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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOHN DOE ONE, JOHN DOE TWO, and
JOHN DOE THREE, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

vs.

AETNA, INC., AETNA HEALTHCARE,
INC., AETNA SPECIALTY PHARMACY,
LLC,

Defendants.

CASE NO. 14cv2986-LAB (DHB)

**ORDER ON MOTION TO DISMISS
(DOCKET NO. 21) AND MOTION FOR
DETERMINATION THAT PLAINTIFFS
ARE ENTITLED TO ATTORNEY'S
FEES, EXPENSES, AND PAYMENTS
TO CLASS REPRESENTATIVES
(DOCKET NO. 24)**

This case arises out of Aetna's announcement that it would change certain health insurance policies to require its insureds to obtain HIV and AIDS medications through the mail. (Docket no. 17 at ¶ 1.)

John Doe One sued Aetna on December 19, 2014, contending that the proposed change would threaten HIV and AIDS patients' health and privacy, and that it would cost them thousands of dollars each month if they chose to get their medications at their community pharmacy instead of through the mail. (Docket no. 1 at ¶ 1.) He alleged that Aetna notified certain plan members of this change through a November 3, 2014 letter, which announced that it was recategorizing certain HIV and AIDS medications effective

1 January 1, 2015. (*Id.* at ¶ 6, Exhibit 1.) A First Amended Complaint (FAC) was filed on May
2 8, 2015. (Docket no. 17.) It added John Doe Two and Three; alleges that all three plaintiffs
3 requested to opt out of the mail order program, but Aetna initially denied their requests; and
4 alleges that John Doe Three—the only plaintiff with an “individual” plan, i.e., a health plan
5 purchased directly by an individual—has been forced to purchase his medication by mail
6 order since March 2015. (*Id.* at ¶¶ 36–38.) Plaintiffs seek injunctive relief and damages.
7 (*Id.* at 74–75.)

8 Plaintiffs acknowledge that in March 2015, Aetna’s counsel informed their counsel
9 that it had suspended the program for “employer” plans—i.e., health plans sponsored by
10 employers for their employees—until January 2016, and for individual plans until July 2015.
11 (Docket no. 24-2 at ¶ 4.)¹ Aetna contends, and Plaintiffs don’t deny, that for customers like
12 John Doe One and Two who have employer plans, it never implemented the program,
13 (Docket no. 17 at ¶¶ 36–37; Docket no. 21-2 at ¶¶ 2, 7, 14), and for customers like John Doe
14 Three who have individual plans, it reversed the program effective June 1, 2015, (Docket no.
15 21-2 at ¶ 13.) Aetna contends that it sent letters about the reversal to individual plan
16 members on May 26, 2015, and to employer plan members in June 2015. (*Id.* at ¶¶ 12, 13.)
17 Plaintiffs acknowledge that on May 14, 2015 Aetna’s counsel confirmed that it had
18 terminated the program. (Docket no. 24-2 at ¶ 7.) Aetna declares that it has no current
19 plans to reinstate the program (Docket no. 21-1 at 11; Docket no. 21-2, at ¶¶ 7, 10), but
20 Plaintiffs complain that Aetna won’t confirm whether its decision to terminate the program
21 is permanent, (Docket no. 24-1 at 2 n.1.) Contrary to Plaintiffs’ allegations, Aetna contends
22 that it would have permitted plan members to opt out of the mail order program. (Docket no.
23 21-1 at 3; Docket no. 21-2 at ¶ 7.)

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26 ¹ Aetna has filed a declaration that suggests, albeit ambiguously, a somewhat
27 different version of what its counsel told Plaintiffs’ counsel in March 2015. (Docket no. 21-5
28 at ¶¶ 3–5.) Aetna’s declaration suggests that Plaintiffs’ counsel knew as of March 2015 that
the program change wouldn’t go into effect at all as to John Doe One, and that after Plaintiffs
filed the FAC, their counsel was informed that the program change wouldn’t go into effect
as to John Doe Two, and it would be reversed as to John Doe Three effective June 1, 2015.
Id. Any inconsistency doesn’t effect the outcome of this order.

1 Aetna seeks dismissal, contending that: all three plaintiffs lack standing to assert
2 claims for prospective relief; John Doe One and Two lack standing to assert claims for
3 damages; and John Doe One and Two's claims aren't ripe. (Docket no. 21.) Plaintiffs
4 contend they were the catalyst for Aetna's reversal, and they seek attorney's fees,
5 reimbursement of expenses, and payment to class representatives. (Docket no. 24.)

6 **I. Standing**

7 **A. Legal Standard Governing 12(b)(1) Motions to Dismiss**

8 Federal Rule of Civil Procedure 12(b)(1) requires a court to dismiss a complaint if the
9 court lacks subject matter jurisdiction over the claims at issue. A court lacks subject matter
10 jurisdiction if a plaintiff lacks Article III standing. *Braunstein v. Arizona Dep't of Transp.*, 683
11 F.3d 1177, 1184 (9th Cir. 2012). Plaintiffs bear the burden of establishing standing for each
12 form of relief sought. *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007).
13 Standing requires that "(1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently
14 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical,' (2) the
15 injury is 'fairly traceable' to the challenged conduct, and (3) the injury is 'likely' to be
16 'redressed by a favorable decision.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S.
17 555, 560–61 (1992)).

18 "Rule 12(b)(1) jurisdictional attacks can be either facial or factual." *White v. Lee*, 227
19 F.3d 1214, 1242 (9th Cir. 2000). With a facial attack, courts inquire whether the allegations
20 contained in a complaint are sufficient on their face to invoke federal jurisdiction. *Terenkian*
21 *v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012). With a factual attack, however, "the
22 defendant may introduce testimony, affidavits, or other evidence to dispute the truth of the
23 allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* (internal
24 brackets and quotation marks omitted). Aetna contends that dismissal is proper under either
25 standard. (Docket no. 21-1 at 9 n.2.)

26 Standing is determined as of the time the complaint was filed. *Haro v. Sebelius*, 747
27 F.3d 1099, 1108 (9th Cir. 2014). The parties dispute whether the relevant complaint is the
28 first complaint, initiating the action, or the FAC, which added John Doe Two and Three.

1 Citing *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), where the Court relied on the
2 final complaint in making its standing determination, Aetna urges the latter. But, as noted
3 by the Sixth Circuit, “[a] careful reading of [*McLaughlin*] demonstrates that the [final]
4 complaint was important not because it was the operative pleading, but because it was that
5 complaint which named ‘three additional plaintiffs’ who were ‘still in custody’ at the time the
6 complaint was filed, and who were the plaintiffs found to have standing by the Court.” *Lynch*
7 *v. Leis*, 382 F.3d 642, 647 (6th Cir. 2004). Thus, “[t]he lesson of *McLaughlin* seems to be
8 that standing is determined at the time the relevant claim is raised or party is joined.” *Saleh*
9 *v. Fed. Bureau of Prisons*, 2009 WL 3158120, at *5 (D. Colo. Sept. 29, 2009). The Court
10 will evaluate John Doe One’s standing as of the time of the original complaint, and will
11 evaluate John Doe Two and Three’s standing as of the time of the FAC.

12 **B. Whether Plaintiffs Suffered an Injury in Fact**

13 **1. Prospective Relief**

14 Aetna’s challenge to Plaintiffs’ standing to seek prospective relief focuses on lack of
15 imminence. The imminence inquiry is meant to “ensure that the alleged injury is not too
16 speculative for Article III purposes—that the injury is *certainly* impending.” *Clapper v.*
17 *Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted).
18 “[A]llegations of *possible* future injury are not sufficient.” *Id.* (internal quotation marks
19 omitted).

20 Relying on its subsequent reversal of the mail order program, Aetna argues that “all
21 three Plaintiffs lack standing to pursue prospective relief because there is no credible threat
22 of any future harm.” (Docket no. 21-1 at 10–11.) At the time that Plaintiffs filed their
23 respective complaints, however, they had ample reason to believe that Aetna’s proposed
24 program would be put into effect. Indeed, Aetna told them that it would; Plaintiffs merely
25 took Aetna’s word for it. This is particularly clear for John Doe One—who brought the first
26 complaint less than two months after he received notice of the program, less than a month
27 before it was to go into effect, and after allegedly being told he couldn’t opt out. John Doe
28 Two and Three pose a closer question because Aetna had informed their counsel that it was

1 suspending the program before they filed the FAC. But at the time, the suspension was
2 temporary,² and Plaintiffs had no reason to doubt that the program would be implemented
3 on January 2016 and July 2015 respectively as Aetna had allegedly announced. See *White*
4 *v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (finding plaintiffs had standing to seek injunctive
5 relief despite a temporary policy change that obviated the plaintiffs’ alleged harm because
6 the policy “had been in effect for only a month and was scheduled to expire in less than a
7 year” and “[t]he recent implementation of such a temporary policy was insufficient to
8 eliminate the plaintiffs’ standing to seek prospective relief.”). While Aetna’s reversal of the
9 mail order program may present a mootness issue, that issue isn’t presented in Aetna’s brief
10 and isn’t before the Court.

11 Aetna’s motion to dismiss the prospective relief claims for lack of standing is **DENIED**.

12 2. Damages

13 Since it never implemented the mail order program for customers like John Doe One
14 and Two that have employer plans, Aetna contends that John Doe One and Two lack
15 standing to seek damages. Plaintiffs don’t challenge this argument, and the Court agrees
16 with it. See *Braunstein v. Arizona Dep’t of Transp.*, 683 F.3d 1177, 1184–85 (9th Cir. 2012)
17 (dismissing damages claim for lack of standing where the plaintiff couldn’t show that the
18 challenged program had affected him personally).

19 Aetna’s motion to dismiss John Doe One and Two’s damages claims for lack of
20 standing is **GRANTED**.

21 II. Prudential Ripeness

22 Prudential ripeness is a question of justiciability that prevents the courts, through the
23 avoidance of premature adjudication, from entangling themselves in abstract disagreements.
24 *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000). It
25 requires courts to “evaluate both the fitness of the issues for judicial decision and the
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27 ² Aetna’s declaration suggests that the change it discussed with Plaintiffs’ counsel
28 wasn’t temporary, but the conversation only applied to John Doe One. Thus, even under
Aetna’s version of the conversation, John Doe Two and Three had no reason to doubt that
the program would be implemented with respect to their plans.

1 hardship to the parties of withholding court consideration.” *Golden v. California Emergency*
2 *Physicians Med. Grp.*, 782 F.3d 1083, 1086 (9th Cir. 2015). The fitness prong asks whether
3 “judicial resolution of the question presented . . . should await a concrete dispute.” *Nat’l Park*
4 *Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003). Under this prong, a case is
5 generally ripe if the remaining questions are purely legal; a case is not ripe if further factual
6 development is required. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d
7 840, 849 (9th Cir. 2007). The hardship prong asks whether “withholding review would result
8 in direct and immediate hardship and would entail more than possible financial loss,”
9 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009). The burden of establishing
10 ripeness rests with the party asserting the claim. *Colwell v. Dep’t of Health & Human Servs.*,
11 558 F.3d 1112, 1121 (9th Cir. 2009). “Ripeness is determined at the time of the filing of the
12 complaint.” *Forest Glade Homeowners Ass’n v. Allied Mut. Ins. Co.*, 2009 WL 927750, at
13 *2 (W.D. Wash. Mar. 31, 2009).

14 Both of the ripeness prongs are satisfied. With respect to fitness, no further factual
15 development is necessary. The program wasn’t an abstract idea when the relevant
16 complaints were filed. *Cf. Addington v. US Airline Pilots Ass’n*, 791 F.3d 967, 980 (9th Cir.
17 2015) (fitness prong met for challenging union’s memorandum of understanding with airlines
18 because “the fruit of negotiations [was] manifest and some kind of final product ha[d] been
19 reached.” (internal quotation marks omitted)). At the time the original complaint was filed,
20 the program was to go into place within the next month. And at the time the FAC was filed,
21 it had already been applied to individual plan members, including John Doe Three. Thus,
22 it’s sufficiently concrete to evaluate against the causes of action in the FAC. Likewise,
23 judged from the time that Plaintiffs filed the relevant complaints, their alleged health and
24 privacy concerns with purchasing their medication through the mail supplied sufficient
25 hardship to meet the second ripeness prong. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109,
26 1126 (9th Cir. 2009) (hardship prong met where, absent a victory in the litigation, the
27 plaintiffs would be required to dispense birth control over their religious and moral
28 objections).

1 Aetna's motion to dismiss John Doe One and Two's claims for lack of ripeness is
2 **DENIED.**

3 **III. Catalyst Theory**

4 Plaintiffs seek attorney's fees, expenses, and payments to class representatives
5 under the "catalyst theory." (Docket no. 24.) They contend that they "have achieved their
6 primary objective in this class action lawsuit" and that their "efforts were the catalyst that
7 brought Aetna to the bar of justice." (*Id.* at 1, 2.)

8 Where the catalyst theory applies, plaintiffs can obtain attorney's fees if their lawsuit
9 brought about a voluntary change in the defendant's conduct. *Buckhannon Bd. & Care*
10 *Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 601 (2001). "[A]
11 party asserting the catalyst theory must meet three thresholds to obtain fees: (1) that
12 defendant's actions provided a plaintiff with 'some of the benefit sought' in the lawsuit; (2)
13 that plaintiff's claims were not frivolous; and (3) that plaintiff's lawsuit was a substantial or
14 significant cause of defendant's actions providing relief." *Feldman's Med. Ctr. Pharmacy,*
15 *Inc. v. CareFirst, Inc.*, 898 F. Supp. 2d 883, 899 (D. Md. 2012); *see also Buckhannon*, 532
16 U.S. at 627–28 (Ginsburg, J., dissenting) (describing the three conditions a plaintiff must
17 show under the catalyst theory).

18 After *Buckhannon*, there's some question as to whether the catalyst theory remains
19 available. Assuming it does, however, the Court is dubious whether it applies here. While
20 Plaintiffs acknowledge the three catalyst theory elements, they provide in depth briefing of
21 the third element only, and do little to establish the first two elements. Indeed, their
22 complaint that Aetna won't promise to never implement a similar mail order program in the
23 future cuts against a finding that they've achieved the benefit that they've sought. And at this
24 stage, Plaintiffs have given the Court no reason to believe that their claims have any legal
25 merit. Plaintiffs point to Aetna's decision to reverse the program, but that doesn't necessarily
26 mean that their claims are colorable. For example, even if the Court were to assume that
27 Aetna made the change in response to this lawsuit, the response may be a business
28 decision made to avoid nuisance-value lawsuits. Other than the possible personal

1 preference of *some* of the class members, the Court doesn't understand what interest it
2 serves to receive medications at a pharmacy as opposed to through the mail in a
3 presumably nondescript package. Since most of Plaintiffs' claims survive Aetna's motion
4 to dismiss, they will have an opportunity to establish that they've stated a genuine claim at
5 a later stage.

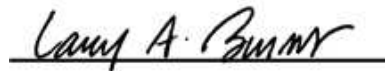
6 The Plaintiffs' catalyst theory motion is **DENIED**.

7 **IV. Conclusion**

8 Aetna's motion to dismiss (Docket no. 21) is **DENIED IN PART AND GRANTED IN**
9 **PART** and Plaintiffs' catalyst theory motion (Docket no. 24) is **DENIED**.

10 **IT IS SO ORDERED.**

11 DATED: March 15, 2016

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13 **HONORABLE LARRY ALAN BURNS**
14 United States District Judge

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