeg)) at 410:19–411:6 ("Q. The question is, the reason that Voya suspended the increase was that New York objected. There was no actuarial analysis done about the New York policies that would have necessitated a suspension. A. So I would say Lincoln recommended a suspension for New York policies, and Voya accepted that. Q. On the grounds that New York objected. A. I think that's fair to say.").

[14] *See, e.g.*, Ex. 4 (Mills Report), Ex. 2 (Hause Report); *cf.* Aetna Opp. 39 (nonsensically claiming that Plaintiff "do[es] not present any evidence" of injury arising from this non-uniform increase). Aetna is required to update and bring current its COI overcharge damages data 50 days before trial. Pltf. X-Mot. 43–45 & Ex. 74.

requirement. To work in tandem, the proposed new definition Aetna posits should read: "uniform as to those *policies classed* to receive an adjustment,"[15] which Aetna undeniably breached because it is undisputed that it classed all policies together nationwide but only imposed the increase outside of New York. As the NYDFS explained, the uniformity "requirement inherently presumes there are classes to which uniformity need be applied." Ex. 49 (10/14/16 NYDFS Ltr.) at LN_HANKS00156809. This argument is also no different than Aetna's earlier request for the Court to add the phrase "within each state" after the term "uniform," a scrivener-addition Aetna advanced in its summary judgment motion but now disavows. Aetna Opp. 40 ("VRIAC does not believe that the Court should depart from a plain language interpretation of the phrase 'uniform.'"). Aetna's new position also makes no sense. It would mean that giving some policyholders in a class a 1% increase and others a 99% increase would constitute a breach of contract, but that discrimination would somehow be contractually permitted if the former group were given a 0% increase.

Aetna also repeats several of its public policy arguments already raised in its opening motion about why the Court should re-write the policies' language, all because life insurance is regulated by different state regulators, while ignoring the numerous reasons why this argument is meritless, as addressed at length in Plaintiff's Cross-Motion and Opposition, *see* Pltf. X-Mot. 18–21 (Section III.B.1.(b)). These are form contracts Aetna drafted and entered into nationwide, and if it really intended to define "uniform" to somehow mean "everywhere but with certain exceptions," it could have said so. Aetna's counterfactual hypotheticals add nothing new. For example, Aetna claims that a Wyoming owner "would not expect" his COI rates "to be doubled"

[15] *Accord* Aetna SJ Mot. 24 ("The purpose of this provision is to protect policyholders from being singled out or treated differently from his or her **class**."); *id.* 14 (arguing COI adjustment complied with contract because "it was on a uniform basis, **applying uniform percentage adjustments to all policyholders within the defined classes**.").

if a New York "regulator required" COI rates to be doubled. Aetna offers no evidence that any state regulator has ever "required" a COI increase on a universal life policy—because none ever has—but even if one were to pretend as if the NYDFS "required" Aetna to double COI rates, it would have to be, by law, as a result of changes in "Aetna's estimates for future cost factors." In that case, a Wyoming owner would of course reasonably expect that her COI rates would be increased by the same amount as a result of the "class basis" and "uniform basis" provisions in her form contracts.

Aetna next argues that imposing the COI increase everywhere but New York is contractually permitted because imposing it over the objection of NYDFS posed "special risks or costs" that permitted "inter-class discrimination." Aetna Opp. 38. The definition of the word "uniform" does not have a built-in exception for "special risks or costs." Aetna does not contend that summary judgment should be denied due to any alleged "force majeure" or any cognizable affirmative defense; it simply claims that unspecified "special risks and costs" allow it to impose a non-uniform increase. No such contractual defense or legal exception exists. The "special risks and costs" that Plaintiff's actuarial expert refers to in his report does not change the meaning of "uniform" and is referring to differing expectations as to future cost factors, such as mortality, investment income, expenses, and persistency, enumerated in the policies. Ex. 2 (Hause Report) ¶66. Aetna also has not submitted any evidence that expectations of future cost factors somehow differ depending on which state's regulator objected to the COI increase; to the contrary, Aetna expressly assumed it would be the same for all policies regardless of state.[16]

Nor is there any merit to Aetna's bizarre argument that the COI adjustment complied with

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[16] *See* Ex. 18 (Parker 30(b)(6) Depo.) at 286:5–14 ("Q. So just to be clear, there's no actuarial basis for suspending the increase in New York; correct? A. So per your description of an actuarial reason being something like a difference in mortality that was identified between New York and other states, there was none that I was aware of."); Ex. 54

the contract because the NYDFS "effectively" changed the contract language for New York policies. Aetna Opp. 39. Aetna concedes that the NYDFS did not make a final administrative ruling;[17] and yet, Aetna does not explain how a regulator's non-final objection could somehow create "two different contractual requirements." *Id.* It cannot. No reasonable construction of the policies allows bootstrapping a decision by Aetna not to challenge the NYDFS's findings into a contractually-authorized reason to treat all policyholders owning the same product with the same language differently.[18] "Uniform basis" does not and cannot mean "everywhere except in a state where Aetna fails to challenge a regulator's findings."

The undisputed facts are that at redetermination, Aetna classed the policies by products, but did not impose the COI increase by products. Only owners of products outside of New York had their COI rates adjusted; New York owners were spared. As a result, the COI increase breached the uniformity clause in the policies, and Plaintiff's motion for partial summary judgment on liability against Aetna should be granted.

III. AETNA'S DEFINTION OF "CLASS BASIS" VIOLATES BLACK-LETTER PRINCIPLES OF CONTRACT INTERPRETATION (BREACH #2)

In the alternative, if the term "uniform" somehow permits the New York exception, the COI increase still breached the policies' "class basis" requirement because Aetna used product-wide groupings. Aetna does not dispute that, as its Rule 30(b)(6) witness testified, the "class basis" clause requires the insurer "to determine the increase for each of the classes independently." Aetna

[17] Aetna Opp. 29 (arguing that NYDFS' objections should be afforded "no weight" because it "has not been formally ruled upon" and "has not been tested in any proceedings"); *see also* Pltf. SUMF ¶ 40 (agreed to by Aetna).

[18] Aetna also continues to ignore Plaintiff's SUMF ¶ 40, to which Aetna stipulated: Aetna never sought any final administrative or judicial ruling challenging the NYDFS's objection to the COI increase. If Aetna's summary judgment opposition had any merit, Aetna should have pressed for a final administrative ruling from the NYDFS and, if any adverse ruling were issued, appealed. For example, NYDFS said that the COI increase was not conducted on the basis of the classes set forth in the policy; Aetna says here that it was, as a matter of law. NYDFS said that Aetna did not define policy classes in accordance with ASOP 2; Aetna now claims that it is an "undisputed fact" that it did and that ASOP 2 is irrelevant. NYDFS said that the COI increase was discriminatory; Aetna here claims that the COI increase was "uniform" and "non-discriminatory" as a matter of law.

Opp. 33–34 (citing Pltf. X-Mot. 21).[19] Thus, if the "class basis" requirement refers to "sex, age, and premium class," then the increase must be determined independently for each of those factors. Here, however, it is undisputed that Aetna did not determine the COI increase independently based on "sex," "age," or "premium class" – rather, the determinations and analysis were done only at the product level, in breach of the policies' "class basis" requirement.

A. <u>The Contract Defines the Classes</u>

The policies expressly state, a mere five sentences above the "class basis" provision, that "[t]he Monthly Cost of Insurance is based on the Insured's sex, attained age, and premium class." Aetna now concedes that a reasonable policyholder would construe this language to mean that COI rates will be *originally* set using classes organized by sex, age, and premium class. *See* Aetna Opp. 26 (acknowledging that "an objective policyholder would understand that . . . COI rates must differ based on sex, age, and premium class"). But Aetna claims that the provision stating that "adjustments will be on a class basis" does not refer to the classes mentioned above and that a redetermination that groups all policy classes together into a single cohort is a "class basis" redetermination. Aetna's arguments are illogical, internally inconsistent, and conflict with fundamental principles of contract interpretation.

First, contracts must be read as an integrated whole and individual provisions should not be read in a vacuum. *See* Pltf. X-Mot. 23. Aetna, in fact, *agrees* with this interpretative rule, but only when applied to the uniformity clause; Aetna rejects this rule when interpreting what "class" itself means in the policies, asking that the Court ignore the classes identified almost immediately above the "class basis" provision—the very same classes that Aetna *concedes* were used at initial

[19] Aetna's brief refers to Mr. Parker as "LLANY's Rule 30(b)(6)" witness, Aetna Opp. 33, but he was designated as a Rule 30(b)(6) witness for both Aetna and Lincoln on some topics, and Aetna claims that Lincoln is acting as its agent for all purposes relating to the COI increase.

determination between 1983 and 2000. Aetna also provides no principled reason why the Court should disregard the fact that the only other instance of the word "class" in the policies are references to "premium class." Aetna admitted to the NYDFS that defining "class basis" by reference to premium class would also be "consistent with Policy language, applicable law, and ASOP,"[20] but now wants "class basis" to be entirely stripped away from this context, contrary to basic principles of contract interpretation. *See Discover Growth Fund v. 6D Glob. Techs. Inc.*, 2015 WL 6619971, at *5 (S.D.N.Y. Oct. 30, 2015) (Castel, J.) ("[A court] may also presume that the same words found in different sections of a contract have the same meaning, 'unless the context indicates a different intention,'… and apply the rule against surplusage, i.e., 'a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect.'") (internal citations omitted).

Second, there is no distinction in the policies between classes used in "setting" versus "adjusting" rates. When COI rates are adjusted, new COI rates are set and new COI rate scales are adopted. This is why the entire process of adjusting COI rates is called a "redetermination." Aetna's actuarial expert likewise uses the term "redetermination" to refer to the COI increase.[21] It therefore makes no sense for Aetna to suggest that while initial rates will be set according to sex, age, and premium class, rates do not have to be adjusted on a basis using those same classes.[22]

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[20] *See* Aetna Resp. to Pltf. SUMF at ¶ 37 (claiming that this fact is "Disputed" but citing no evidence to support that label and stating in conclusory fashion: "Plaintiffs take the quoted sentence out of context, and VRIAC directs the Court to the full document for a complete description").

[21] *See, e.g.*, Dkt. 136-8 (Pfeifer Report) ¶ 5 (stating that a COI increase is "often called a redetermination"); *see also* Ex. 71A (ASOP 2) § 1.1 ("Throughout this standard, the term *determination* includes both initial determination and subsequent redeterminations, where appropriate.").

[22] Aetna implies that Plaintiff Helen Hanks's testimony indicates that she does not believe that "class basis" required classes based on age, sex, and premium class. *See* Aetna Opp. 31–32. This argument is meritless because, aside from a vague, general question about "class basis," Ms. Hanks was never asked whether groupings based "age, sex, and premium class" constitute "classes," whether she understood "age, sex, and premium class" to relate to "class basis," or whether she agreed with Aetna's position that it has complete discretion to determine what classes are used.

Third, Aetna's argument that the COI increase "preserved all class distinctions," Aetna Opp. 26–27, 33, is both irrelevant and wrong. It is irrelevant because the policies do not say that "class distinctions will be preserved"; they say that any "adjustment" will be on "a class basis." And it is wrong because, as Aetna's expert acknowledges, future cost estimates can change over time in different ways for different classes and this must be taken into account when setting and adjusting rates. *See* Ex. 72 (*U.S. Bank* Pfeifer Report) at 27 (Pfeifer explaining in a COI increase case that "issue age ranges, gender, policy size, etc. are all components of class because they can generate unique elements of anticipated experience factors" and that "[t]o define class otherwise would be illogical").[23]

Aetna's suggests that there was no practical harm to its decision to lump everyone together and impose identical increases across products (except in New York) because the two "cost factors" upon which the increase was based—reinsurance and investment income—affected all policyholders equally. Aetna Opp. 33–34. Aetna does not cite to any evidence to support this assertion. Nor could it because Aetna did not do any analysis prior to the COI increase to determine whether the policies should have been classed using the factors that the policies require (e.g. age, sex, and premium class). *See* Ex. 16 (Aetna 30(b)(6) Depo. (Brantzeg)) at 324:4-11; Pltf. SUMF ¶ 23.[24]

[23] Contrary to Aetna's argument, this quote does not just stand for the proposition that "an insurance company must have the ability to identify subsets of its policies as a redetermination class," Aetna Opp. 32–33; Mr. Pfeifer is stating that he believes that the "classes" used in a COI redetermination should take characteristics like age and gender into account, and that to do otherwise would be "illogical." Notably, Mr. Pfeifer used the *policy language* to support his definition of class, even though Aetna does the opposite here. *See* Ex. 73 (*U.S. Bank* Pfeifer Depo.) at 117:5-118:25 ("The contract states that COI rates can vary by net amount at risk. So to me that indicates that that's already a, a classification.").

[24] Aetna claims that this SUMF is "disputed," but acknowledges that it never performed this analysis before imposing the COI increase.

B. <u>Plaintiff's Definition of "Class Basis" is how *Aetna* Defined "Class Basis" for 20+ Years</u>

Aetna also wrongly contends that Plaintiff's definition of "class" is per se unreasonable because Plaintiff has not stated what she believes the redetermination classes should have been, or how they should have been adjusted. Aetna Opp. 28–29. This argument is wrong both factually and legally. Factually, Plaintiff has repeatedly explained what Aetna was required to have done—Aetna could have separately analyzed classes of policyholders based on age, sex, and premium class, rather than at product-level, to determine whether an adjustment was appropriate. *See, e.g.*, Pltf. X-Mot. 21–22; Ex. 2 (Hause Report) ¶¶ 43–65.

In any event, Plaintiff is not required to prove what alternative COI adjustment, if any, would have been proper in order to establish liability (or damages). Considering the exact same question in *DCD Partners, LLC v. Transamerica Life Insurance Co.*, the Court held that the plaintiff was not required to establish what the COI increase would have been absent a breach because "the rate increase itself constitutes a breach of contract and directly caused DCD to pay additional premiums." 2018 WL 3770030, at *12–13 (C.D. Cal. Aug. 1, 2018) (denying defendant's post-trial JMOL motion), *appeal filed*.[25] As this Court likewise already held in its certification order: "Hanks is not asking the Court to adjudicate what an appropriate COI rate

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[REDACTED] Mr. Pfeifer also conducted an analysis for this litigation on behalf of Aetna showing that different classes had vastly differing changes in expectations, and that smokers were subsidizing nonsmokers. *See* Ex. 3 (Hause Rebuttal Report) ¶¶ 18, 20.

[25] *See also Feller v. Transamerica Life Ins. Co.,* 2017 WL 6496803, at *13 (C.D. Cal. Dec. 11, 2017) ("Contrary to Transamerica's assertion, damages will not need to be calculated based on a more complex methodology demonstrating how Transamerica *should* have conducted its MDR increases in order to avoid recouping past losses. Instead, because the evidence demonstrates that Transamerica used [REDACTED] to create the MDR increases, Transamerica has all of the data necessary to simply reverse the MDR overcharges and refund plaintiffs should it be found liable for plaintiffs' claims."); *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 182 (4th Cir. 2010) ("[T]he proposed damages offset [for a hypothetical premium increase] is too largely in the realm of speculation. The district court found that it was far from a sure thing that defendants would have charged higher premiums at all, and even if they had, that the amount of the premium hike was little more than a guess[.]"); *Baker v. Dorfman*, 1999 WL 191531, at *12 (S.D.N.Y. Apr. 6, 1999) (rejecting defendant's proposed offset as "entirely speculative" and noting that "[defendant] cannot avoid through speculation the rightful burden of making [plaintiff] whole[.]").

increase would have been or to impose injunctive relief specifying lawful COI rate calculations; she is claiming that the COI rate increase imposed on June 1, 2016 was a breach of contract causing damages classwide. Any future COI rate increase that Lincoln Life or VOYA seek to impose is immaterial to the current litigation." 330 F.R.D. 374 at 381. That same logic still applies: the policies state that "Adjustments will be on a class basis"; the COI increase was not on a class basis; and it is therefore a breach that caused damages in amounts to be proven at the damages trial.

Aetna also claims that adopting Plaintiff's interpretation is "administratively impossible" because "[u]nder Plaintiffs' reading of the contract, there are hundreds of combinations of classes based on the insureds' sex, attained age, and premium class." Aetna Opp. 28. This is much ado about nothing. What Aetna claims is "administratively impossible" during an adjustment is exactly what:

- Aetna admits it did when initially setting rates at issuance from 1983 onward—analyze classes of age, sex, and premium class separately. *See* Aetna Opp. 27 ("COI charges varied based on the insured's sex, age, and premium class when the Policies were first issued.");

- Aetna repeatedly did in previous COI redeterminations in the 1980s and 1990s. *See, e.g.*, [redacted]

Aetna tries to change the definition of "class basis" as it sees fit. Aetna's Local Rule 56.1 statement included as an "undisputed material fact" that "class basis" means "that adjustments to the COI rates will be on a 'policy class' basis consistent with § 2.6 and § 3.4 of the Actuarial Standards of Practice (ASOP) 2." Aetna SUMF ¶ 19. But in its Opposition, Aetna claimed that

ASOP 2 is "Is Not Necessary" to define "class basis," Aetna Opp. 34, so it switched to a dictionary definition, contending that "class" just means any group of policyholders with "common characteristics," *see id.* 24–26. A definition of "class basis" that lets Aetna do what it wants, whenever it wants, is not a "reasonable alternative reading of the contract" sufficient to survive summary judgement where, as here, the policies *already* provide in the same provision the delineated classes required to be (but were not) used at redetermination. *See Mylan Inc. v. SmithKline Beecham Corp.*, 723 F.3d 413, 418 (3d Cir. 2013) (cited in Aetna's opposition).

IV. LINCOLN'S 1998 PURCHASE ASSUMPTIONS ARE NOT "AETNA'S ESTIMATES" (BREACH #3)

The policies require that any adjustment be based on "Aetna's estimates for future cost factors," but there is no genuine dispute that the COI increase utilized assumptions created for *Lincoln* in 2000 shortly after the 1998 Transaction (the "Purchase Assumptions"). *See* Pltf. X-Mot 30–32 (citing Pltf. SUMF ¶¶ 10, 20). Aetna argues that all of Lincoln's conduct should be imputed to Aetna under an agency theory, and that, as a result, Aetna really made the Purchase Assumptions. These arguments are inconsistent with the plain language of the policies and contradict the governing contractual relationships between Lincoln and Aetna.

A. "Aetna's Estimates" Does Not Mean "Lincoln's Estimates"

Aetna claims that "Aetna's estimates for future cost factors" only means that an adjustment must be "based on an estimate of the expected future cost factors of the remaining Aetna liabilities, *i.e.*, the remaining in-force policies of the Aetna block." Aetna Opp. 4–7 (emphases in original). The goal of this proposed definition is obvious—to try to justify an increase based on Lincoln's estimates of Lincoln's costs by eliminating any obligation for Aetna to participate in a COI adjustment.

This self-serving rewrite of the policies should be rejected. Under Aetna's reading, a COI

increase can be implemented based on anyone's estimates of anyone's expectations of future cost factors for the policies. This reads out the core policyholder protection that an increase arise from Aetna, the sole party in contractual privity with policyholders. The policies do not require "an estimate"; they require "***Aetna's*** estimates."

[26] And while Aetna now argues that the contractual limitations arising from "Aetna's estimates for future cost factors" apply solely to a *current* estimate, the contract does not contain that "only current" limitation. Aetna's reading would lead to the nonsensical result that an increase could be justified using whatever baseline Aetna liked, or even no baseline at all. As Aetna itself recognized in its opening brief, a "court should not interpret a contract in a manner that would be 'absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties." Aetna SJ Mot. 14 (quoting *Callahan v. Glob. Eagle Entm't Inc.*, 2019 WL 2325903, at *3 (S.D.N.Y. May 30, 2019) (Castel, J.)).

Reading out protections for baseline assumptions is also inconsistent with the plain language of the policies. Baseline assumptions *are* "estimates of future cost factors." *See*

). The contractual limitation that "estimates of future cost factors" must be "Aetna's estimates" does not distinguish between the timing of the estimates, and thus applies equally to both current ***and*** baseline estimates of future cost factors, both of which need to exist to

[26] Ex. 18 (Parker 30(b)(6) Depo.) at 231:11–14 *See also* Ex. 16 (Aetna 30(b)(6) Depo. (Brantzeg)) at 206:1–8 Ex. 27 (Lusk Depo.) at 55:6–56:10

adjust COIs. The word "estimate*s*", of course, is plural, so it cannot possibly refer to a current projection by itself. [redacted] .[27] In short, the policies mean what they say: a COI adjustment must be based on ***Aetna's***, not Lincoln's, estimates of ***Aetna's***, not Lincoln's, anticipated future cost factors.[28]

B. <u>An "Administrative Agent" is Not an Agent for All Purposes and Lincoln Was Not Acting as Aetna's Agent for the Purchase Assumptions</u>

Aetna concedes that the Purchase Assumptions were performed by third-party Milliman, and commissioned by Lincoln, as part of the 1998 Transaction, *see* Aetna Resp. to Pltf. SUMF ¶ 10, but argues that they qualify as "Aetna's estimates" because Milliman was acting as Lincoln's agent, which, in turn, was acting as Aetna's agent, *see* Aetna Opp. 11–12. Aetna, however, does not point to any evidence in which Lincoln is referred to as Aetna's agent or as acting on Aetna's behalf in creating the Purchase Assumptions. In fact, the opposite is true—Lincoln's corporate representative testified that the Purchase Assumptions were commissioned because *Lincoln* needed them for *Lincoln's* own internal financial accounting purposes as part of the 1998

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[27] *See also id.* at 204:18–22 [redacted] For these same reasons, Aetna's arguments that it was contractually permitted to ignore estimates actually made by Aetna (such as the original pricing assumptions or last Aetna redetermination) and instead look to a reinsurer's profit expectation as the baseline, Aetna Opp. 20–22, are meritless.

[28] Aetna's Opposition repeats its incorrect assertion that Plaintiff's expert disagrees with Plaintiff's interpretation of "Aetna's estimates for future cost factors." This argument fails for the reasons already discussed in Plaintiff's Cross-Motion. *See* Pltf. X-Mot. 32.

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Transaction. *See* Ex. 21 (Lincoln 30(b)(6) Depo. (Ryan)) at 172:13–173:1 (explaining that Lincoln commissioned Milliman to "help us" in "doing some GAAP projections").[29]

Nor is there any evidence that Lincoln acted as Aetna's agent for the 2016 COI increase. While the Administrative Services Agreement ("ASA") permits Lincoln to make "recommendations" to Aetna regarding non-guaranteed elements, it explicitly says that Aetna "retains the ultimate authority to make final decisions regarding the administration of the Policies." Dkt. 27-9 (ASA) § 2.01. This lawsuit against Aetna challenges the "final decision" to adjust COI rates, and the ASA explicitly states that the final decision was Aetna's alone, and that Lincoln may not act as Aetna's agent in making that decision.[30] While Lincoln recommended a COI increase, it was Aetna's sole responsibility to review and approve it, and to make sure the increase was based on Aetna's estimates – none of which was done.[31]

The ASA makes clear that no agent of one party is the agent of another party, and that Lincoln's authority is limited "to that which is expressly stated" in the Agreement:

Section 9.07. Limited Authority. The Company and the Administrator are not

[29] *See also*

[30] Ex. 16 (Aetna 30(b)(6) (Brantzeg) Depo.) at 51:3–5 ; Ex. 77 (Aetna 30(b)(6) (Brantzeg) Depo.) at 65:9–14

[31] In contemporaneous correspondence with Aetna, Lincoln repeatedly cited the Coinsurance Agreement and the Side Letter between Aetna and Lincoln as authority for recommending the increase, which Lincoln entered into in its role as reinsurer, not administrative agent. *See, e.g.*, ; Ex. 54 (Lincoln Actuarial Justification) at LN_HANKS00267788 ("Pursuant to the terms of the coinsurance agreement, Lincoln from time to time has made recommendations to Voya with respect to nonguaranteed elements within the covered policies[.]"). In Plaintiff's Cross-Motion, Plaintiff inadvertently provided cites to a different coinsurance agreement from the 1998 Transaction (four coinsurance agreements, between various Aetna and Lincoln corporate entities, were executed). The proper pincite for the Coinsurance Agreement (Ex. 30) between Lincoln and Aetna is LN_HANKS00001314 and the COI recommendation provision is LN_HANKS00001330.

> partners or joint venturers, and no employee or agent of either party shall be considered an employee or agent of the other. The Administrator's authority shall be limited to that which is expressly stated in this Agreement.

Dkt. 27-9 at 26. Aetna attempts to shoehorn its myriad claims of agency into provision § 2.03(m), *see* Aetna Opp. 7–9, 18–19, but Lincoln's engagement of Milliman to prepare a GAAP analysis in 2000, for example, falls well outside the express scope of § 2.03(m), and so is not done on Aetna's behalf under Section 9.07. Aetna effectively argues that (i) Milliman was acting as Lincoln's agent in creating the Purchase Assumptions, and (ii) Lincoln was acting as Aetna's agent in creating the Purchase Assumptions, and therefore, by the transitive property, (iii) Milliman must have been acting as Aetna's agent in creating the Purchase Assumptions. Leaving aside the flawed premises, this argument is directly contrary to Section 9.07, which says that "no agent" (Milliman) of "either party" (Lincoln) "shall be considered an … agent of the other" (Aetna).

It is also black letter law that an agent "has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship" and "place the principal's interests first as to matters connected with the agency relationship." Restatement (Third) Of Agency § 8.01 (2006).[32] As shown above and in Plaintiff's Cross-Motion, Lincoln acted for its own benefit (e.g. by commissioning the Purchase Assumptions for its own internal accounting purposes) and put its own interests first ████████████████████████████████

████████. *See* Pltf. X-Mot. 36; Pltf. SUMF ¶ 17.

Aetna claims that Plaintiff's position that Lincoln was not acting as Aetna's agent for all purposes contradicts the allegations in the Complaint, which only alleged that Lincoln was an

[32] *See also News Am. Mktg. In-Store, Inc. v. Marquis*, 86 Conn. App. 527, 535, 862 A.2d 837, 843 (2004), *aff'd* 276 Conn. 310, 885 A.2d 758 (2005) ("The general principle for the agent's duty of loyalty according to the Restatement is that the agent must act solely for the benefit of the principal in matters connected with the agency"); *Schneiderman ex rel. People v. Lower Esopus River Watch, Inc.*, 39 Misc. 3d 1241(A), 975 N.Y.S.2d 369 (Sup. Ct. 2013) (same).

[33] ████████████████████████.

administrative agent. Just like someone's real estate agent is not automatically the principal's agent for all affairs, there is nothing inconsistent about contending that a party who appointed an agent in writing which defines and limits its roles to certain contexts (e.g. as servicer of the policies) is not the agent in other contexts (e.g. commissioning the Purchase Assumptions). "An agent, appointed by a writing which defines and limits his authority, is subject to its terms; and acts done by him, not within the scope of the authority, cannot bind his principal[.]" *In re Nw. Airlines Corp.*, 2010 WL 3529239, at *4 n.7 (S.D.N.Y. Aug. 26, 2010) (quoting *Mulrooney v. Royal Ins. Co. of Liverpool, Eng.*, 157 F. 598, 606 (N.D. Iowa 1907))). Section 9.07 makes plain that Lincoln was Aetna's agent only for the limited purposes "expressly stated" in the Agreement, and nothing therein provides that such purpose includes imposing a COI increase.

C. Aetna Neither Created Nor Adopted Lincoln's 1998 Purchase Assumptions

Finally, Aetna argues that the Purchase Assumptions should qualify as "Aetna's estimates" because Aetna indirectly created them and later adopted them. *See* Aetna Opp. 10-15. This too has no merit. Aetna claims that the Purchase Assumptions "were derived from a separate report commissioned by Aetna," but Lincoln's corporate representative [REDACTED]

[REDACTED].[34] Indeed, even leaving aside that the document Aetna relies upon is inadmissible hearsay,[35] that document states [REDACTED]

[REDACTED]

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[34] Ex. 81 (Lincoln 30(b)(6) Depo. (Ryan)) at 179:4–11 [REDACTED]

[35] *See Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 469–70 (S.D.N.Y. 2008) (holding that defendant's own internal report cannot be used by defendant to prove the truth of matters asserted therein unless defendant establishes that it satisfies a hearsay exception).

Aetna's corporate representative testified that he understood the Purchase Assumptions prepared by Milliman to be Ex. 80 (Parker 30(b)(6) Depo.) at 334:14–23. And in fact, Aetna's own quotation states this explicitly, saying the Purchase Assumptions were derived from the appraisal assumptions "*as well as* a review of Aetna's recent historical experience."[36] In short, the Purchase Assumptions were not Aetna's assumptions, but instead were created by Milliman for Lincoln. Aetna, in fact, did not even review the Purchase Assumptions prior to approving the 2016 COI increase. *See* Pltf. SUMF 30. Although Aetna once again nominally slaps a "Disputed" tag against SUMF ¶ 30, *see* Aetna Resp. to Pltf. SUMF ¶ 30, it cites no evidence disputing this unassailable fact.

CONCLUSION

For the foregoing reasons, Plaintiff, and on behalf of herself and all members of the certified Class, respectfully request that the Court grant her motion for summary judgment on liability, and thereafter set a trial date for the damages phase of the case.

[36] Aetna also quotes its own expert as stating that the Purchase Assumptions "reflected a number of the appraisal assumptions used by the actuarial firm Tillinghast in the seller's (Aetna's) appraisal of the Aetna Block." Aetna Opp. 12 (quoting Pfeifer Report ¶ 38). But the fact that the Purchase Assumptions "reflected" certain other assumptions is insufficient to support Aetna's assertion that both sets of assumptions are functionally one and the same, and Aetna fails to provide any analysis of the two sets of assumptions to try to establish that they are similar.

Dated: January 17, 2020

/s/ Seth Ard

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on the following counsel, this January 17, 2020.

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