



MAY 8 - 2018

CLERK OF THE COURT

BY: [Signature] Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

UFCW & EMPLOYERS BENEFIT TRUST,
et al.,

Plaintiff,

vs.

SUTTER HEALTH, ET AL.,

Defendants.

PEOPLE OF THE STATE OF
CALIFORNIA EX REL. XAVIER

Plaintiff

vs.

SUTTER HEALTH, et al.,

Defendants

Case No. CGC – 14-538451

Case Number: CGC-18-565398

ORDER GRANTING MOTION TO
CONSOLIDATE

Some seven years ago the California Attorney General (AG) opened a formal investigation of Sutter’s managed care contracting. The People (through the AG) filed their suit on March 29, 2018. The People ask their case be consolidated with the pending *UEBT v. Sutter Health* case, No. 14-538451. I heard argument May 7, 2018.

It is obvious that the basic predicates for consolidation are met. For example, there are common issues of law and fact. C.C.P. § 1048(a). Courts have broad discretion to consolidate. *Morehart v. Cty. of Santa Barbara*, 7 Cal. 4th 725, 738 (1994), and the central question is whether, as a matter of practicality, and attending to any prejudice which may befall Sutter, I should consolidate.

1 *Common Questions of Law or Fact.* The benefit of consolidation is obvious, which is in
2 short to avoid two exceedingly lengthy complex trials on the same issues.

3 There are common factual allegations between the two cases. Allegations include
4
5 (1) Sutter's market power stems from its dominance in certain Northern California markets
6 (UEBT Complaint ¶¶ 16, 21, 96; AG Complaint ¶¶ 31, 104); (2) Sutter's ability to impose
7 anticompetitive contract terms on Network Vendors and Sutter's excessive prices are direct
8 evidence of its market power (UEBT Complaint ¶ 69; AG Complaint ¶ 75); (3) Sutter's illegal
9 conduct presents barriers to entry to the hospital healthcare market (UEBT ¶ 94, AG ¶ 102); and
10 (4) Sutter's illegal conduct artificially inflates the prices of hospital healthcare providers above
11 competitive levels (UEBT ¶ 122, AG ¶ 74).

12 There are common legal issues in the two cases. Both allege causes of action under the
13 Cartwright Act, for price tampering/fixing, unreasonable restraint of trade, and combination to
14 monopolize. UEBT Complaint ¶¶ 137–60; AG Complaint ¶¶ 139–62. Both cases seek similar
15 relief including (1) a declaration that Sutter's conduct constitutes an unreasonable restraint of
16 trade under the Cartwright Act, (2) disgorgement of overcharges Sutter imposed on self-funded
17 payors, (3) injunctive relief, and (4) costs of the lawsuit. UEBT Complaint at 43–45; AG
18 Complaint at 46–49.

19 Through their Reply and at argument the People confirmed that they would not seek to
20 alter UEBT's market definitions. Not do the People seek damages, including disgorgement,
21 different from that sought by UEBT. The People's complaint does allege (1) physician referrals
22 enhance Sutter's market power (AG Complaint ¶¶ 31, 57, 63); (2) commercial insurance
23 premiums are inflated due to Sutter's contracts (*id.* ¶¶ 5, 6, 30, 38, 73); (3) Sutter caused higher
24 prices for outpatient services distinct from inpatient services (*id.* ¶ 86). But given (i) the People's
25
26
27

1 agreement not to notice separate discovery and (2) the bases for recovery sought by UEBT and
2 the People's agreement not to expand on those, these distinctions are not enough to block
3 consolidation. With consolidation, the People seek no more time for depositions or at trial. The
4 current discovery deadlines will not be affected. And because the People have aligned their legal
5 strategy with the UEBT class, consolidation will not force Sutter to argue inconsistent positions
6 as between the two cases.

8 *Impact of Attacks on People's Complaint.* Sutter's likely attacks on the People's
9 complaint will take time to resolve and so could have an impact on consolidation, but at this
10 point the concern is speculative.

12 *Delay.* Regarding the People's delay in asking for consolidation, while the explanation
13 offered by the People was vague,¹ it is best to evaluate the issue through the lens of prejudice,
14 that is, to ask how Sutter is more harmed by consolidation now than e.g., a year or two (or more)
15 ago. I see none, give the concessions made the People discussed elsewhere in this order.

16 *Jury Confusion.* There is no good argument for jury confusion that cannot be ameliorated
17 with instructions. Juries routinely handle multiple parties on a given side.

18 *Relief Sought.* I separately note Sutter's main concern—and indeed the apparent concern
19 of amici²--which relates to the injunctive relief sought by the People. This does not affect
20 consolidation because equitable relief including the sought-for injunctive relief will be dealt with
21 after the jury returns its verdict on liability.³ If in fairness parties need further evidence to
22 explain to me the impact of the requested injunction, I can then accommodate the parties. And as
23

24
25 ¹ And without exposing attorney work product, perhaps necessarily so.

26 ²The American Hospital Association (AHA) and the California Hospital Association (CHA) seek permission to file
27 briefs. I have asked for declarations noting any connection between these amici and any parties before I grant that
permission.

³ The parties will of course propose special jury verdict forms (and perhaps the less frequently used special jury
interrogatories, although those can cause confusion, CAL. JUDGES BENCHBOOK CIV. PROC. TRIAL § 14.9 (2017))
designed to support or defeat requests for equitable relief.


1 to money damages, the People seek no money (as by way of equitable disgorgement) other than
2 the sums sought by the UEFT class.

3 *Binding jury verdict.* Sutter suggests a second (bench) trial on the People's claims after
4 the UEFT jury trial. The issue of the extent to which the jury verdict binds me as I consider the
5 People's case for equitable relief is essentially the same whether I consolidate not; and the
6 People have agreed to have me in a consolidated trial treat the jury verdict as binding; which I
7 will.
8

9
10 **Conclusion**

11 The motion to consolidate this case with No. 18-565398 is granted and future filings will
12 be filed in this case as the lead case, indicating it is consolidated with No. 18-565398.

13
14
15 Dated: May 7, 2018

16 
17 _____
18 Curtis E.A. Karnow
19 Judge Of The Superior Court
20
21
22
23
24
25
26
27

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **MAY 8 - 2018**, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **MAY 8 - 2018**

T. Michael Yuen, Clerk

By: 

DANIAL LEMIRE, Deputy Clerk