

1 Jeffrey A. LeVee (State Bar No. 125863)
2 JONES DAY
3 555 South Flower Street, 50th Floor
4 Los Angeles, CA 90071
5 Telephone: +1.213.489.3939
6 Facsimile: +1.213.243.2539
7 Email: jlevee@jonesday.com

5 David C. Kiernan (State Bar No. 215335)
6 Brian G. Selden (State Bar No. 261828)
7 Matthew J. Silveira (State Bar No. 264250)
8 JONES DAY
9 555 California Street, 26th Floor
10 San Francisco, CA 94104
11 Telephone: +1.415.626.3939
12 Facsimile: +1.415.875.5700
13 Email: dkiernan@jonesday.com

10 Robert H. Bunzel (SBN 99395)
11 Patrick M. Ryan (SBN 203215)
12 Oliver Q. Dunlap (SBN 225566)
13 BARTKO ZANKEL BUNZEL & MILLER
14 One Embarcadero Center, Suite 800
15 San Francisco, CA 94111
16 Telephone: +1.415.956.1900
17 Facsimile: +1.415.956.1152
18 Email: rbunzel@bzbm.com

15 Attorneys for Defendants Sutter Health, et al.

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **FOR THE CITY AND COUNTY OF SAN FRANCISCO**

19 UFCW & EMPLOYERS BENEFIT TRUST,
20 Plaintiff,
21 v.
22 SUTTER HEALTH, et al.,
23 Defendants.

23 PEOPLE OF THE STATE OF
24 CALIFORNIA, EX REL. XAVIER
25 BECERRA
26 Plaintiff,
27 v.
28 SUTTER HEALTH, et al.,
29 Defendants.

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*

06/12/2020
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

CASE NO. CGC 14-538451
Consolidated with
CASE NO. CGC 18-565398

Assigned for all purposes to
Hon. Anne-Christine Massullo, Dept. 304

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO CONTINUE
PRELIMINARY APPROVAL HEARING;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Hearing Date: July 9, 2020
Time: 9:15 a.m.
Dept.: 304

Complaint Filed: April 7, 2014

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, on July 9, 2020, at 9:15 a.m., in Department 304 of this
3 Court, located at 400 McAllister St., San Francisco, CA 94102, Defendants (collectively referred
4 to as “Sutter”) will and hereby do move to continue the settlement approval proceedings,
5 including the preliminary approval hearing scheduled for June 22, to the sooner of (a) 90 days
6 after a decision on this motion or (b) 30 days after the California Governor declares that
7 California is no longer in a State of Emergency and the shelter-in-place orders have been lifted.

8 This Motion is based on this Notice, the accompanying Memorandum of Points and
9 Authorities, the Declarations of James Conforti and David C. Kiernan, and any argument and
10 evidence that may be presented at the hearing.

11 A proposed order is being submitted with this Motion.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: June 12, 2020

JONES DAY

By: /s/ David C. Kiernan
David C. Kiernan

Attorneys for all Defendants
SUTTER HEALTH et al.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION	5
II. DISCUSSION	7
A. COVID-19 Has Significantly Impacted Sutter’s Operations and Financial Condition.....	8
1. Sutter Acted Quickly and Mobilized Its Entire System of Healthcare Providers to Respond to COVID-19	8
2. COVID-19 Has Had a Devastating Impact on Sutter’s Financial Condition.....	9
3. Sutter Anticipates that COVID-19 May Have Lasting Impacts on the Sutter System	10
B. Northern California Is in the Early Stages of a Critical Period That Should Be Accounted for Before Approval Proceedings Resume.....	11
C. The Lasting Impact of COVID-19 May Materially Impact Key Provisions of the Proposed Injunction	14
D. SB 977’s Introduction of Uncertainty into the Legal Landscape Further Supports a Continuance/Stay	16
III. CONCLUSION	17

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **CASES**

4 *California v. Levi Strauss & Co.*,
5 41 Cal. 3d 460 (1986)8

6 *Cellphone Term. Fee Cases*,
7 180 Cal. App. 4th 1110 (2009).....8

8 *Forthmann v. Boyer*,
9 97 Cal. App. 4th 977 (2002).....7

10 *Freiberg v. City of Mission Viejo*,
11 33 Cal. App. 4th 1484 (1995).....7

12 *Landis v. North American Co.*,
13 299 U.S. 248 (1936).....7

14 *Lerma v. Cty. of Orange*,
15 120 Cal. App. 4th 709 (2004).....7

16 *OTO, L.L.C. v. Kho*,
17 8 Cal. 5th 111 (2019)7

18 *Robert Ito Farm, Inc. v. Cty. of Maui*,
19 No. 14-00511 SDM/BMK, 2015 WL 1279422 (D. Hawaii Mar. 19, 2015).....16

20 *Union Pac. R.R. Co. v. Utah State Tax Comm’n*,
21 No. 18-cv-00630-DAK, 2020 U.S. Dist. LEXIS 88715 (D. Utah May 19, 2020).....7

22 *Walker v. Superior Court*,
23 53 Cal. 3d 257 (1991)7

24 **STATUTES**

25 Cal. Civ. Proc. Code § 583.310.....8

26 Cal. Civ. Proc. Code § 583.340.....8

27 **OTHER AUTHORITIES**

28 Cal. Rule of Court 3.1332(d)(1)-(11).....7

S.F. Uniform Local Rules of Court 8.2B(1).....7

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In the span of just a few months, COVID-19 has profoundly altered the healthcare
4 landscape in California and throughout the country. Sutter has met the challenge by mobilizing
5 its entire integrated network to respond to the pandemic, but the consequences of doing so have
6 been severe and have already put Sutter in a drastically different position than when the parties
7 agreed to settle this matter in December. Not only has Sutter had to alter the way it coordinates
8 its care and significantly increase expenditures to respond to the crisis, it has also suffered
9 devastating declines in patient volume due to governmental limitations on non-emergent surgeries
10 and procedures, ongoing surge preparation requirements, and the public’s reluctance to seek
11 healthcare during the pandemic. Sutter’s financial losses due to these changes have been nothing
12 short of catastrophic, and while the long-term impact of COVID-19 is still playing out, Sutter’s
13 ability to comply with the terms of the proposed injunction is already in question.

14 Resuming the settlement approval process in such an uncertain and fluid situation would
15 be impractical, inefficient, and potentially detrimental to the class and the communities that Sutter
16 Health serves. As the Court recently acknowledged, there is no need to “rush[] things in a way
17 that creates more problems on the back end” of the approval process, and the better course is to
18 make any needed modifications to the proposed injunction before the settlement is approved. *See*
19 *Ex. 2, 5/29/20 Tr. at 28:12-14.*¹ Allowing time for the parties and the Court to meaningfully
20 assess whether the proposed injunction should be modified would prevent serial modifications,
21 avoid multiple notices to absent class members, and thereby conserve resources and reduce the
22 risk of confusing class members.² And perhaps most importantly, it would help protect the
23 communities that Sutter serves by preventing the finalization of a settlement that may no longer
24 make sense in its current form and could jeopardize Sutter’s ability to continue providing care. In

25 _____
26 ¹ All “Ex.” references in this motion are to the exhibits attached to the Declaration of David C. Kiernan.

27 ² *Ex. 2, 5/29/20 Tr. at 28:5-10* (The Court: “[H]ow are class members supposed to look at
28 and decide what to do with the settlement when according to [plaintiffs] right now well the notice is that Sutter recommends for changed circumstances. I don’t know what that means if I’m a member of the class.”)

1 this regard, Plaintiffs’ statement that they will not reassess even a single provision of a proposed
2 injunction negotiated prior to COVID-19 is troublesome because it ignores the potentially
3 harmful consequences of railroading the settlement through to approval in such an uncertain time.
4 *See* Ex. 2, 5/29/20 Tr. at 8:16-17 (“The plaintiffs are not going to renegotiate the settlement.”).

5 Continuing the approval process for a reasonable time, on the other hand, would give
6 needed clarity to several critical issues relevant to settlement, thereby putting the Court in a better
7 position to finalize a settlement that properly accounts for COVID-19 and makes sense for the
8 parties, the class, and the community. *First*, it would enable the parties and the Court to better
9 understand the trajectory of the COVID-19 pandemic, particularly as state and local governments
10 begin to relax shelter-in-place restrictions and the economy reopens. This critical phase of the
11 response to COVID-19 will test the degree to which society can safely reopen and the degree to
12 which Sutter and other providers will be impacted should a surge of patients occur. In turn, it will
13 help the Court evaluate whether a level of stability appropriate for resuming approval proceedings
14 has been reached. *Second*, continuing the approval process would provide critical time for Sutter
15 to more conclusively assess the financial impact of COVID-19 after another quarter of financial
16 results and related financial modeling, as well as consider several potential operational responses
17 to COVID-19. These considerations could directly impact the viability of key injunctive relief
18 provisions, including but not limited to the chargemaster limiter and conditional participation
19 provisions. And *third*, continuing the approval process would allow the content and ultimate fate
20 of SB 977 – the Attorney General’s attempt to alter California’s antitrust laws following the
21 settlement of this matter – to be determined. Whether and in what form this bill passes could
22 impact key injunctive relief provisions or even render the injunction moot, so waiting the few
23 short months for it to resolve before the approval process resumes would promote efficiency and
24 practicality.

25 For these reasons, and as more fully stated below, the Court should continue the
26 settlement approval proceedings, including the preliminary approval hearing scheduled for June
27 22, until the sooner of (a) 90 days after a decision on this motion or (b) 30 days after the
28 Governor declares that California is no longer in a State of Emergency and the shelter-in-place

1 (“SIP”) orders have been lifted. Continuing the hearing for this short period will put the Court in
2 a better position to ensure that the resolution of this matter makes sense for the parties, the class,
3 and the communities it will impact. It will also prevent Sutter from having to oppose the
4 settlement when its ultimate objective is the same as Plaintiffs’: to resolve this matter.

5 **II. DISCUSSION**

6 “The decision to grant or deny a continuance is committed to the sound discretion of the
7 trial court.” *Forthmann v. Boyer*, 97 Cal. App. 4th 977, 984 (2002); *see also* S.F. Uniform Local
8 Rules of Court 8.2B(1) (“The judge hearing the matter has discretion concerning
9 continuances[.]”); *Lerma v. Cty. of Orange*, 120 Cal. App. 4th 709, 716 (2004) (considering a
10 continuance of a summary judgment hearing under standard governing request for trial
11 continuances). Factors relevant to the court’s decision include “[t]he length of the continuance
12 requested”; “[t]he prejudice that parties ... will suffer as a result of the continuance”; “[w]hether
13 the interests of justice are best served by a continuance”; and “[a]ny other fact or circumstance
14 relevant to the fair determination of the motion or application.” Cal. Rule of Court 3.1332(d)(1)-
15 (11).³ Courts have not hesitated to continue proceedings during a pandemic even when the
16 parties are not on the front lines of the response as Sutter is here. *See Union Pac. R.R. Co. v.*
17 *Utah State Tax Comm’n*, No. 18-cv-00630-DAK, 2020 U.S. Dist. LEXIS 88715, at *3-4 (D.
18 Utah May 19, 2020) (“Given that the perils created by the pandemic are being felt by nearly every
19 sector of society, courts need not be immovable in providing parties some leeway as they
20 navigate these uncertain times.”).

21 Ultimately, in approving a class action settlement, the Court must determine that the
22 settlement is fair, reasonable, and adequate to class members and in the public interest.

24 ³ Similar factors would support a stay of the case in its entirety under the “inherent powers
25 of the court . . . to insure the orderly administration of justice.” *Walker v. Superior Court*, 53 Cal.
26 3d 257, 266 (1991) (quoting *Hays v. Superior Court*, 16 Cal. 2d 260, 264 (1940), *superseded by*
27 *statute on other grounds*); *see also OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 141 (2019). “[T]he power
28 to stay proceeding is incidental to the power inherent in every court to control the disposition of
the causes on its docket with the economy of time and effort for itself, for counsel, and for
litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). A court should exercise this
power “in the interests of justice and to promote judicial efficiency.” *Freiberg v. City of Mission*
Viejo, 33 Cal. App. 4th 1484, 1489 (1995).

1 *Cellphone Term. Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009) (final approval). The purpose
2 of preliminary approval is to ensure that “probable cause” exists to send notice to the class of the
3 settlement terms and their rights to comment on and/or object to the settlement on the grounds
4 that it is not fair, reasonable, and adequate to class members. *California v. Levi Strauss & Co.*, 41
5 Cal. 3d 460, 485 (1986). The requested continuance will provide the Court with vital information
6 necessary to determine whether notice should be sent to class members, avoiding multiple rounds
7 of notice if the Court decides that modifications are needed before final approval.⁴

8 **A. COVID-19 Has Significantly Impacted Sutter’s Operations and Financial**
9 **Condition.**

10 **1. Sutter Acted Quickly and Mobilized Its Entire System of Healthcare**
11 **Providers to Respond to COVID-19.**

12 Long before communities were shut down, on January 23, 2020, Sutter activated the
13 Sutter Health Emergency Management System (“SHEMS”) to coordinate and direct Sutter’s
14 operations in response to COVID-19. Declaration of James Conforti (“Conforti Decl.”) ¶ 4. At
15 SHEMS’ direction, Sutter adapted and modified its pre-pandemic operations so that Sutter’s
16 facilities and healthcare providers were optimally deployed to treat a surge of COVID-19
17 patients. *Id.* These efforts included increasing general, medical surgery, critical care and
18 intensive care unit (“ICU”) bed capacities and units; placing testing tents strategically throughout
19 the Sutter system; creating COVID-19 units to isolate and treat COVID-19-positive patients while
20 safeguarding the health of other Sutter patients and Sutter’s workforce; securing sufficient
21 Personal Protective Equipment (“PPE”), testing equipment, ventilators, and supplies essential to
22 treating COVID-19 patients; and expanding telehealth capabilities. *Id.* In addition, Sutter
23 cancelled non-emergency healthcare services in mid-March 2020 pursuant to federal, state, and
24 local recommendations and orders to slow the spread of the virus. *Id.*

25 _____
26 ⁴ The requested continuance would not cause any schedule-related prejudice for this case
27 under Cal. Code of Civ. Proc. §§ 583.310 and 583.340, because the time “between October 16,
28 2019 and the earlier of (a) the effective date of the Settlement as agreed by the parties or (b) the
date of a non-appealable order denying approval of the Settlement or the date of termination of
the Settlement on the record” would be added to July 6, 2020 by Stipulation and Order entered
December 11, 2019.

1 Sutter’s ability to respond to the pandemic has been highly dependent on the freedom and
2 flexibility to leverage Sutter’s entire integrated system, including its facilities, equipment,
3 supplies (including PPE), staff, and physicians. *Id.* ¶ 5. Sutter needs the freedom to move
4 resources and people to where they are needed most and, when appropriate, redirect or transfer
5 patients to ensure they receive the right care. *Id.*

6 Sutter’s efforts to expand critical care capacity exemplify the importance of its integrated
7 network to its COVID-19 response.⁵ By leveraging the entire system, Sutter has expanded its
8 potential capacity more than six-fold, such that it has available 600 additional critical care beds
9 supported by properly trained staff with sufficient supplies and equipment. *Id.* ¶ 6. To enable
10 this expansion, Sutter has adopted a four-stage surge plan that designates certain Sutter hospitals
11 as COVID-19 centers to which COVID-19 patients will be redirected from hospitals already at
12 capacity, including two hospitals designated Group A Providers under the proposed injunction
13 (Alta Bates Summit Medical Center and California Pacific Medical Center).⁶ *Id.* ¶¶ 6-7.

14 Leveraging Sutter’s entire system is the only way to expand critical care capacity to a level that
15 would enable Sutter to respond to a potential second surge that could occur this summer during
16 the fire season or during the fall flu season. *Id.* ¶ 6.

17 **2. COVID-19 Has Had a Devastating Impact on Sutter’s Financial** 18 **Condition.**

19 In the first quarter of 2020 alone, Sutter incurred more than a \$1 billion loss from its
20 operations and investments due to COVID-19. *Id.* ¶ 11.⁷ Sutter also lost hundreds of millions of

21 ⁵ See, e.g., Ex. 25, Shalini Ramachandran, Laura Kusisto & Katie Honan, *New York*
22 *Response Worsened Pandemic – Hasty expansion of facilities by state, city, and hospital leaders*
23 *led to grave mistakes*, Wall Street Journal, June 12, 2020 (discussing how New York’s
24 uncoordinated response to the pandemic put residents at greater risk).

25 ⁶ For example, if Eden Medical Center were at capacity, new COVID-19 patients would
26 be redirected to one of the six COVID-19 centers (likely Alta Bates or CPMC given the
27 proximity).

28 ⁷ See also Ex. 3, Felicia Alvarez, *Sutter Health reports \$1 billion first-quarter loss*,
Sacramento Business Journal, May 14, 2020 (discussing financial impacts of pandemic at Sutter);
Ex. 4, Mallory Moench, *Hospitals hurting from coronavirus*, San Francisco Chronicle, June 4,
2020 (“California hospital revenue plummeted by more than a third in the first four months of the
pandemic as costs to care for coronavirus patients rose.”); Ex. 6, Kaufman Hall, *The Financial*
Impact of COVID-19 on California Hospitals, June 2020 (estimating California hospitals will
lose \$15 billion through December 2020 and predicting “long-term changes to hospital financial
stability and care delivery in California hospitals”); Ex. 5, Kaufman Hall, *National Hospital*

1 dollars on its operations through April 30, 2020, even after accounting for approximately \$200
2 million in federal COVID-19 relief funds. *Id.* These operational losses are due in part to
3 declining patient volume and the increased expenditures necessary to respond to COVID-19,
4 including for PPE and other supplies and equipment. *Id.* ¶ 10.

5 The degree to which many Californians have forgone care, including primary care,
6 emergency care, and other specialty care visits, has been staggering. For instance, from March
7 17, 2020 through April 30, 2020, outpatient surgical cases at Sutter dropped 73%, inpatient bed
8 days declined 23%, Emergency Department visits declined 43%, and visits to medical
9 foundations dropped 60%. *Id.* ¶ 10. And as patient volume declined rapidly, Sutter significantly
10 increased its expenditures to respond to the State of California’s request to increase capacity to
11 care for more than twice the normal number of critically ill patients and fifty percent more acute
12 care patients. *Id.* Given the expected severity and duration of the pandemic, Sutter anticipates
13 operating at a significant loss until containment of COVID-19 due to reduced patient volume and
14 significant expenditures. *Id.* ¶ 11.

15 **3. Sutter Anticipates that COVID-19 May Have Lasting Impacts on the**
16 **Sutter System.**

17 Sutter is evaluating potential changes that may be necessary to continue its mission to
18 provide high quality and affordable healthcare in the over 100 Northern California communities it
19 serves. In particular, the severe financial impact of COVID-19 may force Sutter to shut down,
20 divest or convert to other uses (e.g., ambulatory care) some of its general acute care hospitals and
21 other providers and/or consolidate service lines between other facilities. *Id.* ¶ 13; *see also* Ex. 6,
22 Kaufman Hall, *The Financial Impact of COVID-19 on California Hospitals* at 16 (predicting
23 California hospital closures as long-term impact of pandemic). Should Sutter take any of these
24 measures, it would have to reevaluate how it coordinates care across the reconfigured system.
25 Conforti Decl. ¶ 13. For example, if a hospital is closed or a service line is eliminated, Sutter
26 would need to evaluate where to redirect patients to ensure access to care. *Id.* Such changes are

27 _____
28 *Flash Report*, May 2020 (“Our nation’s hospitals are caught in a perilous situation. At the same
time that they are serving as the frontlines for the battle against a highly contagious and
unpredictable virus, their financial viability is being threatened.”).

1 not theoretical. Indeed, because it is not financially feasible to seismically retrofit the Ashby
2 Campus of Alta Bates Summit Medical Center, Sutter is exploring alternative arrangements for
3 the care that is currently delivered at the Ashby Campus, including shutting down the campus,
4 selling the campus, converting it to an emergency room only facility or partnering with a third-
5 party to own and operate the facility. *Id.* ¶ 14.

6 At an upcoming special board meeting scheduled for June 25, 2020, the Sutter Board will
7 hear management’s assessment of the financial impact of the pandemic and potential changes to
8 its operating and capital plans, which will include the evaluation of several Sutter acute care sites
9 that are subject to the proposed injunction, in addition to recommendations for Sutter to reduce its
10 operating costs by, among other things, significantly reducing support services costs. *Id.* ¶ 15.

11 Benchmarks such as easing the state of emergency and SIP orders will allow Sutter and
12 other providers to assess the near-term challenges and the impact of those challenges on the
13 proposed injunctive relief. And while the evaluation of these near-term challenges will not
14 eliminate the possibility of changed circumstances in the future, the additional time and
15 understanding of COVID-19’s impacts will minimize the likelihood of Sutter needing to object
16 during the approval process.

17 **B. Northern California Is in the Early Stages of a Critical Period That Should**
18 **Be Accounted for Before Approval Proceedings Resume.**

19 California and its counties recently began relaxing the SIP orders as the curve of the
20 number of cases had flattened, and many SIP orders are set to expire over the next ninety days.⁸
21 Despite some progress, the State of California and many Northern California counties have
22 expressed concern about a resurgence in the coming weeks as SIP orders are eased, as individuals
23 choose not to follow social distancing guidelines, and as large gatherings of protesters continue
24 throughout the state. *Id.* ¶ 8. A resurgence, particularly during the fire and fall flu season, would

25 _____
26 ⁸ Although Californians are starting to seek elective care again, Sutter does not know
27 whether or when patient volume will return to pre-pandemic levels. That will depend in part on
28 when SIP orders are lifted and when Californians will feel comfortable returning to physician
offices, hospitals and other facilities. See Ex. 6, Kaufman Hall, *The Financial Impacts of
COVID-19 on California Hospitals* at 16 (“24% of Americans said they would wait a year or
longer before scheduling an elective procedure.”).

1 put additional strain on hospitals. Resuming approval proceedings now will prevent Sutter and
2 the Court from accounting for the impact of reopening on California hospitals and Sutter’s
3 response to this next critical phase of the pandemic.

4 With varying levels of reliance on the State’s guidelines, Northern California counties
5 have begun reopening their economies over the past month. Some, including the counties in
6 which Sutter’s three rural “Group A” hospitals operate and Contra Costa County, have followed
7 the State’s reopening plan, by submitting self-attestations reflecting their compliance with the
8 State’s readiness criteria.⁹ Others, such as San Francisco, have adopted their own variations on
9 the State’s four-stage reopening plan. San Francisco recently moved into Phase 2A of its plan,
10 with Phase 2B starting on June 15, Phase 2C anticipated to start on July 13, and Phase 3 targeted
11 for mid-August.¹⁰ Marin County has adopted a three-phase reopening plan, and has gradually
12 permitted certain industries to reopen in Phase 2, with the next phase of loosening to commence
13 on June 29.¹¹ And Alameda County has announced a reopening plan in which additional
14 businesses will reopen every two to four weeks, depending on satisfaction of certain COVID-19
15 indicators.¹² Still others, including San Mateo and Santa Clara counties have not adopted formal
16 reopening plans, but have started issuing orders announcing the reopening of various sectors of
17 the economy.¹³ The one constant is that reopening is now underway across the counties where
18 Sutter operates and is anticipated to intensify over the next ninety days.

19 _____
20 ⁹ Ex. 14, Amador County COVID-19 County Variance Attestation Form; Ex. 15, Del
21 Norte County COVID-19 County Variance Attestation Form; Ex. 16, Lake County COVID-19
22 County Variance Attestation Form; Ex. 20, Contra Costa County COVID-19 County Variance
23 Attestation Form.

24 ¹⁰ Phase 2B allows non-emergency medical appointments, outdoor dining, indoor retail,
25 outdoor fitness activities, and small gatherings, among other activities, to resume. Phase 2C
26 covers hair salons, indoor dining, and real estate open houses. And Phase 3, would allow public
27 schools, gyms, bars, and indoor museums and recreation activities to resume. *See* Ex. 17,
28 *Reopening San Francisco*, SF.gov, <https://sf.gov/information/reopening-san-francisco>.

¹¹ *See* Ex. 18, *Reopening Status*, Marin Recovers, <https://marinrecovers.com/reopening-status/>.

¹² Ex. 19, Alameda County Reopening Plan, Alameda County Health Care Services Agency.

¹³ *See, e.g.*, Ex. 21, San Mateo County Health Officer Order No. c19-5f, App’x C-1 (REVISED): Additional Businesses Permitted to Operate, Effective June 6, 2020; Ex., 22, Santa Clara County Executive Summary of June 5, 2020 Shelter-in-Place Order Updates.

1 The early returns are cause for concern. *See* Ex. 11, Sharon Bernstein, *California,*
2 *Southwest face new coronavirus woes as U.S. economy reopens*, Reuters, June 9, 2020 (reporting
3 California county public health officers’ conclusion that many new COVID-19 cases in recent
4 weeks “stem from loosened public health restrictions”); Ex. 7, Rong-Gong Lin II, Iris Lee &
5 Colleen Shalby, *California braces for second wave of coronavirus even as first wave is far from*
6 *over*, Los Angeles Times, June 3, 2020. While public health officials are cautiously optimistic
7 about the decline in COVID-19 cases nationwide, California is one of a group of states trending
8 in the opposite direction.¹⁴ And while hospitalizations have remained relatively flat in some
9 counties, others, including Sacramento and Santa Clara, are seeing spikes in hospitalizations. *See*
10 Ex. 9, Tony Bizjak & Michael McGough, *California health officials are monitoring coronavirus*
11 *spikes in these 9 counties*, Sacramento Bee, June 9, 2020 (reporting that Sacramento experienced
12 a 58% increase in hospitalized COVID-19 cases between June 5 and 7 as compared to June 2 to 4,
13 while Santa Clara is also “experiencing increasing hospitalization”). Meanwhile, Sutter and other
14 Northern California hospitals have begun accepting transfers from disproportionately impacted
15 areas in Southern California, reducing the current surplus of beds. Conforti Decl. ¶ 8; *see also*
16 Ex. 8, Miriam Jordan, *Coronavirus Jumps the Border, Overwhelming Hospitals in California,*
17 *New York Times*, June 7, 2020. And the recent protest activity has only heightened concerns of a
18 near-term surge, as large crowds have been congregating for the first time in months. *See* Ex. 7,
19 *Los Angeles Times*, June 3, 2020; Ex. 10, Aidin Vaziri, *Newsom says protests may cause*
20 *California’s coronavirus numbers to surge*, San Francisco Chronicle, June 5, 2020 (“Gov. Gavin

21 _____
22 ¹⁴ *See* Ex. 23, COVID-19: What’s New for May 29, 2020, Institute for Health Metrics and
23 Evaluation (“While national estimates of COVID-19 infections are declining, several states
24 [including California] may be experiencing stagnated progress or increased infections –
25 concerning trends given upward trends in mobility and eased social distancing measures
26 throughout the US.”); Ex. 7, *Los Angeles Times*, June 3, 2020 (“Health experts have long warned
27 of a potential second wave of the coronavirus as the economy reopens. But while other states
28 have seen the first wave fade, the Golden State continues to see cases rise at a rapid clip,”
including “troubling increases in reported disease in some Bay Area counties.”); Ex. 11, Reuters,
June 9, 2020 (“Coronavirus cases and hospitalizations are spiking in parts of California . . .
prompting . . . California to place counties where half of its population lives on a watch list.”);
Ex. 12, Emma Court & David R. Baker, *Second U.S. Virus Wave Emerges with Texas Hitting*
Record, Bloomberg, June 10, 2020 (“California’s hospitalizations are at their highest since May
13 and have risen in nine of the past 10 days.”); Ex. 24, Eliza Collins & Elizabeth Findell,
COVID-19 Hospitalizations Surge in Some States, Wall Street Journal, June 11, 2020.

1 Newsom said California should prepare for a surge in its coronavirus positive test rate following a
2 week of protests against police brutality.”).

3 Continuing the approval proceedings for 90 days or until 30 days after the SIP orders are
4 lifted and the Governor ends the State of Emergency would allow Sutter and the Court to monitor
5 the success and impact of lifting the SIP orders in California on Sutter and other healthcare
6 providers. Whether current projections are wrong or there is a second surge that risks
7 overwhelming hospitals, Sutter and the Court will be in a far better position to evaluate the
8 propriety of the injunctive relief.

9 **C. The Lasting Impact of COVID-19 May Materially Impact Key Provisions of**
10 **the Proposed Injunction.**

11 The financial and operational effects of the pandemic could result in lasting changes that
12 may render impracticable or otherwise materially impact key injunctive relief provisions. *First*,
13 the limit on chargemaster increases may be too low to cover the unprecedented and unforeseeable
14 increase in expenditures to respond to COVID-19 particularly given declining revenue. Conforti
15 ¶ 18. The Proposed Final Judgment (“PFJ”) at § IV.D. 4, p. 18, places limits on the amount that
16 Sutter may increase the charges in its charge description masters or “chargemasters.”¹⁵ As
17 discussed above, Sutter has been operating at a loss and anticipates significant losses until
18 COVID-19 is contained due to declining patient volume and increasing expenditures necessary to
19 provide clinical care and to be prepared for potential future surges. Sutter may need to increase
20 its chargemasters above the current limit in the proposed injunction to ensure that it can cover the
21 increased costs of additional PPE and other expenditures necessary to respond to COVID-19. *Id.*
22 ¶ 18. Any changes to hospital chargemasters will be determined in September 2020 as part of
23 Sutter’s budget planning. *Id.*

24 *Second*, as shown above, the restrictions on conditional participation may constrain
25 Sutter’s ability to use all resources in the system to respond to COVID-19 and a resurgence. *Id.* ¶

26 _____
27 ¹⁵A chargemaster is a primary driver of the revenue necessary to cover the costs of patient
28 care. Conforti Decl. ¶ 17. It includes a list of all the billable procedures, services and items, as
well as the associated charge amount. *Id.* In general, providers like Sutter negotiate contracted
rates with payers at a discount off the chargemaster. *Id.*

1 19. In general, the proposed injunction prohibits hospitals that are referred to as Group A
2 Providers (ABSMC, the three rural hospitals, and CPMC) from conditioning their participation in
3 a commercial product on the participation of other Sutter providers except in limited
4 circumstances (e.g., in a capitated or ACO product). *Id.* ¶ 20 (citing PFJ § IV.C.1.a). In addition,
5 non-Group A hospitals are prohibited from conditioning their participation on the participation of
6 the Group A Providers (e.g., Eden Medical Center cannot require that ABSMC or CPMC be in
7 network). *Id.* In its current form, the PFJ does not allow for any exceptions to these restrictions,
8 even if conditioning participation would be necessary to ensure patient access to care.¹⁶ *Id.*

9 The rules regarding conditional participation were negotiated based on how Sutter existed
10 and coordinated care in the fall of 2019. But as noted above, there is a distinct possibility that
11 Sutter will operate differently as a result of the pandemic. *Id.* ¶ 21. Moreover, an exception to
12 the conditional participation restrictions may be needed to avoid interfering with or disrupting
13 Sutter’s ability to respond to a future surge. *Id.* For example, depending on the severity of the
14 surge, Sutter may be required to move entire service lines (e.g., maternity) from Group A
15 hospitals that are designated COVID-19 centers, such as ABSMC, to other hospitals. *Id.* If the
16 other hospital is out-of-network during the surge, patients may be forced to make a choice
17 between seeing their Sutter healthcare provider but paying higher out-of-network rates or
18 switching providers during the pandemic. *Id.* Or, to avoid that choice, patients may decide to
19 wait until the pandemic subsides and the services are restored before seeking care—an obviously
20 undesirable result from both a private and public health perspective. *Id.* The injunction’s
21 restrictions could also impact the operation of Sutter’s critical care surge plan if hospitals
22 designated COVID-19 centers are out of network. *Id.* ¶ 22. Ultimately, the lack of an exception
23 could result in discouraging vital treatment during a pandemic.

24
25
26 _____
27 ¹⁶ These prohibitions are in contrast to the rules regarding Group B Hospitals. Group B
28 Hospitals may condition their participation in a commercial product on the participation of
another Group B Hospital under a number of circumstances, including without limitation where
reasonably necessary to ensure patient access to care or where the hospitals are clinically
integrated. PFJ § IV.C.3.a-c.

1 **D. SB 977’s Introduction of Uncertainty into the Legal Landscape Further**
2 **Supports a Continuance/Stay.**

3 Continuing the approval process will also allow the Court to account for SB 977, a bill
4 cosponsored by the California Attorney General. According to the authors and sponsor, SB 977
5 seeks to build upon the injunctive relief agreed to by Sutter. *See* Ex. 13, Senate Appropriations
6 Committee Analysis at 2 (identifying this case and its proposed injunctive relief as background
7 for the bill). If passed, SB 977 could impose significant changes to California antitrust laws that,
8 depending on the final content of the legislation, may profoundly impact the parties’ settlement.
9 According to Mr. Varanini, “Sutter benefitted in significant respects” under the proposed
10 injunction as compared to the legislation. Ex. 1, 5/15/20 Tr. at 30:23-31:1. But the interplay
11 between SB 977 and the injunction should be vetted and accounted for, not ignored. For
12 example, if the final legislation duplicates portions of the injunctive relief, those portions should
13 be stricken, to avoid an improper and unnecessary order directing Sutter to comply with the law.

14 SB 977 was the subject of a Senate committee hearing on June 9, 2020, and we anticipate
15 knowing if it will become law by either August 31, 2020 (the end of the legislative session) or
16 September 30, 2020 (the last date for Governor Newsom to sign legislation that has passed).
17 Because of the possibility that this bill, if passed, could materially impact the injunction or even
18 render it unnecessary or in conflict with the injunction, preliminary approval should be delayed
19 until the legal landscape becomes clear. *See Robert Ito Farm, Inc. v. Cty. of Maui*, No. 14-00511
20 SDM/BMK, 2015 WL 1279422, at *6 (D. Hawaii Mar. 19, 2015) (“[A] delay of this litigation
21 makes practical sense given the potential effect of legislation on this case. Failure to extend the
22 injunction staying the Ordinance could result in a considerable waste of public resources if the
23 County is forced to build the infrastructure necessary to enforce the Ordinance, only to find that
24 other circumstances render those efforts unnecessary.”); Ex. 1, 5/15/20 Tr. at 29:11-16 (“[I]f the
25 law is requiring something, then we don’t need an injunction. And if that’s going to happen
26 before I approve the settlement, then let’s just modify the settlement and take out the injunctive
27 relief.”).

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

For these reasons, the Court should continue the approval proceedings for 90 days or until 30 days after the SIP orders are lifted and the Governor ends the state of emergency.

Dated: June 12, 2020

JONES DAY

By: /s/ David C. Kiernan
David C. Kiernan

Attorneys for Defendants
SUTTER HEALTH et al.