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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

UFCW & EMPLOYERS BENEFIT TRUST,

Plaintiff,

v.

SUTTER HEALTH, et al.,

Defendants.

PEOPLE OF THE STATE OF CALIFORNIA, EX REL. XAVIER BECERRA

Plaintiff,

v.

SUTTER HEALTH, et al.,

Defendant.

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

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

SUTTER'S OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE CONCERNING DEFENDANTS' SOCIAL WELFARE OR PUBLIC BENEFIT SPENDING THAT DOES NOT CONSTITUTE PROCOMPETITIVE EFFICIENCIES (REDACTED)

Hearing Date: July 3, 2019
Time: 10:00 AM

Complaint Filed: April 7, 2014
Trial Date: August 12, 2019

PUBLIC – REDACTS MATERIALS FROM CONDITIONALLY SEALED RECORD

INTRODUCTION

Plaintiffs claim that Sutter's prices for hospital services are higher than non-Sutter prices as a result of the challenged conduct. Yet Plaintiffs seek to exclude evidence directly relevant to this issue. Specifically, they ask the Court to exclude all evidence related to Sutter's significant subsidization of government payers (Medicare, MediCal) and charity care (uninsured) as well as certain of Sutter's capital expenditures (i.e., spending on infrastructure, seismic retrofitting, and technology). But this evidence is directly relevant to Sutter's pricing—indeed, the evidence will show that Sutter sets its prices to cover losses on government and uninsured payers as well as its capital expenditures. And such evidence is relevant to why Sutter's prices are different from non-Sutter prices. Indeed, recognizing this, Plaintiffs' own experts (Drs. Leitzinger and Vistnes) both [redacted]. The Court should deny the motion on this ground alone.

Perhaps realizing that they cannot credibly argue that such evidence is irrelevant, Plaintiffs devote their Motion in Limine No. 1 to arguing that "social welfare spending" is irrelevant because it is not a procompetitive benefit under the antitrust laws. But Plaintiffs' own precedent shows that Sutter's spending is relevant evidence of procompetitive benefits. As the evidence will show, the contract terms protect predictable revenue streams that permit Sutter to make capital improvements (including in technology, infrastructure, and safety), which promotes competition by others to make similar investments. The Court should therefore deny the motion.

ARGUMENT

I. THE EVIDENCE PLAINTIFFS TARGET IS RELEVANT TO PRICING.

Despite Plaintiffs' claim that Sutter's prices are higher than non-Sutter hospitals' due to the challenged provisions, the experts in this case (including Plaintiffs' experts) recognize that other reasons may also explain why Sutter's prices are higher, including percentage of government spend, quality, and capital expenditures. *See* Leitzinger Report (8/31/2018) ¶¶ 65, 67-71; Vistnes Report (8/31/2018) Ex. S-1; Vistnes Rebuttal Report (1/31/2019) at 15-16; Willig Report (10/29/2018) Appx. Table A-4, Table 16. Plaintiffs thus have put directly at issue how and why Sutter sets its price levels and why they are allegedly higher than non-Sutter prices.

Nevertheless, Plaintiffs seek to exclude all evidence related to Sutter's (1) subsidization of Medicare, Medi-Cal, community care, and support for rural hospitals; (2) expenditures on capital projects, infrastructure maintenance, and seismic improvements; and (3) technology enhancements—all of which are factors in setting its price levels. MIL No. 1 at 2 n.1; Proposed Order. Put another way, Sutter sets prices on its commercial book of business to cover losses on government payors, to cover charity care and community investment, to maintain and improve its facilities, to comply with seismic safety laws (e.g., SB 1953), and to invest in the technology it uses to provide quality care. For example, Sutter witnesses such as CFO Jeff Sprague testified at deposition in response to plaintiff questioning that [redacted] Silveira Opp. Decl. Ex. 1c at 75:1-10.[1]

Thus, Plaintiffs' and Sutter's experts include variables in their regressions to account for [redacted]. *See* Vistnes Report Ex. S-1 ("[redacted]"); Leitzinger Report ¶ 65 (charges "[redacted]"). They also [redacted]. Leitzinger Report ¶ 70; Vistnes Rebuttal Report at 15; Willig Report Appx. Table A-4. Sutter, having been accused of charging supracompetitive prices purportedly resulting in more than $1 billion in non-trebled damages, is entitled to explain why it sets its prices at the levels it sets them. All of the evidence Plaintiffs target is relevant regardless of Plaintiffs' argument that evidence of "social welfare benefits" is improper.

II. THE TARGETED SPENDING ALSO HAS PROCOMPETITIVE EFFECTS.

Plaintiffs' argument that Sutter cannot present evidence that its spending on these categories provides procompetitive and consumer benefits is also wrong. Under the Cartwright Act, Plaintiffs must prove that the "purpose or effect" of the restraints was to harm competition. *Corwin v. L.A. Newspaper Serv. Bureau, Inc.*, 22 Cal. 3d 302, 314 (1978). In its defense, Sutter is entitled to present evidence that the "purpose" of the challenged contract provisions was

[1] In fact, Plaintiffs' own expert Dr. Vistnes acknowledges that "[n]ot-for-profit hospitals, regardless of whether they have substantial market power, are also commonly believed to use revenues from commercial patients to subsidize certain non-commercial patient segments (e.g., Medi-Cal or indigent patients)." Vistnes Rebuttal Report at 14 n.64.

something other than to "harm competition." Here, the purpose of the challenged restraints included (among other things) protecting predictable revenue to cover Sutter's operating and capital expenses. Order (5/6/19), at 21; *see also* Opp. to Pls.' MIL No. 2 (6/21/19). Sutter's right to offer this type of evidence is clear under California law. *Aguilar v. Atlantic Richfield Co.*, cited by Plaintiffs, affirmatively recognizes that "enabling or facilitating companies to compete in … markets in which they otherwise could not or would not compete as efficiently or at all" is procompetitive, and it further recognizes that an alleged restraint's status as "'pro-environmental' and safety enhancing" is relevant to the Cartwright Act inquiry. 25 Cal. 4th 826, 863-64 & n.31 (2001). And this is just as clear under federal law, including that cited by Plaintiffs.

A. "Spending on Charitable Care and Public Mandates"

Without Sutter's "spending on Medicare and MediCal, rural hospital support, and community care goals" (MIL No. 1 at 2 n.1), fewer patients would have the option of accessing the Sutter hospital services at issue. By "remov[ing] financial obstacles" to patients accessing its services, Sutter "widen[s] consumer choice," which "is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit." *United States v. Brown Univ.*, 5 F.3d 658, 675 (3d Cir. 1993). For that exact reason, *Brown* held that MIT's financial aid policy allowing enrollment of students who otherwise could not have afforded MIT was procompetitive, not an irrelevant "social welfare justification[]." *Id.* at 674–75. The court explained "provid[ing] some consumers, the needy, with additional choices" they would otherwise be denied "enhances competition by broadening the socio-economic sphere of [the] potential student body." *Id.* at 677. The same is true of Sutter's charitable care spending and support of rural hospitals, which allow customers who would otherwise be excluded to access Sutter's services. What Plaintiffs miss is that, when determining whether a justification is procompetitive, courts focus on the impact on consumers, the beneficiaries of competition. Yet Plaintiffs improperly try to preclude Sutter from explaining to the jury how the challenged restraints do just that.

B. "Spending or investment in capital projects, infrastructure maintenance, and seismic improvements" and "spending on technology enhancements"

Sutter's "spending or investment in capital projects, infrastructure maintenance, and

seismic improvements" as well as its "spending on technology enhancements" (such as electronic health records and initiatives like the e-ICU system) also have procompetitive benefits. If the challenged restraints allow Sutter to make such investments, not only do consumers benefit from improved quality, facilities, infrastructure, and safety, but competition is promoted because other providers will feel pressure to make similar investments. Capital projects, infrastructure maintenance, seismic improvements, and technology enhancements are all important investments in quality that enable Sutter to provide better, higher quality, and safer healthcare to more patients than would be possible without the investments. *See, e.g.*, Pilch Report (10/26/2018) ¶¶ 99-110, 258–74. And numerous cases hold that investments in general, and investments in healthcare quality specifically, are procompetitive benefits for antitrust law purposes.[2]

III. PLAINTIFFS' CASES ARE DISTINGUISHABLE.

Plaintiffs cite to a number of cases that do not support excluding evidence of Sutter's spending on charity care, government payors, or capital expenditures. Some of the excluded evidence that was not relevant to promoting competition or consumer benefits has involved arguments that the conduct, while precluding competition, is supported by public policy.[3] That is not Sutter's argument here. Rather, Sutter will present evidence that the challenged conduct ***enhanced*** competition and output by making Sutter a better provider of health care services, and

[2] *See, e.g.*, *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159–60 (9th Cir. 2001) (a hospital's "effort to maintain the quality of patient care that it provides" is a "procompetitive" justification); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1412 (9th Cir. 1991) (restraints helping hospital "provide more efficient, higher quality service in order to compete against other hospitals" "sharpen[s] competition by making [defendant] a more attractive competitor"); *Balaklaw v. Lovell*, 14 F.3d 793, 800 n.13 (2d Cir. 1994) (contract "best [met] the needs of the purchaser, the hospital, and by extension its patients, and therefore it is clearly justified on procompetitiveness grounds"); *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998) ("increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice" are procompetitive effects); *Surf City Steel v. Int'l Longshore & Warehouse Union*, No. CV14-05604, 2017 WL 5973279, at *6 (C.D. Cal. Mar. 7, 2017) ("facilitation of new technologies" "may increase efficiency and competition").

[3] *See, e.g.*, *FTC v. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (rejecting argument that public defenders' "boycott is permissible because the price it seeks to set is reasonable"); *FTC v. Ind. Fed. of Dentists*, 476 U.S. 447, 462-63 (1986) (rejecting argument by dentists that refusing to provide x-rays to insurers was better for patients); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 693-94 (1978) (rejecting argument that prohibiting competitive bidding was better for customers); *see also* Opp. to Pls.' MIL No. 7 (June 21, 2019).

thus a better competitor. Other cases involved efforts to justify a restraint by pointing to benefits in a completely different market.[4] But all of the evidence Plaintiffs challenge relates to the same hospital care markets in which Plaintiffs allege harm. Thus, the cases excluding "social welfare" evidence have nothing to do with the evidence that Plaintiffs ask the Court to exclude.[5]

IV. THE EVIDENCE IS NOT MORE PREJUDICIAL THAN PROBATIVE.

Plaintiffs' fallback argument that evidence of Sutter's spending should be excluded as more prejudicial than probative and confusing to the jury fails for two reasons. First, as mentioned in Section I, the evidence Plaintiffs seek to exclude is relevant to Sutter's prices, which is relevant to Plaintiffs prima facie case (i.e., whether Sutter prices are higher as a result of the conduct and/or whether the purposes of the restraints was to cover such expenses or instead was to harm competition). Even Plaintiffs' own experts acknowledge that such evidence is relevant to their price studies. Second, as part of its defense, Sutter is entitled to present evidence of the procompetitive benefits of the challenged restraints. *See In re Cipro Cases I & II*, 61 Cal. 4th 116, 157 (2015). This is not a collateral issue, but a core part of applying the rule of reason to Sutter's conduct. Plaintiffs cannot exclude the evidence supporting Sutter's core defenses simply because they feel that the trial would be shorter and less complicated without it.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

Dated: June 21, 2019

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

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[4] *See In re NCAA Student Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1150 (N.D. Cal. 2014) (rejecting promotion of "the integration of education and athletics" as a procompetitive benefit of a restraint where relevant market was athletics and defendant identified only educational advantages); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963) (rejecting merger based on justification that "Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development"); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 251–52 (D.D.C. 2017) (rejecting "elevat[ion of] Anthem's ability to sustain its margins over the need or ability of physicians and hospitals to do the same").

[5] Plaintiffs' California cases do nothing to change this. *Aguilar*, which supports Sutter, is addressed above. *Clayworth v. Pfizer*, 49 Cal. 4th 758 (2010), says nothing about procompetitive effects at all. And *Fisher v. City of Berkeley* held that a "public welfare 'defense'" ***was*** available to a suit against a municipality. 37 Cal. 3d 644, 673 (1984), *aff'd*, 475 U.S. 260 (1986).