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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF SAN FRANCISCO

17 UFCW & Employers Benefit Trust, on behalf
of itself and all others similarly situated

18 Plaintiffs,

19 vs.

20 Sutter Health, et al.,

21 Defendants.

22
23 People of the State of California, ex. rel.
Xavier Becerra,

24 Plaintiff,

25 vs.

26 Sutter Health,

27 Defendant.
28

Case No. CGC 14-538451
Consolidated with
Case No. CGC-18-565398

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL SUBMISSION IN
RESPONSE TO THE COURT'S
FEBRUARY 25, 2020 ORDER RE (1)
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT; AND (2) PLAINTIFFS'
MOTION TO APPOINT A MONITOR;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: June 22, 2020
Time: 9:15 am
Judge: Hon. Anne-Christine Massullo
Dept.: 304

Action Filed: April 7, 2014

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco

05/22/2020
Clerk of the Court
BY: EDNALEEN ALEGRE
Deputy Clerk

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NOTICE OF MOTION AND MOTION

To the Court, the parties, and counsel of record:

Please take notice that, on June 22, 2020, at 9:15 a.m., or as soon thereafter as the parties may be heard, in Department 304 of the Superior Court, County of San Francisco, 400 McAllister Street, San Francisco, California 94102, Plaintiffs UFCW & Employers Benefit Trust, et al. and the People of the State of California (“Plaintiffs”) will and hereby do move for leave to file a supplemental submission in response to the Court’s February 25, 2020 Order Re (1) Plaintiffs’ Motion for Preliminary Approval of Settlement; and (2) Plaintiffs’ Motion to Appoint a Monitor. This motion is based on the accompanying memorandum and any argument and evidence the Court may permit at the hearing.

Dated: May 22, 2019

CALIFORNIA ATTORNEY GENERAL

By: /s/ Emilio Varanini
Emilio Varanini
Attorney for The People of the State of California

Dated: May 22, 2019

PILLSBURY & COLEMAN, LLP

By: /s/ Richard Grossman
Richard Grossman
Attorney for Plaintiff Class

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MEMORANDUM

The People of the State of California (the “People”) and UFCW & Employers Benefit Trust (“UEBT”) (collectively “Plaintiffs”), seek leave to file the accompanying responses to the Court’s Order of February 25, 2020.¹

In early March, before the onset of the COVID-19 health crisis, Plaintiffs had engaged in productive discussions with Defendants Sutter Health, et al. (“Sutter”) to allow Sutter to have input on a submission that the Court ordered in response to the Court’s questions regarding Plaintiffs’ unopposed Motion for Preliminary Approval, including a number of questions pertaining to the settlement’s injunctive relief. At the time of the parties’ initial discussions, the parties engaged in constructive discussions with the goal of submitting a joint response. Although Sutter had not yet formally responded to the draft submission that Plaintiffs provided, Plaintiffs, based on informal discussions, attempted to address areas of potential concern through revisions that were sent to Sutter in March. Unfortunately, as Sutter’s counsel has informed the Court, Sutter states that it has been unable to engage in further discussions with Plaintiffs regarding the substance of any submission to the Court since March and will not commit to doing so at any specific point in the future.

Plaintiffs therefore seek leave to submit the accompanying responses to the Court’s questions to set out the governing legal framework surrounding those questions and to provide responses that will be of assistance to the Court in moving through any remaining issues towards an orderly resolution of the Plaintiffs’ unopposed Motion for Preliminary Approval.² Resolution of that motion, and ultimately moving this case towards final approval of the settlement, is of utmost importance not only to the members of the Plaintiff Class but also to healthcare markets in Northern California and the public at large in realizing the benefits of the settlement. Inquiries as

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¹ That order directed Plaintiffs to address the following: the terms of the injunctive relief in the Proposed Final Judgment (“PFJ”); the proposed notice to the class; allocation and distribution of the settlement proceeds; the scope of the release in the Settlement Agreement; additional miscellaneous issues implicated by the Plaintiffs’ Motion for Preliminary Approval of Settlement; as well as questions regarding the appointment of a monitor.

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² Plaintiffs provided this motion and attachments to Sutter before filing it, and Sutter has stated that it intends to oppose the motion.

1 to the status of this settlement from the public are constant. Rather than remain in limbo more
2 than three months into COVID-19, Plaintiffs deserve the opportunity to proceed now so that they
3 will have the opportunity to show at final approval in the Fall of this year that entry of this
4 settlement is fair, reasonable, and adequate, and that entry of the injunctive relief would not
5 disserve the public interest. The Chief Justice of the California Supreme Court stated in her
6 Emergency Order dated April 29, 2020, that “the courts are further encouraged to work with
7 justice partners to encourage and facilitate appropriate settlement.” (Judicial Council of
8 California, State Emergency Order by Tani G. Cantil-Sakayue, Chief Justice of California and
9 Chair of the Judicial Council (Apr. 29, 2020) at p. 4.) Though this point was expressly made in the
10 context of an order that otherwise applied to criminal proceedings, it resonates equally in civil
11 proceedings and sits well within this Court’s point at the case status conference on May 15, 2020
12 that the Court will officially open on June 1.

13 Granting this request for leave to file these responses, which this Court ordered Plaintiffs
14 to provide, is not prejudicial to Sutter. These responses are the same as those that Sutter has had
15 for more than two months. Plaintiffs have repeatedly engaged Sutter’s outside counsel on the
16 responses and made several changes in response to concerns expressed by Sutter’s outside
17 counsel. And Plaintiffs believe that any further responses from Sutter can be addressed as part of
18 a process put in place either leading up to preliminary approval or, as may be more appropriate
19 given the standards governing preliminary approval, leading up to final approval in the Fall. In
20 the meantime, the Court will have the benefit of these responses as it contemplates the unopposed
21 preliminary approval motion. Indeed, while most of these responses involve questions about
22 injunctive relief and the monitor, some of the questions address notice to the class and allocation
23 and distribution of the settlement proceeds – issues that do not even remotely implicate Sutter’s
24 interests in any form but rather concern only the interests of the Plaintiff Class and the People.

25 In particular, viewing this settlement against the legal framework in which the Court
26 reviews injunctive relief, as set out in the responses, there is no need to derail the preliminary
27 approval process by attempting to anticipate contingent events that may impact the injunctive
28 relief in the future. California law is very clear, as a matter of statute and precedent, as set out in

1 the responses, that altering injunctive relief to address a material change in facts or law is an
2 accepted part of the legal landscape; the impact of any possible change can be addressed once
3 injunctive relief is entered several months from now if such a change has crystallized at that point
4 (or later). The change of circumstances provision set out in Section VII of the Proposed Final
5 Judgment implements and reinforces this well accepted principle by expressly referring to Code of
6 Civil Procedure §533 which states as follows:

7 In any action, the court may on notice modify or dissolve an
8 injunction or temporary restraining order upon a showing that there
9 has been a material change in the facts upon which the injunction or
10 temporary restraining order was granted, that the law upon which
11 the injunction or temporary restraining order was granted has
12 changed, or that the ends of justice would be served by the
13 modification or dissolution of the injunction or temporary
14 restraining order.

12 No one questions that the COVID-19 crisis is having and will have profound effects on
13 health care, the economy, and society. But the crisis has not changed the need for commercial
14 insurers and Sutter to negotiate agreements, it does not alter the underlying antitrust concerns that
15 motivated Plaintiffs' actions, and it does not affect the centrality of the PFJ to Plaintiffs' decision to
16 reach a negotiated resolution with Sutter. If there ever comes a time for any party to argue that
17 COVID-19 (or other significant change of circumstances) requires modification to the PFJ, it would
18 come after approval, pursuant to the Changed Circumstances provision to which the parties agreed
19 and at the point when the impact of such circumstances will have crystallized.³ Now more than
20 ever, there is an urgent need for the Court to grant preliminary approval, authorize notice to the
21 Plaintiff Class, and establish an expeditious timetable for final approval of this historic settlement
22 of crucial importance not just to that class but to the People and to healthcare markets in Northern
23 California.

24 Ultimately, as the responses explain in more detail, the PFJ (which was mutually
25 negotiated to implement the terms of the parties' settlement agreement which itself was negotiated

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27 ³ Under the schedule proposed in the preliminary approval motion, there would be about four
28 months between preliminary approval and the final approval hearing. That would afford
substantial additional time to gauge whether changed circumstances warrant a modification--after
final approval--to the PFJ.

1 and agreed to under the auspices of an experienced mediator) reflects a valid and binding contract
2 between the parties that – like any contract – may require interpretation in the event of later
3 disputes. At preliminary approval, the Court should satisfy itself that the settlement, including the
4 PFJ, is “within the ‘ballpark’ of reasonableness” (*Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
5 4th 116, 133 (2008), consistent with the absence of any opposition to Plaintiffs’ motion. As we
6 explain in detail in the accompanying submission, the PFJ easily satisfies the standard. The Court
7 should not, however, second-guess the terms to which sophisticated parties agreed after lengthy
8 and intricate negotiations.

9 It is important also to recognize that the PFJ itself will be implemented in the first instance
10 through negotiations between Sutter and commercial health insurers. With respect to almost all of
11 its provisions, enforcement of the PFJ will be required only to the extent that those private
12 negotiations reach impasse over a disagreement – that cannot be resolved with the assistance of
13 the Settlement Compliance Monitor – concerning whether Sutter has imposed demands that go
14 outside the permissible bounds established by the PFJ.

15 As we explain in the accompanying responses, bargaining in the shadow of the PFJ should
16 help to ensure that relatively few disagreements will lead the parties to resort to the dispute
17 resolution mechanisms established by the PFJ, including bringing disputes to the Settlement
18 Compliance Monitor (and, if necessary, to the Court). At the same time, to ensure that parties
19 have appropriate incentives to resolve disputes in accordance with the terms of the PFJ, Plaintiffs
20 believe that it is critical to grant Plaintiffs’ unopposed Motion for the Appointment of a Settlement
21 Monitor concurrently with final approval, to give the Monitor the time to study the PFJ, to gain
22 familiarity with the industry context, to engage with interested parties, and to begin to monitor
23 compliance, as is his job. If the Monitor is in place and prepared to address any disputes that may
24 be presented to him, or that he may discover, parties to private negotiations will understand both
25 that resort to the Monitor is unlikely to create significant delay and that the Monitor will be well
26 informed and prepared to address any potential disputes expeditiously. For this reason, and as
27 explained further in this submission, Plaintiffs believe that putting the Monitor to work as of the
28 date of final approval will lead to more effective and lower cost implementation of the settlement,

PROOF OF SERVICE

**UFCW & Employers Benefit Trust vs. Sutter Health, et al.
Case No. CCG-14-538451**

**People of the State of California, ex. rel. Xavier Becerra vs. Sutter Health
Case No. CGC-18-565398**

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery Street, 17th Floor, San Francisco, CA 94104.

On May 22, 2020, I served true copies of the document(s) described as

PLAINTIFFS’ NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL SUBMISSION IN RESPONSE TO THE COURT’S FEBRUARY 25, 2020 ORDER RE (1) PLAINTIFFS’ MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT; AND (2) PLAINTIFFS’ MOTION TO APPOINT A MONITOR; MEMORANDUM OF POINTS AND AUTHORITIES

PLAINTIFFS’ SUPPLEMENTAL SUBMISSION IN RESPONSE TO THE COURT’S FEBRUARY 25, 2020 ORDER RE (1) PLAINTIFFS’ MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT; AND (2) PLAINTIFFS’ MOTION TO APPOINT A MONITOR; MEMORANDUM OF POINTS AND AUTHORITIES (UNREDACTED AND REDACTED VERSIONS)

DECLARATION OF EMILIO E. VARANINI IN SUPPORT OF PLAINTIFFS’ SUPPLEMENTAL SUBMISSION IN RESPONSE TO THE COURT’S FEBRUARY 25 ORDER RE (1) PLAINTIFFS’ MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT; AND (2) PLAINTIFFS’ MOTION TO APPOINT A MONITOR

DECLARATION OF CHERYL L. JOHNSON IN SUPPORT OF PLAINTIFFS’ SUPPLEMENTAL SUBMISSION IN RESPONSE TO THE COURT’S FEBRUARY 25 ORDER RE (1) PLAINTIFFS’ MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT; AND (2) PLAINTIFFS’ MOTION TO APPOINT A MONITOR

SUPPLEMENTAL DECLARATION OF CAMERON R. AZARI, ESQ.

on the interested parties in this action as follows:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address laflamme@fbm.com to the persons at the e-mail

1 addresses listed below. I did not receive, within a reasonable time after the transmission, any
2 electronic message or other indication that the transmission was unsuccessful.

3 sutterservice@jonesday.com; Sutterredgraveteam@redgravellp.com; SUTTKVP@keker.com;
4 sutterservice@bzbm.com; AG_AntitrustService@doj.ca.gov; UEBT@cohenmilstein.com;
5 SERVICEUEBT@lists.kellogghansen.com; UEBT@msh.law; uebt@pillsburycoleman.com;
6 UEBTservice@fbm.com

7 **BY ELECTRONIC SERVICE:** I electronically served the document(s) described above
8 via File & ServeXpress, on the recipients designated on the Transaction Receipt located on the
9 File & ServeXpress website (<https://secure.fileandservexpress.com>) pursuant to the Court Order
10 establishing the case website and authorizing service of documents.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Executed on May 22, 2020, at Concord, California.

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LouAnne Laflamme